

HONG KONG / JUDGMENT

HKSAR v. HAN SHUO HUMPHREY

[2020] HKCFI 3095**COURT**

Court of First Instance

DECIDED

23 December 2020

CASE / FILE NUMBER

HCMA134/2020

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bjbj HCMA 134/2020

[2020] HKCFI 3095 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO 134 OF 2020 (ON APPEAL FROM WKCC 1501 OF 2020)

BETWEEN HKSAR Respondent and HAN SHUO HUMPHREY Appellant

Before: Hon Wong J in Court Date of Hearing: 14 December 2020 Date of Judgment: 14 December 2020 Date of Reasons for Judgment: 23 December 2020 R E A S O N S F O R J U D G M E N T

AUTONUMOUT The appell inst the sentence. AUTONUMOUT The hearing below was conducted in Chinese. Upon the request of the appellant, and with the consent of the respondent, this hearing was conducted in English. AUTONUMOUT At the hearing, having heard the Counsel, I dismissed the appeal. These are the reasons for my decision. FACTS OF THE CASE

AUTONUMOUT In the morning of the day of offence, the appellant was walking on a street holding an axe and a can of beer. He was seen having used the axe to knock on the street railing when he was walking along the road. Police was alerted and arrested the appellant. At that time, he was holding a can of beer in his hand with an axe leaning on the railing beside him.

AUTONUMOUT Under caution, the appellant admitted that the axe belonged to him and he intended to use it for self-defence as there had been just an incident during which he was confronted by mobs when he was clearing road obstacles (the original Chinese: V& KNMRk^ @urU bHQ6^ ate of the background of the appellant, the main points were: the appellant is a Hong Kong citizen 44 years of age, he is married with three children not yet adult; he started studying in Australia at the age of 15 and returned in 1995; he is the Managing Director of: Asia Health Management Centre; Long Far International Holdings Limited; and Vetive Life; he is holding position in some organizations, such as: Honorary President of the New Territories School Heads Association; Honorary President of the Association of Founders; and Vice

Chairman of the Hong Kong Chongqing Youth Exchange Promotion Association; he is a responsible husband, a caring father and caring son to his own parents; and he had a clear record and did not have any history of violence. AUTONUMOUT As regards the circumstances leading to the incident, the following main points were said: the appellant left home initially only with the intent of buying cigarettes, he did not have any weapon with him; when he saw bricks and other blockages on the road in his neighbourhood, he picked the bricks up and put them on the side of the pavement, so as to remove blockage of the street and inconvenience danger to road users; he was alone doing this; and some people in black clothing wearing mask were there pointing and shouting at him for what he was doing. AUTONUMOUT The followings were the main points of mitigation put forward on his behalf: the appellant pleaded guilty at the earliest opportunity; he is remorseful; the risk of re-offending is minimal; he admitted the offence on the basis that it was not a reasonable excuse to carry a weapon for use in self-defence in the circumstances where there was no imminent attack; carrying of the axe was a contingency measure; under the situation prevailing at the time of the offence when social events were going on there was a lack of certainty of safety; committing of the offence was completely out of character of the appellant; the incident had caused no injury to any person or damage to any property, there was even no threat nor any sign of hostility demonstrated by the appellant; he has been cooperative to the authority; the offence to which the appellant pleaded guilty is under the Summary Offence Ordinance; The appellant had participated in charities and made donation, organizations persons benefitted, and activities participated include: Hong Kong Blind Sports Federation; Charitable event organized by the Lions Club; To Kwa Wan Kai Fong Welfare Association; sponsored two children through World Vision; donation to the elderly; and volunteer work such as giving out rice to the elderly; the circumstances in which he was involved in the incident were special. AUTONUMOUT Mitigation letters from two Justices of Peace were submitted, both speak well of the appellant. THE MAGISTRATE S REASONS FOR SENTENCE AUTONUMOUT The Magistrate said he had taken into account the following matters : he accepted that the axe was for self defence of the appellant; there was no aggravating factor; the harm that caused by the axe could be lethal; despite the appellant did not actually use the weapon he was well aware of the intense social climate at that time; and in case the appellant was attacked or the axe was taken away, it was very likely that the axe would have been used by others (the words by others appear in the certified English translation but not in the original Chinese transcript, there is dispute as to whether this was what the Magistrate meant by what he had said). AUTONUMOUT Having considered some aut t case and the axe in question in the present case; The Magistrate failed to sufficiently consider and failed to take into account the totality of the mitigation submitted and the suitability of a suspended sentence or other sentencing options; The Magistrate failed to give sufficient weight to the fact that the appellant felt threatened with assault rather than being simply shouted at by people in black clothing, when he carried the axe back to where it was found; and The starting point of 7 \$5,000 and imprisonment for two years. Not only that the maximum sentence is lower than the offence relating to offensive weapon under the Public Order Ordinance , the court has more flexibility in sentencing. Ground 1 AUTONUMOUT The focus of this ground was the last sentence in the certified English translation of the following passage in the Magistrate s Reasons for Sentence: Even it was just for self-

defence and he did not actually use it, as he said in his cautioned statement, he was well aware that a man criticized that it was an ill considered finding in particular as the appellant was not threatening anyone, he was simply concerned that he might be attacked or molested and therefore was fearful given that violence had sometimes been displayed by demonstrators especially against those seen or thought to be assisting the authorities. The axe was possessed as a threat to keep away any evil-minded person. The suggestion that the appellant might have used the axe beyond self-defence in the circumstances where there was anyone at the scene when the appellant was found in possession of the axe. He also stressed that when found, the axe was only leaning against the railing on the pavement about one meter away from the appellant and the appellant had been penalised unjustifiably for the risk the axe would be used by others.

