

HONG KONG / JUDGMENT

## HKSAR v. GURUNG ROYAL

[2024] HKCA 1120

COURT

Court of Appeal

DECIDED

27 November 2024

CASE / FILE NUMBER

CACC38/2024

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CACC 38/2024

[2024] HKCA 1120

in the high court of the

hong kong special administrative region

court of appeal

criminal appeal no 38 of 2024

(on appeal from hccc NOs 131 of 2021 and 149 of 2023 (CONSOLIDATED))

BETWEEN

HKSAR

Respondent

and

GURUNG ROYAL (D2)

Applicant

Before: Hon Macrae VP in Court

Date of Hearing: 27 November 2024

Date of Judgment: 27 November 2024

## J U D G M E N T

The applicant, who was D2 at trial, was indicted jointly on one count of robbery together with Mehmood Arshad (“D1”), contrary to section 10 of the Theft Ordinance, Cap 210 (“Count 1”), and a further count of wounding with intent against himself alone, contrary to section 17(a) of the Offences against the Person Ordinance, Cap 212 (“Count 2”). Following a trial in the High Court before Deputy Judge D Yau (as ¶D ¶Yau ¶J ¶then was) (“the judge”) and a jury, the applicant was convicted unanimously of both counts on 25 January 2024. Subsequently, on 29 ¶January 2024, he was sentenced to a total term of 13 years’ imprisonment.

By his Form XI Notice filed on 15 February 2024, the applicant seeks leave to appeal against his conviction only.

### The prosecution case

It was admitted by the applicant that the robbery took place on 21 September 2018 at 10:25 am, and that a Mr Koo (“PW1”) and a Mr ¶Ketan were injured by knives and robbed of HK\$363,060 and US\$740,000 in cash, as well as US\$54,613 in cheques, at the junction of Hok Yuen Street East and Hung Hom Road, in Hung Hom, Kowloon.

According to the evidence of Sahil Kumar (“PW2”), the robbery involved himself and other persons, including D1, a Nepalese male called Limbu Binod (“Limbu”) and another Nepalese male alleged to be the applicant, who played the following roles:

D1 was the planner and organiser of the robbery. In the morning before the robbery took place, a meeting was held inside the residence of D1 and PW2 at 7A Pitt Street, Pik ¶Wah ¶Building, Yau Ma Tei (“Pik Wah Building”), during which D1 briefed the others about the intended robbery and the escape plan.

PW2, Limbu and the other Nepalese man (said to be the applicant) actually carried out the robbery, with PW2 acting as both lookout and the one who took away the stolen money, whilst Limbu and the other Nepalese man would threaten the victims with knives. After the robbery, PW2 and the other Nepalese man fled together by getting into a getaway car, whilst Limbu fled on his own by foot.

A person named “Wifi” was the driver of the getaway car, which was a stolen vehicle. This vehicle was used not only as a getaway car but also to transport the robbers to the scene of the robbery.

The dashboard camera of a civilian vehicle recorded PW2 and Limbu running away, with the other Nepalese man holding a knife in his hand, after the robbery. This other Nepalese man was also depicted by other admitted CCTV evidence (footage and enlarged screenshots) taken from Pik Wah Building, although its quality was alleged (by the defence) to be unsuitable for the purpose of identifying him as the applicant.

The prosecution also relied, however, on the applicant's fingerprints and DNA found in, on or near the getaway car. Among the items seized inside the vehicle containing the applicant's DNA were two knives (one bearing the blood of PW1), two plastic bags, a face mask, a cap and three pieces of clothing. This evidence, according to the prosecution, proved that the other Nepalese man was the applicant, who had taken part in the robbery and the wounding of PW1.

Although it was the prosecution case that the applicant was the other Nepalese male, who had gone to and left the scene of the robbery and wounding in the back of the vehicle, PW2 was unable to identify the applicant as one of the robbers at an identification parade conducted on 19 August 2021.

