

HONG KONG / JUDGMENT

HKSAR v. CHOW WING WAI

COURT

Court of Final Appeal

DECIDED

6 November 2017

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FAMC No. 29 of 2017 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MISCELLANEOUS PROCEEDINGS NO. 29 OF 2017 (CRIMINAL) (On APPLICATION FOR LEAVE TO appeal from CACC No. 107 of 2013)

Between HKSAR Respondent and CHOW WING WAI Applicant

Appeal Committee : Mr Justice Ribeiro PJ, Mr Justice Tang PJ and Mr Justice Fok PJ Date of Hearing and Determination : 30 October 2017 Date of Reasons for Determination : 6 November 2017 REASONS FOR DETERMINATION Mr Justice Ribeiro PJ: At the hearing we dismissed this leave application for reasons which we now provide. The applicant was convicted after trial before Poon J and a jury of possession and trafficking of quantities of cocaine, ice and ketamine at Room B, on the second floor of 368 Reclamation Street, Mongkok on 14 February 2012. He was sentenced to 18 months' imprisonment on the possession count and to 12 years on the trafficking count, to be served concurrently. His appeal was dismissed by the Court of Appeal. The applicant seeks leave to appeal on the substantial and grave injustice basis, advancing two arguments. First, it is alleged that, in breach of its duty to provide unused material, the prosecution failed to make available the notebook of PC 2199, an officer who took part in the operation, which (he says) would have supported his version and undermined the prosecution case. Secondly, it is contended on his behalf by Mr Eric Cheung that counsel instructed at the trial was guilty of flagrant incompetence in failing to cross-examine police officers regarding certain omissions in police notebooks and in a video-recorded interview ("VRI"). The application focusses on the circumstances of the arrest. PW1, the arresting officer, testified that he intercepted the applicant just as he emerged from Room B, barefoot and dressed only in his underpants, carrying a garbage bag which, on being searched, was found to contain household rubbish and two small resealable bags with traces of cocaine. PW1 and other officers thereupon executed the warrant and entered and searched Room B where the drugs and paraphernalia founding the trafficking charge were discovered. PW1 and PW2 (another participating officer) testified that the applicant admitted to living in Room B and to using cocaine but denied knowledge of the drugs and

paraphernalia found. The applicant did not give evidence. His case as it emerged in a VRI and in cross-examination on his behalf involved denying every aspect of the prosecution's case, including a denial that he was intercepted as described above. His case was that he was playing a computer game alone in Room B when the police gained entry into Room B using a key to the front door and arrested him. Eleven police officers were involved in the operation. PC 2199 took up a position in a building across the road to observe the 2nd floor premises where drug trafficking was suspected because persons who appeared to be addicts were seen coming and going. The notebooks of PW1 and PW2 were obtained by the defence at the trial but not those of the other officers. After requesting and obtaining all their notebooks when preparing for this leave application, the applicant seized upon an entry in PC 2199's notebook which stated that at 12:30h he: "... [saw] from the OP position that the cream-coloured gate in the right corridor at 368 Reclamation Street was open, and PC 33021 and team members rushed forward and entered the above flat. And I continued to observe from the OP position." That entry, the applicant contends, contradicts the evidence of PW1 and PW2 regarding the alleged interception outside Room B, undermining their credibility, making the failure to provide the notebook material to the outcome of the trial. This, he argues, is supported by the fact that their own notebooks and the VRIs make no mention of the interception, dealing only with what occurred inside Room B. Counsel instructed at the trial is alleged to have been flagrantly incompetent because he failed to cross-examine on the absence of any mention of the applicant's interception in the notebooks of PW1 and PW2 and in two VRIs. In *HKSAR v Ip Tsz Yau*, relied on by the applicant, the officers' notebooks were of central relevance since they established that two important defence witnesses were indeed present at the scene, whereas the Judge had found that they and the defendant were lying when they claimed to be present. In contrast, the entry in PC 2199's notebook is of much less significance and, if relied on, would have been inconsistent with aspects of the applicant's case. At the trial, the applicant was faced with overwhelming evidence of possession and trafficking. The prosecution case was that he resided in Room B where the police found packets of drugs with a street value of about \$94,000, mostly in the locked bedroom, plus drug paraphernalia, a quantity of resealable bags and an electronic scale, together with a notebook appearing to contain accounting entries. The officers gave evidence that they found keys to the flat and to the bedroom (referred to as the keys "with the black star") in a pair of jeans belonging to the applicant, as well as a photograph of the applicant's young son and expired passports and travel documents belonging to the applicant in the premises. While the police were present in the course of the raid, a woman named Mok Yee-mei ("Mok") let herself into Room B with her own set of keys (which did not include a key to the bedroom). Giving evidence as a defence witness, she testified that the applicant had given her permission to stay in Room B and also allowed her to let a man called Mak, nicknamed "Scorpion" ("Mak"), to stay there too. Mok and Mak (who also testified as a defence witness) said that they had seen the applicant consume drugs in Room B. It was, as noted above, the applicant's own case that he was alone in Room B when, as he alleges, the police entered. The evidence that he went outside barefoot, in his underpants and carrying a bag of household rubbish was also consistent with him residing there. Two important pieces of evidence indicating that the applicant resided in Room B and had control of the drugs and paraphernalia were (i) the presence of his personal effects and (ii) his "black star" keys to Room B

