

HONG KONG / JUDGMENT

HKSAR v. CHOW HOI YAM

[2023] HKCFI 3194

COURT

Court of First Instance

DECIDED

19 December 2023

CASE / FILE NUMBER

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HCMA 153/2023

[2023] HKCFI 3194

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO 153 OF 2023

(ON APPEAL FROM KCCC 70049/2021)

BETWEEN

HKSAR

Respondent

and

CHOW HOI YAM

Appellant

Before: Deputy High Court Judge Woodcock in Court

Date of Hearing: 10 October 2023

Date of Judgment: 19 December 2023

J U D G M E N T

Appeal against Conviction and Sentence

The appellant, the 2nd defendant at trial, pleaded not guilty to one count of robbery and was convicted after trial on 13 February 2023. On 27 February 2023, the magistrate sentenced the appellant to 21 months' imprisonment. At that time, the appellant was serving a 44-month term of imprisonment for trafficking in dangerous drugs. The magistrate ordered 12 months of the 21 months for the robbery to run consecutively to that sentence with the balance to run concurrently.

The appellant now appeals against both conviction and sentence. Mr Oliver Davies represented him in the court below and in his appeal.

Facts

The facts of this case are that about 7:50 pm on 9 October 2021 the victim of this robbery was walking on Yue On Lane, Tseung Kwan Road when two men came up behind him and a plastic bag was put over his head. He was restrained from behind and his bag stolen. There was a struggle and he fell to the ground with the 1st defendant who had pinned his arms down from behind. The victim, PW1, chased the 1st defendant but saw the 2nd defendant running away in the opposite direction. He cornered the 1st defendant and after the robbery was reported to the police, the 1st defendant was arrested. The 1st defendant pleaded guilty before trial and gave evidence on behalf of the prosecution as PW2.

The appellant was arrested for the offence of robbery the following day at home in the presence of his father. At that time, the appellant was 15 years old. He had a clear record.

PW2 gave evidence for the prosecution and told the court that he met the appellant in Hang Hau at about 7 pm that night. They both went into a 7-Eleven convenience store and the appellant bought some plastic bags. After leaving the store, they walked a short distance to the location of the robbery and sat on a slope by the path. There, the appellant gave PW2 some plastic bags and said someone would walk past later and PW2 was to put one of the plastic bags over that person's head. He refused and returned the bags to the appellant.

At that moment, PW1 walked pass and the appellant rushed out and put a bag over the man's head from behind him. He shouted at PW2 to assist him. PW2 did by wrapping his arms around the victim PW1 from behind. There was a struggle and they both fell over. PW2 saw the appellant take the victim's bag and run away. He himself was chased by the victim in a different direction and cornered. The victim demanded the return of his bag. The victim refused to let PW2 leave the scene, so it was PW2 who called the police; they then arrested him.

PW2 identified himself and the appellant in CCTV footage from the 7-Eleven convenience store, Exhibit P1 about 10 minutes before the robbery. He was shown other CCTV footage, Exhibits P2 – P5 where he agreed he could not see the face of the person but could recognise that that person was the appellant because of his clothes and appearance.

It was suggested in cross-examination that PW2 was fabricating the evidence against the appellant for his own benefit and a discount in his sentence. In cross-examination of the victim, PW1, it was suggested he was involved in trafficking drugs and not an innocent bystander, victim or a credible witness. The appellant elected not to give evidence.

Reasons for Conviction

The magistrate found both PW1 and PW2 reliable and credible witnesses. She identified the issues as one of their credibility and identification of the appellant. She took into account the evidence of PW2 as well as the CCTV footage and found that the other robber was the appellant. She did make a comparison of the appellant in court during the course of the trial before verdict against the CCTV footage. She found that the other male, not PW2, in all the different CCTV footage was wearing the same outfit and it was distinctive enough for her to find and identify him as the appellant.

The male in all CCTV footage Exhibits P1 to P5 was wearing a mask, a black cap, black trainers or sneakers, a black outfit with a full zipper at the front of the jacket and white stripes on the side of the trousers above the ankle.

Reasons for Sentence

This unarmed robbery involved stealing a bag with items worth around HK\$12,000 in it as well as two mobile phones, an identity card and two bankcards. In light of the appellant's age, the magistrate called for reports. The appellant was deemed unsuitable for a rehabilitation centre order or a detention centre order as he was serving a term of imprisonment. He was not recommended for probation. He was also not recommended for a training centre order due to his lack of remorse and denial.

The magistrate was of the view that if the appellant had been an adult he would have been sentenced to at least 4 years' imprisonment. In view of the appellant's age and relevant mitigation, she found a term of imprisonment the only appropriate sentencing option and sentenced the appellant to 21 months' imprisonment.