### The defence case

The applicant elected to testify at trial. In essence, he denied that he was the person captured in the relevant CCTV images. He did not take part in the robbery, nor did he wound the victim. He claimed that he did not know D1, PW2 or Wifi. However, he had known Limbu since first meeting him in Hong Kong in about 2014 or 2015. Between 2017 and September 2019, he had gone to Pik Wah Building frequently to cook, play games and drink together with Limbu. Moreover, between June and August 2018, he would often go out with Limbu (or Limbu's friends) who would drive a car to pick him up. In respect of the DNA and fingerprint evidence, the applicant testified that he had had to move things in the car to make room to sit and accordingly, could have come into contact with the car and the seized items when he did so.

### The summing-up

Regarding PW2's identification of the other Nepalese man (said to be the applicant) in the various CCTV footage and screenshots, the judge directed the jury at length in accordance with Specimen Direction 108I(C).

In relation to the prosecution's invitation for the jury to compare the image of the Nepalese man in the green polka dot T-shirt in the CCTV footage and the photograph taken at Pik Wah Building directly with the applicant's appearance in court, the judge further directed the jury in line with Specimen Direction 108II(A), save and except for paragraph 4 of the Direction, which was inapplicable to the case.

In addition, the judge instructed the jury that to succeed in proving the applicant's guilt, the prosecution had the burden of proving its case beyond reasonable doubt; however, "if the account given by D2 or put forward by the defence is or may be true then the defendant must be acquitted".

### Grounds of appeal against conviction

In his Form XI Notice, the applicant has averred four homemade grounds of appeal against conviction, which may be summarised as follows:

Ground 1 – He was wrongly convicted;

Ground 2 – The judge failed to give clear directions to the jury as to their role and responsibilities as jurors;

Ground 3 – The judge did not give proper directions to the jury as to PW2's failure to identify the applicant; and

Ground 4 – The judge's directions were unfair in the sense the jury might have thought they could still convict the applicant by simply believing in the prosecution allegation without considering the applicant's evidence, since the jury asked the judge if they could convict the defendants by only believing in the prosecution's allegations.

In respect of Ground 4, the question posed by the jury was as follows (in its certified translation):

*"Our understanding is that we need to judge in accordance with the Prosecution's stance. Since the Prosecution has, on numerous occasions, in his Opening Speech & Closing Speech stressed that D1 was the "Master Mind", we want to confirm again if we need to believe D1 was the "Master Mind" and only then we can convict him?"*

It may immediately be noted that the jury's question does not in fact focus on the applicant at all, but on his co-accused D1 in relation to the role he (D1) played in the robbery.

### **The respondent's reply**

As for Ground 1, Mr Antony Leung, for the respondent, submitted that credibility and reliability of witnesses were matters for the jury, who were entitled to accept PW2's evidence and reject the applicant's account.

In reply to Grounds 2 to 4, Mr Leung contended that the judge had given sufficient and proper directions to the jury as to their functions and responsibilities as jurors, so as to "judge the evidence and decide all the relevant facts of this case" and to assess the credibility and reliability of each witness. The judge had clearly explained to the jury the burden and standard of proof and specifically reminded them to take the applicant's evidence into account when considering the factual issues in the case.

As for the identification evidence in relation to the applicant, Mr Leung submits that the directions given by the judge were detailed and comprehensive. The judge warned the jury of the special need for caution before relying on identification evidence as there was a possibility that an honest witness might be mistaken and he further highlighted the relevant considerations, in particular, that PW2 and the applicant did not come from the same ethnic background; and the admitted fact that PW2 had failed to identify the applicant in the identification parade.

## Consideration

Before addressing the specific grounds of appeal, I should say something about the evidence in this case. There was one very important and rather damning category of evidence, which not only supports, and even corroborates (in its historical, technical sense), any identification evidence but is capable, together with the other evidence, of leading to the irresistible inference that the applicant was one of the robbers in the back seat of the vehicle on the way to and from the robbery. That category is the forensic evidence, which established not only that the applicant's fingerprints were found on a red plastic bag (Exhibit P17) inside the vehicle but also that his palm print was found on the vehicle itself, whilst his DNA was found on a mask lying by the side of the vehicle (Exhibit P11) after it had been abandoned, on a cap (Exhibit P15), on two plastic bags (Exhibit P17 and P23), one of which contained a knife (Exhibit P18) with the applicant's DNA also on the handle, on another knife also with the applicant's DNA on the handle (Exhibit P20) and on three pieces of clothing found inside the vehicle (Exhibits P 26, 27 and 29). Such forensic material, in particular the applicant's DNA on the mask lying next to the abandoned vehicle after the robbery and his DNA on the handle of two knives, one of which also bore the blood of PW1 and had clearly been used to wound that particular victim, was highly compelling evidence.

