

HONG KONG / JUDGMENT

HKSAR v. CHONG PAN PAN

COURT

Court of First Instance

DECIDED

7 October 2009

CASE / FILE NUMBER

HCMA614/2009

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bjbj HCMA614/2009 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 614 OF 2009 (ON APPEAL FROM 1900 OF 2009)

between HKSAR Respondent and CHONG PAN PAN (he appellant appeals against the sentence imposed upon him on 17 July 2009 by Mr Winston Leung, namely that he be detained in a Training Centre. Trial AUTONUMOUT On 6 July 2009 the appellant pleaded guilty to a single charge of acting as a member of a Triad Society on 24 July 2008, contrary to section 20(2) of the Societies Ordinance, Cap.

151. The Particulars of Offence averred that the appellant, together with five other young men, committed the offence at Smiling Shau Kei Wan Plaza (Plaza), Shau Kei Wan Road, Chai Wan. As the factual basis upon which he pleaded guilty the appellant accepted the Brief Facts read to the court. In particular, he accepted that he had admitted to the police following his arrest that he had been summoned by Chung Hin (Chung) to the lower ground floor of the Plaza where he and his named co-defendants had been told by Chung that they were to show force; strength and disturbed [sic] business to a second-hand textbook store in the Plaza . He accepted that an undercover police officer had heard Chung giving the appellant and his co-defendants those instructions at the lower ground floor of the Plaza shortly before he led them to wander around the Plaza, after which they had been arrested by the police. All those events took about one minute. Reasons for sentence AUTONUMOUT Having adjourned sentence to obtain a report from a probation officer and reports as to the appellant s suitability for detention in a Detention Centre and/or a Training Centre, on 17 July 2009 the Deputy Magistrate ordered the appellant to be detained in a Training Centre. AUTONUMOUT Of the gravity of the offence, the Deputy Magistrate stated in his written Statement of Findings under the title Reasons for sentence Acting as a member of a Triad Society is a serious offence for two reasons. First, it involves Triad society [sic] which, if allowed to flourish could be a grave threat to the society. Secondly, it involves a joint enterprise of a group of people to do illegal acts. A deterrent sentence in the form of

imprisonment is called for. AUTONUMOUT Of the role and personal circumstances of the appellant, the Deputy Magistrate said D4 is 19. He has a previous conviction of AOABH in

2005. He denied he was member of any Triad Society, but by his participation in the whistle-blowing, I find he must have close affiliation with them. Whistle-blowing is both a privilege and an obligation of a Triad member. He had also tried Ketamine. Grounds of appeal against sentence AUTONUMOUT In the Grounds of Appeal against Sentence advanced by Mr Donald on behalf of the appellant it is asserted that in imposing sentence upon the appellant the Deputy Magistrate failed to take into account his very minor role (Ground
- 1) and failed to give him a discount for his plea of guilty, in particular having regard to the fact that two co-defendants, who were convicted of the same charge after trial, received the same sentence, namely detention in a Training Centre (Ground 2). Further, it is contended that there was a disparity in the sentence imposed upon the appellant and the ringleader , Chung, following his plea of guilty to the same charge and an additional charge of being a member of a Triad Society for which he received two concurrent sentences of 6 months imprisonment (Ground 4). AUTONUMOUT By Ground 3, it is submitted that the Deputy Magistrate imposed sentence upon the appellant upon a false factual basis, namely that the appellant had admitted to the probation officer who compiled the report ordered by the magistrate that he was a member of a Triad Society, when in fact he had made a specific denial of that matter to the probation officer, which denial was reflected in the report. That ground is founded on the Deputy Magistrate s oral statement in respect of the appellant at the time of sentencing He pleaded guilty to Charge 1 of acting as a member of a Triad Society. He was not charged with any being (a) member of a Triad Society, but he admitted to be a member to the probation officer. AUTONUMOUT In the course of oral argument, Mr Donald answered the enquiry of the court in the affirmative that it was his submission that the false factual basis upon which the Deputy Magistrate proceeded was one that he had been relied upon in the process of imposing sentence such that the sentencing process was impugned and this court was required to embark upon sentence afresh. AUTONUMOUT Finally, by Ground 5 it is contended that the Deputy Magistrate failed to consider the very favourable report of the probation officer, in which it had been recommended that the appellant be placed on probation. The submissions of the respondent AUTONUMOUT On behalf of the respondent Mr Tso submitted that whilst the Deputy Magistrate s statement in the process of sentencing that the appellant had admitted to the probation officer that he was a member of a Triad Society was inaccurate, that statement was a mere slip of the tongue upon which the Deputy Magistrate had not relied in determining sentence. In support of that assertion, he pointed to the remarks made by the Deputy Magistrate shortly thereafter in which he had said Now, his involvement in the whistle-blowing activity seemed to be a follower, but this is not a main consideration in sentence. He should be taught a hard lesson now or never, irrespective of his involvement. Now, acting as a member of the Triad Society is a serious offence. And for a young man like this 4th defendant, Detention Centre or Training Centre is always appropriate. AUTONUMOUT In his written submissions, Mr Simon Tso submitted that an offence contrary to section 20(2) of the Societies Ordinance