and the bedroom. It would be difficult to accuse the police of fabricating such items to be “discovered” in the raid. The applicant sought to explain away the presence of his personal effects by relying on Mok’s evidence (as the Judge put it in her summing-up): “... that a locksmith had to be engaged to unlock the door of the defendant’s old flat and she had to climb up on top of a cabinet to retrieve these photographs and documents which she considered valuable to the defendant and to transfer all those to Room B.” The plausibility of that account is self-evidently vulnerable to attack. As to the keys, the applicant relied on Mak’s evidence that Mak had a key to Room B (but not to the bedroom) which had been taken from him by the police when they intercepted him at about 09:30 that morning after he left the premises. Mak said that he had been taken by the police to an adjacent building, questioned, relieved of the keys and then released. That such an encounter with the police took place was challenged by the prosecution as incredible since Mak was a wanted person, having escaped from a hostel, so that he would not have been let off so easily. Moreover, Mok testified that she owned the keys which did not include the bedroom key. Thus, it was central to the applicant’s defence that the account of the arrest and raid given by PW1 and PW2 was a total fabrication and that in truth, the police, using the key taken from Mak, had let themselves into Room B where they found the applicant playing a video game. It was his case that this occurred at about 10:30h and not at 12:30h. It was a case which the jury obviously rejected. It is in that context that the entry in PC 2199’s notebook must be viewed. While it is true that it did not record him seeing the applicant being intercepted outside Room B, the relevant entry noted that the metal gate was opened, so that, as Mr William Tam SC pointed out, it would have obstructed PC 2199’s view of what was occurring from across the road. Absence of any mention of the interception was therefore not necessarily inconsistent with PW1’s testimony. Moreover, the entry in PC2199’s notebook was inconsistent with the applicant’s case and helpful to the prosecution in two important respects. First, entry by the police was recorded as occurring at 12:30h and not, as the applicant sought to suggest, at 10:30h. Secondly, entry into Room B was made after the cream-coloured gate was opened. As he was the only person present, it had to be the applicant who had opened the gate, contradicting his suggestion that the police gained entry by using a key seized from Mak to open the gate themselves. The materiality of non-disclosure of PC 2199’s notebook is therefore highly doubtful and we do not consider it reasonably arguable that such non-disclosure constituted a substantial and grave injustice. It is regrettable that it was thought fit to allege that there was flagrant incompetence on the part of defence counsel at the trial. Such an allegation is not justified merely by suggesting possibly viable lines of cross-examination that might have been, but were not, adopted. Trial counsel was faced with an overwhelming case against the applicant and had to exercise his judgment as to how the defence was to be conducted. We do not accept that a failure to ask why the officers did not deal with the alleged interception of the applicant in their notebooks and in the VRIs resulted in the applicant being deprived of a fair trial. As Mr Tam SC submitted, the fact that there were no written records and no signed acknowledgments by the applicant of admissions allegedly made by him when intercepted was pointed out by defence counsel in final submissions and by the trial Judge in the summing up so that the jury were made aware of those omissions. HKSAR v Chan Yuk Ling, (not a “flagrant incompetence” case) cited by Mr Cheung, does not advance the applicant’s argument. There, the conviction was quashed because the Judge had failed to deal

with the fact, central to the defence, that an oral admission, heavily relied on by the prosecution, was not recorded in writing and not put to the defendant in a VRI. The importance of the omission in that case was pivotal. Whereas in the present case, the prosecution was based on the copious evidence mentioned above and a failure to cross-examine about the omissions, was of only tangential significance. We accordingly do not consider it reasonably arguable that there was a substantial and grave injustice in the present case. (R A V Ribeiro) (Robert Tang) (Joseph Fok) Permanent Judge Permanent Judge Permanent Judge Mr Eric TM Cheung, Solicitor Advocate, instructed by ONC Lawyers, assigned by the Director of Legal Aid, for the Applicant Mr William Tam SC, DDPP, and Ms Cherry Ho, PP, of the Department of Justice, for the Respondent

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