

HONG KONG / JUDGMENT

HKSAR v. FAN TAK WAN

COURT

Court of Appeal

DECIDED

4 October 2007

CASE / FILE NUMBER

CACC10/2007

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj nt

Before : Hon Stuart-Moore VP and Lunn J in Court Date of Hearing : 4 October 2007 Date of Judgment : 4 October 2007

J U D G M E N T

Hon Lunn J (giving the judgment of the court) : AUTONUMOUT This is an application for leave to appeal against a sentence of four years imprisonment imposed upon the applicant by Mr Recorder SC on 29 December 2006. The applicant pleaded guilty in the Magistracy on 20 October 2006 to a single charge of wounding with intent, contrary to section 17(a) of the Offences Against the Person Ordinance, Cap. 212 and was committed for sentence in the Court of First Instance. AUTONUMOUT The victim of the wounding is Madam Then Kong, the applicant s wife of 14 years and the mother of his two sons, aged 10 and 11 years at the time of the wounding, in March

2006. The attack by the applicant on his wife took place at about 2 a.m. on 28 March 2006 in the family home in Tuen Mun whilst Madam Then was asleep in the upper bunk of a bunk bed, the lower bunk of which was occupied by her younger son. The applicant used a kitchen chopper to deliver multiple blows to Madam Then s head, face, hands and right arm. The blows to her hands and right arm were caused as she tried to fend off the attack. In the commotion of the attack both sons of the family were awakened. At first, the applicant ignored the requests of the elder son to desist in his attack. However, later the applicant did cease his attack and engaged in a conversation with the victim in which he questioned her as to whether or not she had forgiven him. Both the applicant and his victim asked the sons to call the police. They did so. AUTONUMOUT On the arrival of the police at the family home the applicant indicated where the weapon he had used was and in answer to being arrested and cautioned complained that his wife did not treat him as a person, saying that on that night he could stand it no more and he had attacked her with a knife

that he had fetched from the kitchen. Subsequently, in a written statement under caution the applicant described the marital discord that had ensued between them, complaining that her personality had changed after she had begun to work. She became more distant, saying that she preferred to spend time with her friends. He began to suspect that she was conducting an extra marital affair, but he did not raise the matter with her. He did advise his wife not to gamble. In response, Madam Then scolded him. In the course of such quarrels Madam Then demanded that they be divorced. The applicant described to the police thoughts that had come into his mind in that early morning of him on the one hand begging her not to divorce him and she responding by denigrating him. That had been the trigger for the attack. INJURIES AUTONUMOUT Madam Then was taken by ambulance to the Tuen Mun Hospital, where she was admitted and found to have multiple chop wounds over her head, face and deep chop wounds over both hands with the bone and tendon exposed. The tip of the right thumb had been amputated. She had a cut wound over the right arm. Subsequent tomography of the brain showed a fracture over the front region of the skull bone but no internal haemorrhaging. The injuries to her face and ear were sutured by plastic surgeons and those to her skull by neurosurgical surgeons. The injuries to her hands were managed by the Orthopaedic Department. The injuries to her right hand involved muscles and tendons of the ring and little finger with some digital nerve involvement. The injuries to the left hand involved tendon, nerve and artery damage. Madam Then was detained as an inpatient until she was discharged on 9 April 2006. In the absence of consent from Madam Then no photographs were taken of her injuries. PROCEEDINGS IN THE MAGISTRACY AUTONUMOUT Notwithstanding the position taken by Madam Then, articulated in her witness statement, that she would not give evidence against the applicant the latter nevertheless pleaded guilty in the Magistracy, following which he was committed for sentence to the Court of First Instance. SENTENCING AUTONUMOUT On the first appearance of the applicant before the Court of First Instance the Recorder ordered the preparation of a psychological report on the appellant. A report from a clinical psychologist, Ms Sarina Lam, dated 27 December 2006 was available to the Recorder at the time that he passed sentence. In addition, the Recorder was provided with a copy of a witness statement of Dr Sun, of the Department of Orthopaedic and Traumatology of Tuen Mun Hospital, dated 26 May 2006. The latter report described the victim s wounds as having healed well. The latest follow-up examination of 17 May 2006 revealed that Madam Then had largely recovered function in range and power of the left hand, although then there was remaining stiffness and loss of sensation in the right hand. Finally, the Recorder was given a statement of 26 September 2006 of Madam Then there she asserted that she had made a full physical and mental recovery. THE PSYCHOLOGIST S REPORT AUTONUMOUT The psychologist s report described the applicant as being 53 years of age. He and his wife was separated by 18 years, she having been 20 years of age when they got married. In the early years of their marriage she had been a housewife and mother. However, in 2005 notwithstanding the strong objections of the applicant she obtained employment in a laundry, which required her to work overnight. Marital discord ensued and Madam Then began to speak of seeking a divorce. For his part, the applicant