normally attracts a custodial sentence. He contended that in determining to impose upon the appellant an order of detention in a Training Centre, the Deputy Magistrate had been satisfied that the requirements of section 4(1) of the Training Centre Ordinance, Cap. 280 were met, namely Where a person is convicted of an offence punishable with imprisonment and the court is satisfied that it is in the interest of the community and that having regard to his character and previous conduct, and to the circumstances of the offence, it is expedient for his reformation and for the prevention of crime that he should undergo a period of training in a training centre, the court may in lieu of any other sentence, pass a sentence of detention in a training centre. AUTONUMOUT It is submitted that it is neither relevant or helpful to equate a period spent in training centre with a period spent in jail. The regimes on the fundamentals which drive them are entirely different . In support of which proposition the court was referred to a passage to that effect in the judgment of Wright J in HKSAR v Cheung Man Yui at paragraph 6 (unreported HCMA612/2002 judgment delivered on 8 August 2002). Developments subsequent to sentence AUTONUMOUT On 3 September 2009, Deputy High Court Judge Toh granted the appellant s application for bail pending the hearing of his appeal against sentence. Earlier, on 5 August 2009, in the absence of the Deputy Magistrate Reasons for Sentence , Bokhary J had refused the appellant s application for bail pending appeal. In the course of this hearing today hearing, with no objection from Counsel for the respondent, Mr Donald placed before the court documents relevant to the appellant s conduct since his release on bail. He is to sit and examination for Insurance Intermediaries on 20 October 2009. Since 6 September 2009, he has been employed as an assistant chef, working a nine-hour day, in a Vietnamese restaurant in North Point. The restaurant is owned by a friend of the family. The Neighbourhood Advice Action Council of Eastern/Wanchai District Outreaching Social Work Team testify to the appellant s voluntary work at the recent mid Autumn Festival in helping the elderly at Stanley Elderly Centre and in distributing mooncakes in Shau Kei Wan. A consideration of the submissions AUTONUMOUT There is no doubt that the Deputy Magistrate s oral statement in the sentencing of the appellant that, He was not charged with any being member of a Triad society, but he admitted to be a member to the probation officer is incorrect as to the latter assertion. In paragraph 3 of the probation officer s report, reference was made to the appellant s admissions of contacts with members of a Triad Society He knew that some of his friends had Triad Society background. His friends had invited him to join their Triad Society in the past but he refused. Though he had gatherings with his friends occasionally, he claimed that he was not a member of Triad Society. He maintained association with his undesirable peers because he had noting [sic] to do and he only treated them as casual friends. AUTONUMOUT It is to be noted that the Detention Centre/Training Centre Suitability Report records the same denial from the appellant as that given to the probation officer, namely of having joined a Triad Society (page (Although) defendant denied having joined any Triad Society. Indeed, the report repeats three times (pages 3 and