Legal Principles - Appeals

The legal principles concerning the approach to magistracy appeals are well established. I should only depart from the magistrate's finding of fact and assessment of a witness's credibility where her finding of fact is plainly wrong. The test in deciding whether the magistrate has erred so that an appeal should be allowed is whether it is just for the conviction to be quashed. A magistrate appeal is conducted by way of rehearing notwithstanding the absence of any error by the

magistrate. I should examine closely whether on the evidence adduced, the charge is proved beyond reasonable doubt and if not, the appeal should be allowed.

The magistrate had the advantage, which I do not, of having heard and seen the witnesses give evidence. The magistrate is the trier of fact and appointed to resolve issues of credibility. Barnes J pointed out in *HKSAR v Chan Wai Yip Albert* [2016] 2 HKLRD 718 that only if the findings of the trial magistrate are shown to be unreasonable or illogical, or inherently improbable; or that the trial magistrate has misquoted, or omitted, or failed to consider and analyse any significant aspect of the evidence then the appellate court should find the conviction unsafe and unsatisfactory.

The appellate court should act with great caution before interfering with a magistrate's finding if the findings appear reasonable after a consideration of the whole of the evidence.

Grounds of Appeal

Regarding the conviction, Mr. Davies set out two grounds of appeal in his perfected grounds of appeal.

The first ground is that the learned magistrate failed to properly assess the evidence of PW2. The second ground is that the learned magistrate wrongly relied on CCTV taken in Tseung Kwan O Police Station, the clothing of the individual in the various CCTV footage and her own identification of the appellant, after the trial had concluded, to find that the appellant was the same person accompanying PW2 as shown on CCTV taken in that 7-Eleven convenience store earlier the same day.

Regarding the sentence, Mr Davies sets out one ground of appeal in his perfected grounds of appeal. The order that 12 months of the 21-month sentence to run consecutively to the 44-month sentence the appellant was serving at the time of his conviction is manifestly excessive.

Consideration of Ground 1 against Conviction

Mr Davies submits that the only direct evidence was from PW2 and he was obviously lying about firstly his reasons for going to meet the appellant, secondly the amount of time he spent with the appellant just prior to the robbery and lastly his own involvement, knowledge and intention to rob. He submits that all of these matters affected credibility and did cast doubt on PW2.

Those three matters or criticisms were dealt with at length by the magistrate in her statement of findings. A magistrate is entitled to ignore or reject part of a witness's evidence and accept other parts so long as she carefully considers those other parts with other evidence from the prosecution she finds proved.

I find the magistrate dealt with all criticisms raised during this appeal when they were raised during the trial and dealt with them thoroughly. She warned herself that neither prosecution witnesses were independent witnesses. She warned herself that the appellant had a clear record and he had nothing to prove. She reminded herself that the prosecution bore both the burden and standard of proof.

Despite these criticisms and after observing PW2 give evidence she found him in the main, to be truthful and credible. The magistrate found no inconsistencies or discrepancies that cast doubt on his credibility overall. She also considered other independent evidence she found proved. This included a WhatsApp message from the appellant to PW2 sending a map and sharing his location with PW2 at 7:07 pm that day. This was in order for PW2 to find and meet up with the appellant in Hang Hau.

Other evidence she found supported the evidence of PW2 included the CCTV from the 7-Eleven convenience store in Hang Hau taken 10 minutes before the robbery where PW2 identifies the appellant and it would appear that bags are passed to the appellant by the cashier.

She describes the clothing of the male with PW2 identified as the appellant in that 7-Eleven convenience store CCTV footage. He is dressed all in black from head to toe but his pants or trousers had a distinctive white striped on each leg on the outside.

In order to reach a conclusion that the appellant was the other robber, it is clear that the magistrate not only considered PW2's evidence but also other supporting evidence to identify him. She considers carefully the other CCTV footage produced from various locations set out in paragraph 1 of the admitted facts, Exhibit P9. She finds the male in that footage wearing exactly the same clothes and distinctive trousers as the male identified as the appellant in the CCTV footage of the 7-Eleven convenience store.

The magistrate gave full reasons for accepting the evidence of the witnesses for the prosecution. I find no merit in this first ground of appeal against conviction.

Consideration of the Ground 2 against Conviction

Mr Davies submits the magistrate was wrong to ask after the case had been closed but before a verdict given the appellant to remove his facemask in court and then show the CCTV footage of the Tseung Kwan O Police Station where a male is reporting to the report room at 20:36 pm on the night of the robbery.