sought the assistance of the Caritas Family Service Centre in Tai Hang Estate, but Madam Then refused to attend counselling sessions with him. AUTONUMOUT In her report Ms Lam went on to describe the applicant as having ruminated to her about the state of his marriage ve been treating my wife well all along, what did I do wrong to deserve a divorce? I will lose everything if I was divorced. The applicant described symptoms of tightness in the chest, and an inability to concentrate together with a feeling of desperation. A few days before the attack he had gone on to his knees and presented his wife with a ring, begging her not to divorce him. However, Madam Then had responded by scolding him, telling him to die as far as possible away from her. She slapped him once and he had responded by calling the police. Ms Lam noted that Madam Then had confirmed the occurrence of this incident. On the day before the attack the applicant had responded to the feeling of tightness in his chest by attending the Tuen Mun Hospital. He had tried unsuccessfully to locate his social worker. AUTONUMOUT Finally, Ms Lam described the applicant s description to her of a quarrel which had ensued with his wife over his complaint of the modest qualities of the evening meal that she had prepared for him on the evening before this attack. He blamed her for not paying enough attention to the needs of the family. Later, they quarrelled over her request to be given a copy of the telephone bill, she saying that she wished to change the subscription plan. The applicant believed that she wished to have possession of it in order to use it to borrow money from a financial institution. MADAM THEN S WITNESS STATEMENTS AUTONUMOUT Finally, the Recorder was provided with several witness statements of Madam Then, the latter two being 31 July and 26 September 2006, in which she repeated her assertion that she had forgiven the applicant, that they had become reconciled and that they wished to resume life together with their sons. Indeed, Madam Then was present in court at the time counsel mitigated on behalf of her husband. SENTENCE AUTONUMOUT In sentencing the applicant the Recorder said that the gravamen of the offence was that the attack was upon his wife with a chopper as she lay asleep. He noted that the injuries were rather serious and that an unpleasant feature of the case was that the attack had taken place in the presence of the couple s two young children. Furthermore, although he acknowledged that there was a background of marital mistrust, in which the victim had been seeking a divorce, the Recorder noted that there was no immediate provocation on the part of the victim preceding the attack. Finally, he noted that both Madam Then and the two children of the family had written to the court describing the applicant respectively as a caring husband and father and the attack as an isolated incident. In the result, the Recorder stipulated a starting point of seven years imprisonment. AUTONUMOUT Of the mitigating factors the Recorder noted that the applicant had desisted in the attack on the intervention of his sons and had confessed his culpability to the police upon their arrival at their home. Furthermore, the applicant had apologised to the victim. Finally, the Recorder noted that the applicant had pleaded guilty and had done so knowing that his wife would not give evidence, but by doing so he had saved the necessity of the prosecution calling his two sons as witnesses. AUTONUMOUT In the result, the Recorder stated that he reduced the starting point taken for sentence from seven to six years imprisonment. Having applied a

one-third discount for the applicant's timely plea of guilty to that lower figure the Recorder imposed a sentence of four years imprisonment. GROUND OF APPEAL AGAINST SENTENCE AUTONUMOUT On behalf of the applicant Ms Draycott submits that the Recorder failed to give sufficient weight to the significant mitigating factors, namely :

- (i) the applicant's plea of guilty, whereby the need for his sons to testify was avoided; (ii) the efforts that the applicant had made prior to the offence to seek help from the stress of marital discord; and (iii) the absence of a history of violence in the marriage so that the prospects of recidivism were low; finding that the stress within the marriage might be amenable to social, psychiatric or psychological intervention; the fact that the victim had forgiven the applicant and that she and the children remained affectionate and caring towards him and wished to be reunited as a family. SUBMISSIONS ON BEHALF OF THE APPLICANT The forgiveness of the victim AUTONUMOUT At the outset of her address to the court and in her written submissions Ms Draycott acknowledged that in determining the appropriate sentence the forgiveness of a victim of his assailant must be weighed against the interest of the public that a serious crime is punished properly. However, she submits that the Recorder failed to accord the proper weight or balance to the oft-repeated desire of the victim and her children to be reunited with the applicant as a family. She invites the court to note that the use of violence by the applicant on the victim was an isolated incident. AUTONUMOUT In addition, Ms Draycott asks the court to take into account that the applicant had sufficient insight into his own problems that he had sought to obtain assistance, firstly by contacting the Caritas organization in July 2005, to arrange marital counselling and, secondly, on the day before the incident unsuccessfully seeking to contact his social worker. SUBMISSIONS ON BEHALF OF THE RESPONDENT AUTONUMOUT In respect of the submissions relating to the factor of forgiveness in the determination of the appropriate sentence Mr Marco Li, on behalf of the respondent, draws the court's attention, in particular, to two decisions of the Court of Appeal of England and Wales (*R. v. Buchanan* [1980] 2 Cr. App. R. 13; and *R. v. Darvill* [1987] 9 Cr. App. 225). In each case that court was concerned with violence committed by one cohabiting partner on the other in which the male partner had pleaded guilty to an offence of wounding with intent committed with a knife upon the female partner, who had subsequently forgiven her partner. AUTONUMOUT In *Buchanan*, Bridge LJ (as he then was) said of the issue of domestic violence and subsequent forgiveness by the victim of that violence (page When such offences of violence are committed, whoever the victim may be, the matter is inevitably one of considerable public concern. The courts cannot regrettably be deflected from their duty of imposing sentences appropriate to the gravity of the offence when crimes of violence of this nature are committed against a domestic background. A CONSIDERATION OF THE SUBMISSIONS AUTONUMOUT With respect to the Recorder he was in error in the mechanics by which he reached the sentence of four years imprisonment imposed upon the applicant. As set out earlier, the Recorder identified a starting point of seven years imprisonment from which he deducted one year's imprisonment in light of the mitigating factors he found (Appeal Bundle, page I have considered all the relevant mitigating circumstances. I will bring down