- 4) the fact of the appellant's denial of that fact. AUTONUMOUT In his undated Statement of Findings : Reasons for Sentence the Deputy Magistrate, whilst stating of the appellant, He denied he was a member of any Triad Society, but by his participation in the whistle-blowing, I find he must have close affiliation with them makes no reference to let alone explanation of his earlier contrary oral assertion at the time that the appellant was sentenced. AUTONUMOUT In the result, I am satisfied that the Deputy Magistrate proceeded to sentence the appellant on a materially incorrect factual basis. It is to be noted that in his short oral reasons for imposing sentence that the Deputy Magistrate made these factually incorrect assertions at the outset. I reject the respondent's submission that the materially incorrect assertions played no part in the Magistrate's determination that it was appropriate to invoke the power to impose an order for detention in a training centre. Accordingly, it falls to this court to approach the matter of sentence afresh. AUTONUMOUT Although the appellant was arrested together with his co-accused on 24 July 2008 it was not until 6 July 2009 and that the matter came on for trial and not until 17 July 2009 that sentence was imposed upon him. At the time of the offence the appellant was 19 years 4 months of age. At the time sentence was imposed he was about one year older. The delay in bringing the proceedings on for trial, in particular in a case involving young persons, is a matter of considerable regret. Given the appellant's age, his conduct in the intervening period, during which time he was on bail, was highly relevant to the issue of sentence. Firstly, the reports indicate that the appellant has not been arrested for or charged with any further criminal offences. Secondly, they both report that he continued in Form V education until March
2009. Thirdly, both reports state that he began employment as an office assistant in an engineering company in June
2009. The probation officer's report indicates that in the period March-June 2009 the defendant had worked as a part-time delivery worker and casual worker in fast food restaurants. Information placed before the court of the appellant's conduct since his release on bail on 3 September 2009 supports the submission that he continues to make a productive way in life. AUTONUMOUT Both the probation officer's report and the report as to suitability for his admission to a Detention Centre/Training Centre describe the appellant in addition to having pleaded guilty to the charge to having expressed remorse for his misdeed. Furthermore, both reports describe the appellant as having claimed to having ceased his contacts with those of his friends who had Triad associations. Similarly, both reports describe his parents as being of the opinion that the appellant had learned a hard lesson and that they were willing to keep a close eye on him in the future and give him guidance. Those observations in the reports are supported by the presence in this court today of a number of his family members including his mother, grandmother and, I understand, grandfather. AUTONUMOUT Notwithstanding the considerable common ground in the two reports it is in their recommendations that they differ. The compiler of the Detention Centre/Training Centre report, having noted that the appellant's health rendered him unsuitable for detention in a detention centre, concluded Although he managed to work gainfully and stayed away from further crime during his bail period, in view of his current

law-transgressing behaviour, a period of disciplinary training coupled with a term of statutory supervision is considered beneficial to him. By contrast, the probation officer concluded In view of defendant s remorseful attitude, his promise to stay away from his dubious peers, determination to lead a law-abiding life and the unfailing support of his parents, it s worth trying to give him a chance for probation supervision with counselling element.

Conclusion

AUTONUMOUT Of course, the court is conscious that in one very material respect this court is in a different position from the Deputy Magistrate when he impose sentence on 17 July 2009. In the meantime, the appellant was remanded in custody for two weeks after which he served six weeks of detention in a Training Centre prior to his release on bail on 3 September 2009. In the month since his release on bail pending appeal, no doubt with the very sensible encouragement of his family, the appellant has found and is in employment and has done good works for the community. AUTONUMOUT Of the circumstances of the commission of the offence, it is to be noted from the paucity of detail disclosed in the Brief Facts that the misconduct occurred over a period of no more than about one minute during which the appellant and his 5 co-defendants were described as having wandered around the Plaza seemingly looking for someone, after which they made to leave the Plaza. Clearly, this conduct is to be viewed as falling at the lower end of the seriousness of the circumstances in which the offence can be committed.

AUTONUMOUT In all the circumstances, in particular mindful of the year-long period from the events the subject of the charge and the time of the appellant s trial, during which time the appellant led a law-abiding life in which for the first part he studied and in the second part was in gainful employment for several months prior to his trial, in my judgment the appropriate order to make is that of probation for 12 months subject to the conditions suggested by the probation officer. Those conditions are that the appellant :

- (i) work and reside as lawfully directed by his probation officer; (ii) abstain from the use of all unlawful dangerous drugs; (iii) submit urine samples for random urine tests as lawfully required by his probation officer; (iv) not associate with any persons/groups of persons as lawfully directed by his probation officer; and
- (v) participate in any activities and group programme is beneficial to his rehabilitation as lawfully directed by his probation officer. AUTONUMOUT In the result, for the reasons given earlier the order made by the Deputy Magistrate that the appellant be detained in a Training Centre is quashed. In its place, this court makes a probation order for 12 months, pursuant to section 3 of the Probation of Offenders Ordinance, Cap. 298, subject to the provisions outlined earlier. AUTONUMOUT In the course of the oral hearing, the court inquired of counsel for the respondent of the circumstances in which the trial of the appellant had taken almost 12 months to come on for hearing. It is to be noted that the charge sheet described two of the six defendants as being 16 years of age. Expeditiously and very helpfully, Mr Tso has been able to inform the court that following the judgment of Wright J

in X v Secretary for Justice, CACV318/2008, the Department of Justice has since 18 September 2009 put in place Arrangements for fast tracking these cases through the legal advice stage in order to get them before the court as soon as possible with a view to having such cases dealt with within 6 months. Costs AUTONUMOUT I accede to the application of Mr Donald and order that the appellant is to have his costs of the appeal, to be taxed if not agreed. (Michael Lunn) Judge of the Court of First Instance High Court Mr Simon Tso, SPP of the Department of Justice, for the Respondent 1udk 1udk N O P Q R S T U V &`#\$"@AB G\m i\$&`G =nKd dGdM> 1m[F ?FuX G\m dGdM & 6" ABC.dot Administrator Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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