

HONG KONG / JUDGMENT

HKSAR v. CHOW KIN CHUNG

COURT

Court of Appeal

DECIDED

6 July 2007

CASE / FILE NUMBER

CACC8/2007

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bjbj hTeP-N Hon Stuart-Moore VP and Beeson J in Court Dates of Hearing: 12 June 2007 and 6 July 2007 Date of Judgment: 6 July 2007

J U D G M E N T

Beeson J (Giving the judgment of the Court) The Applicant was convicted of one charge of Assault with Intent to Rob contrary to section 10 of the Theft Ordinance, Cap. 210. He pleaded guilty and was sentenced to 2 years imprisonment, by Deputy District Judge S.M. Sham. The Applicant filed a notice to apply for leave to appeal against sentence, which was heard by a single judge, Tang V.P. on 11 April 2007. Leave to appeal against sentence was refused. On 13 April 2007, the Applicant sought renewal of his application for leave to appeal. On 12 June 2007 the Applicant appeared before us in person in pursuit of that application. He repeated what he had told the single Judge; his contention that the victim aged 14, was mature ; that the starting point adopted by the judge was excessive; that as the victim had been able to escape he could have been only in minimal fear and that his crime was opportunistic, rather than pre-meditated. Comments made by defence counsel at the time of sentencing and by the judge in his Reasons for Sentence (B6 para.5), showed that the Applicant was held on remand before trial at Siu Lam Psychiatric Centre and that he had a psychiatric history, the nature of which was not immediately discernible from his criminal record. Defence counsel had submitted on sentencing that the commission of the offence had nothing to do with the Applicant's mental condition. The Applicant confirmed to us that he had such a history and that he was a psychiatric outpatient of the East Kowloon Polyclinic. We considered it appropriate to seek a psychiatric report before we gave judgment on this application and the hearing was adjourned, part-heard.

Facts

The facts showed that the Applicant had followed a 14 years old school boy for some time as he walked home at 1 am. He grabbed the boy's T-shirt from behind declaring a robbery. The boy, who was very frightened, took off his T-shirt and gave it to the Applicant. The Applicant asked what he had inside a bag he was carrying; the boy said there was nothing inside and fled. The boy sought help from a security guard nearby. A report was made to the police and a short time later the boy pointed out the Applicant to police officers as the man who robbed him. Under caution, the Applicant admitted he had grabbed the T-shirt but later he had thrown it away in some bushes. He led the officers to recover it. The Applicant has a long criminal record going back to 1988. He has a total of 24 court appearances comprising 32 offences, of those offences 25 were violence-related; other offences involved dishonesty but none is similar to the present offence. In mitigation, the court was told that the Applicant who was aged 47, had been unemployed since 1998 and relied on public assistance. Counsel stressed that no weapon had been used; that the boy was not injured and that no actual loss had been caused to him. The reason the Applicant committed the offence was because he was in a bad mood at the time. Counsel submitted further that the boy looked much older than his age of 14 years. The judge took a starting point of 3 years and gave the Applicant credits in which for assault with intent to rob, a lower starting point was adopted. We have to say that we entirely support the view which the judge went on to express when he said that; in terms of seriousness, the present case would be equal if not more to that of an unarmed robbery. (B7 para. 9) The Applicant had produced homemade grounds to support his application to the single judge. Those same grounds were relied on this hearing. The first was that he had no similar convictions and although his previous convictions related to violence, they were of a minor nature. No weapon had been used; the victim was tall and big for his 14 years and did not suffer any injury. He had pleaded guilty and assisted the police to recover the stolen property. He submitted that the sentence was heavy when compared with other cases and said he committed the offence because he could not find a job and had no one to help him. It is true that the Applicant had no previous similar conviction, but it is not quite accurate to say that the violence-related convictions on his record were minor. There were 25 such convictions and the sentences imposed ranged from 1 month to 6 months imprisonment. In light of this record, which showed the Applicant had at the very least a serious inability to govern his temper, the judge would have been justified in adopting a higher starting point than he did. The judge took into account that actual violence was used on the young victim. He considered that youthful victims needed protection from persons such as the Applicant, and for that reason the sentence should act as a general deterrent. The judge noted that the Applicant had a mental health problem, but did not investigate it further as the Applicant had not put it in issue and in any event, given the seriousness of the offence, he would not have been prepared to consider a Hospital Order. The judge took the view with which we do not disagree, that the Applicant would receive adequate psychiatric treatment from CSD, if it were necessary, while he was serving his sentence. However the judge's remark about his unwillingness to countenance a Hospital Order, because of the serious nature of this offence (B7 para. 11) causes us some concern. If it appears from the nature of a defendant's criminal record and the submissions of counsel that a defendant

has a chronic mental health problem, it behoves the court to examine the matter, regardless of whether the Applicant has relied on it in some way, or whether counsel has asked the court to investigate further. If defence counsel does not suggest that a psychiatric report be obtained, it is open to the judge to obtain one before sentencing, particularly if as here, the circumstances of the offence are somewhat unusual. Further, if what the Applicant needs is a Hospital Order and such an order is recommended, it is usually not desirable that the judge ignores such an order as the best sentencing option. The psychiatric report we sought advised that the Applicant was diagnosed initially in 1989 with schizophrenia, but later he claimed he had feigned those symptoms to avoid a harsh sentence. No psychotic symptoms were detected at his various subsequent admissions to Siu Lam Psychiatric Centre, or in follow-up appointments at the psychiatric outpatient clinic. In August 2004, the time of his last assessment, he was categorised as a Severe Paranoid Personality a diagnosis which was confirmed, albeit under different nomenclature, as a Paranoid Personality Disorder by Dr Poon Kam-shan, Resident Visiting Psychiatrist at Siu Lam Psychiatric Centre, who completed the latest report, dated 21 June 2007. Manifestations of the Applicant's disorder were said to be: suspiciousness, tenacious sense of personal rights and a tendency not to forgive insults or slights. To explain this offence to the psychiatrist the Applicant claimed that his social security allowance was insufficient for his monthly expenses, so he had robbed a passer-by in the street. He claimed he had not stolen anything and that his sentence was too harsh. Dr Poon said the Applicant understood the nature of the offence and his position in the legal proceedings; he was neither depressed nor delusional. Having considered Dr Poon's report we are satisfied that no psychiatric intervention is necessary at this stage. The main ground of complaint from the Applicant is that he has been sentenced more heavily on this occasion than he has been in the past. We note that until the date of the present offence he has been dealt with only in the Magistracy. Given his record it appears inevitable that at some point a longer than usual sentence would be passed on him. This appears to be that moment. The Applicant has not learned any lesson from repeated sentences of imprisonment, or from non-custodial sentences. The judge had taken all relevant matters into account. There is no justification for reducing the sentence. This application for leave to appeal against sentence is dismissed. (M. Stuart-Moore) Vice-President (C-M Beeson) Judge of the Court of First Instance Ms Mary Sin, SGC of the Department of Justice, for the Respondent Applicant in person, present PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk i\$&`G rLy.E _Rzd ABC Paper05.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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