the starting point of 7 years to 6 years. In view of your timely plea, I will give you the full one-third discount. AUTONUMOUT Clearly, the Recorder ought to have fixed the starting point having regard to all the circumstances of the commission of the offence, including the circumstances relevant to the position of the applicant. From that starting point was to be deducted the appropriate discount for the factors of mitigation. AUTONUMOUT There is no doubt that the Recorder was correct in describing the gravamen of the offence as being the use of a chopper by the applicant to attack his wife as she lay asleep. The chopper is depicted in the photographs taken by the police as being of the standard type used in kitchens in Hong Kong, the blade being about 6 or 7 inches in length and about 3 inches in width. Equally, he was correct to describe the consequences as being serious injuries, the violence of the attack being such that Madam Then's skull was fractured. The photographs of the scene of the attack bear eloquent testimony to its violence, blood having been sprayed from the victim onto the walls next to the bunk. Indeed, in April 2006 the prosecution amended the original charge against the applicant to one of attempted murder. It was in face of that charge that in October 2006 the applicant tendered a plea of guilty, which was accepted by the prosecution, to the offence of wounding with intent. AUTONUMOUT The presence of extensive defensive injuries to the hands and the right arm of Madam Then are consistent with the applicant's acceptance of the summary of facts in which the attack was described as having been pressed home notwithstanding the intervention of one of the sons. AUTONUMOUT The weight to be given to the element of the forgiveness by the victim of a wounding with intent is lessened the more serious is the nature of the injuries. With respect, we accept as entirely apposite the observations cited earlier of Bridge LJ in Buchanan, namely When such offences of violence are committed, whoever the victim may be, the matter is inevitably one of considerable public concern. The courts cannot regrettably be deflected from their duty of imposing sentences appropriate to the gravity of the offence when crimes of violence of this nature are committed against a domestic background. AUTONUMOUT In Darvill Lord Lane CJ said of the element of forgiveness, in a case in which there had been three stab wounds to the victim so serious that the lung had been penetrated (page There is no doubt that forgiveness can in many cases have an effect, albeit an indirect effect, upon the task of the sentencing judge. It may reduce the possibility of re-offending, it may reduce the danger of public outrage which sometimes arises where a defendant has been released into the community unexpectedly early, and it may enhance the evidence of provocation by the victim and render such provocation more readily credible by the court. AUTONUMOUT It is to be noted that whilst in the instant case the risk of re-offending by the applicant is described in the psychological report, there being no evidence of the use of violence by the applicant inside or outside the family, on the one hand as being low on the other hand the caveat was entered by Ms Lam that if the applicant's mistrust and fear of being abandoned by his wife persisted then the risk of future violence against his wife would be aggravated. In light of her finding that the applicant had no insight towards his over suspiciousness of his wife, which was described as an important factors [sic] that contributed to violent behaviour towards his wife, psychological follow-up for the applicant was recommended by Ms Lam.

CONCLUSION

AUTONUMOUT In all the circumstances of this case, we are satisfied that the Recorder was correct in choosing as the ultimate starting point a sentence of six years imprisonment. Similarly, in light of his immediate acceptance of culpability and his subsequent timely plea of guilty the one-third discount from that starting point afforded to the applicant was appropriate. In the result, we are satisfied that the sentence of four years imprisonment imposed upon the applicant was neither wrong in principle nor manifestly excessive. Accordingly, the application for leave to appeal against sentence is dismissed. (M. Stuart-Moore) Vice President (Michael Lunn) Judge of the Court of First Instance Mr Macro Li, SGC, of the Department of Justice, for the Respondent Ms Charlotte Draycott, assigned by Director of the Legal Aid Department, for the Applicant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk G H I J K L M N O P Q R S T U V P" (# r P" P" (# & `#\$ 4or~ Rs~/ \*fn (Q\*<< jZS+ ,DGpH nPz- c8T4 j^6\* ~ B; <(z&; Ym/A8 xXED NFaF4\ B[UN` "O^B (BQ VhrLO ;3t[a8]b5 ,7)a~D ^|r ~ B; ,7)a NFaF (BQ B[UN nPz- Ym/A *fn jZS+ ;3t[c8T4 D\$ti \TvV UH2 & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=58734
CASE PAGE	https://chat.esheria.ai/case-law/hong-kong/hksar-v-fan-tak-wan-2007

Prepared on 26 October 2026 · Esheria