The magistrate adjourned her verdict after hearing submissions to 31 January 2023. However, on that day she informed all parties she was not ready with her verdict and had other matters which she wished to clarify. She wanted to look at the height comparison of both the appellant and PW2 stood side-by-side as well as look at the face of the appellant who had until that moment during the course of the trial been wearing a face mask. She wanted to draw their attention and re-watch the CCTV footage of Exhibit P3, which was of a male in the report room of Tseung Kwan O Police Station facing the CCTV camera, talking to a police officer and removing his facemask. That

person's clothing and face can be seen on CCTV once he removes his mask.

The transcript of that hearing on the 31 January 2023 clearly indicates the magistrate informing parties that she wished to look at the appellant's face. Obviously, she wished to compare it to the CCTV of that police station. She makes it clear that other than PW2's identification of the appellant, there is other evidence admitted of a person filmed at other times and places that evening where that person's clothing and outlook is relevant.

She gave the parties an opportunity to make further submissions. No further submissions were made and the verdict was adjourned to 13 February 2023.

There is nothing to prevent the magistrate from looking at a appellant in the courtroom and then looking at CCTV footage presented during the course of the trial if sufficiently clear, to conclude for herself whether the appellant was captured in those CCTV images. It was not unfair to the appellant in this case; parties were given an opportunity to make any further submissions.

Even if facial features were not sufficiently clear on the footage, there are other means by which a person may be identified. One example would be by their clothing if there were any distinctive features or marks.

The magistrate does in her findings at paragraph 40 referred to that footage from the police station. She found that although the resolution was not of the highest quality, she found the face of that male was very much like the appellant's face.

Mr Davies has submitted that the learning magistrate has relied on that CCTV to conclude that the appellant was at the police station but the finding was he looked "very much like the defendant" was well below the criminal standard required to be proved.

However, the magistrate made very clear that she took into account the fact he looked "very much like the defendant" as well as the fact he was wearing the same clothes in all the CCTV including CCTV footage where PW2 identified the appellant. Her opinion was that the clothing was distinctive; the long black pants had a distinctive white striped on each side above the ankle area.

She also took into account the CCTV footage Exhibit P5 of a male wearing the same distinctive clothing with the white stripes on the trousers inside the lift at Sau Lam House, Tsui Lam Estate at 10:42 pm that night. Sau Lam House was where the appellant lived and where he was arrested the following morning.

She concluded that all those facts she found proved convinced her that it was the appellant in all the CCTV footage and she drew the only reasonable irresistible inference that the appellant robbed the victim with PW2.

I found no merit in Ground 2; the magistrate was entitled to make a comparison of the appellant in court with photographs or CCTV footage produced in the course of the trial. She took her time before delivering verdict and did give the parties an opportunity to make submissions on this comparison.

Although I find no merit in the two grounds of appeal, I have also reviewed all the evidence of this case by way of rehearing. I am of the view that the appellant's conviction was correct. I am satisfied that the appellant's conviction is neither unsafe nor unsatisfactory; his appeal against conviction is dismissed.

Consideration of the Appeal against Sentence

Mr Davies does not submit that the 21-month sentence in itself is too long or excessive. It is, in view of the facts and aggravating factor of two robbers, a lenient sentence in spite of the appellant's age.

Mr Davies submits that to order 12 months of that sentence to run consecutively to the appellant's sentence for trafficking in dangerous drugs, a sentence of 44 months' imprisonment was manifestly excessive.

The magistrate took into account the totality principle in deciding to make this 21-month sentence partly consecutive to that sentence the appellant was presently serving.

The appellant was sentenced to 44 months for two counts of trafficking in a dangerous drug in the District Court on 27 January 2023; just prior to his conviction for this robbery. He had committed this robbery whilst on bail for that drugs case.

These offences are distinctly separate independent criminal acts committed some time apart. The magistrate was right not to consider wholly concurrent sentences. The magistrate was entitled to order part of the sentence to run consecutively to reach the overall effect of both sentences. This reflects the total criminality of the two offences.

Considering the overall criminality of the two cases, I agree with the respondent that the ultimate sentence imposed by the magistrate was proper and not excessive.

I find the magistrate's sentence was not wrong in principle nor manifestly excessive and I find no reason to interfere with it.

Conclusion

In light of the above, the appellant's appeal against conviction and sentence are dismissed.

(Amanda Jane Woodcock)

Deputy High Court Judge

Mr Lui Ming Chun, Pierre, Senior Public Prosecutor and MS Wong Hei Man, Jaime, Public Prosecutor of Department of Justice, for the Respondent

Mr Oliver Davies, instructed by Wong & Co., for the Appellant

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