Once the jury had rejected the applicant's innocent explanation for the presence of his fingerprints, palm print and DNA on these items, in, on or near the vehicle, then this forensic evidence, together with PW2's evidence of the participation in the crimes of at least one Nepalese man (which the applicant was), who had been in the back of the stolen vehicle both before and after the offences were committed, was capable of establishing the applicant's presence at the scene of the robbery and the wounding of PW1: see, for example, *R v Castleton*; applied in *HKSAR v Chiu Wai Keung*. And if the jury were satisfied from this evidence that he was at the scene of the robbery, having travelled to and from the scene of the attack in this particular vehicle, then on PW2's evidence and the CCTV footage, he took an active part in the robbery and the wounding of PW1.

It is true that PW2 did not identify the applicant, a fact of which the jury were clearly reminded by the judge. But, once the jury had excluded the applicant's innocent explanation for his association with the various articles and objects bearing his fingerprints, palm print and DNA, in conjunction with the evidence of PW2 that two Nepalese men were involved in the offences, then the forensic evidence established that the applicant was one of the men. In the leading case of *R v Turnbull*, which has given rise to the standard specimen directions used in all cases where identification evidence is in issue, the Court held:

*“When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.”*

Clearly, there was here abundant supporting evidence to show that the applicant was in the vehicle, and that he had direct contact with the weapons and other items used to carry out the robbery.

Of any alternative, innocent explanation given by the applicant, the judge correctly told the jury that:

*“It is for you to decide whether you believe the evidence of [the applicant] or whether that evidence may be true.*

I have previously told you that if... the account given by [the applicant] or put forward by the defence is or may be true then the [applicant] must be acquitted – is or may be true then the [applicant] must be acquitted”.

This was an important direction, which made clear the responsibilities of the jury in dealing with the defence case (Ground 2).

The jury unanimously convicted the applicant. It follows that they must have rejected the innocent explanation he gave for his fingerprints, palm print and DNA in, on or near the vehicle used in the robbery. Accordingly, such forensic evidence clearly pointed to the applicant as one of the robbers at the scene, whether he was directly identified by any of the witnesses or not. It is not reasonably arguable that the judge’s directions on the question of identification were deficient (Grounds 2 and 3), or that he failed to remind the jury that PW2 did not identify the applicant (Ground 3). Equally, the inferences to be drawn from the forensic evidence in the circumstances were overwhelming. It is to be noted that the judge gave full and proper instructions to the jury on the drawing of inferences, about which no complaint is made.

As for the applicant’s complaint about the jury’s question (Ground 4), this question had nothing to do with the applicant. It concerned whether or not the jury were required to go so far as to find, on the evidence and in accordance with the prosecution’s contention, that D1 was the mastermind. It does not assist the applicant and the ground is not reasonably arguable.

Finally, issues of credibility (Ground 1) are classically for a jury to determine. The jury plainly did not believe the applicant while the other evidence, strengthened by cogent forensic evidence, clearly pointed to the applicant’s involvement in both the robbery and the wounding offences. Once the judge gave the correct directions in respect of any identification by the jury of the man in the CCTV, there can be no reasonably arguable complaint.

The application is accordingly refused. The applicant is nevertheless informed that he has the right to renew his application for leave to appeal before the Court of Appeal, but he is also warned that the Court of Appeal has the power to order the loss of any time which he has served in custody pending the appeal, if the Court were to come to the view that there was no justification for the renewal of the application.

(Andrew Macrae)

Vice President

Mr Antony Leung SPP, of the Department of Justice, for the Respondent

The Applicant appeared in person

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