AUTONUMOUT As mentioned earlier, there was dispute as to what the Magistrate had actually said. AUTONUMOUT According to the transcript of the hearing, the Magistrate said: S/f(u KN(u [0R4XBf>e(W1 vuvQBf>y {vuBf N6^r R'YfkhV QlQ>w0W 0& sS S/f(u O(ur FO9h vuvQBf>y N6^r RfkhV0RlQ>w0W I did say the risk that some could have fallen in the hands of other people for illegal use could not be ignored either. However, this remark must be read in context of the case. The offence which the appellant in the present case was charged with is possession of an offensive weapon with intent to use it for unlawful purpose. Culpability of the appellant is to be gauged by reference to his state of mind and the other relevant circumstances pertaining to him. In Chan Yiu Shing case, the risk I had in mind was that the chilli spray might be willingly passed to others for illegal use. It does not in ordinary circumstances cover the situation where the weapon falls into the wrong hands against the wish of the person who is in possession of it. In any case, whether this factor can be taken into account depends on whether the evidence supports such inference. In Chan Yiu Shing case, the appellant wearing an armour-like black hard plastic protective gear had five bottles of chilli spray as he was proceeding to a place where he knew sensitive social event was taking place. At the present case, the appellant was only in possession of one weapon and there was no sufficient evidence, if any at all, to support an inference that it would be passed to others for unlawful use. AUTONUMOUT Assessment of the Magistrate that the risk that the appellant would use the axe was high, despite the axe was not held in the hand of the appellant when eventually found. He drew the attention of the court to the following matters: It was a deliberate act of the appellant to bring the axe from home to the places in question; He had carried the axe in public for a considerable distance; He publicly displayed the axe without any wrapping or cover; He could have easy access to the weapon and was ready to use it; In the morning which was not at a time when disturbance usually happened and indeed nothing unpleasant had occurred during the time the appellant was in possession of the axe. AUTONUMOUT It is true that nothing untoward had actually happened but what the Magistrate had to do was to assess the risk involved. The risk that there would have been confrontation could not be lightly discarded as it did happen just a while ago. It was a fair finding of the Magistrate that the appellant was ready to use the arranged threat and harassment, and no public officer was threatened. AUTONUMOUT The appellant in Chan So Ching case was charged with the same offence. She pointed a 12-inch fruit knife wrapped in newspaper at a staff of the Lands Department subjecting him to unwarranted threat and harassment and the court considered that such behavior should be deterred. At the same time, the court recognized that

she had been deceived and committed the offence on impulse.

AUTONUMOUT The reason why no tariff is set for this type of offence is that each case must be decided on its own facts and context. There are marked difference in the facts and context between the present case and Chan So Ching case. Despite I said in that case that a suspended sentence is adequate the judgment must be read in full and in context. The appellant in that case was sentenced by the magistrate to a suspended sentence plus a fine. There was no application by the Secretary for Justice for review of sentence. There was an appeal a & e task of an appellate court in examining whether the sentence passed was proper will invariably involve a consideration of whether the sentencing court has fallen into appealable error, not whether a lesser sentence was given in another unrelated case ; and as Macrae ppellant justifiably felt threatened having been abused by people in black clothing and what he was doing was a civic duty to prevent harm to innocent people.

AUTONUMOUT In consideration of sentence in this nature of offence, the whole circumstances of the particular case must be taken into account. It is quite impossible to set out an exhaustive list of matters to be considered. Very often the following matters are relevant: the nature and size of the weapon; the potential harm it is capable to cause; hostile response by people whom he described as mob to his act of clearing the road. It was clearly a deliberate act of the appellant with full appreciation of the circumstances he would be in. Using of the axe as a weapon was within his contemplation, it was indeed his case that he possessed it for the purpose of self-defence. The guilty plea was tendered as it was accepted that there was no imminent threat of safety. As stated earlier, it was also contended that as there was no imminent threat of safety the risk involved was low. My observation in this regard is as stated above. The appellant could have avoided the situation but he chose to do what he did, going to a place where risk of confrontation would have been obvious in the height of the social event despite it was in the morning. The axe could have been used readily when required by situation.

AUTONUMOUT The offence is preventive in nature. It reflects that the society does not condone carrying of offensive weapon in public place by members of the general public. Its objective is to promote a relatively safe community and prevent people from taking the law into their own hands by resorting to violence to settle their own disputes.

AUTONUMOUT With full appreciation of the circumstances and events leading to the incident, bearing firmly in mind that the attempt of clearing the road was an unselfish act and there was no allegation that the appellant would initiate force or violence on others, taking into account all relevant matters incl

court should do is to have regard to all the circumstances of the commission of that offence and that of the accused in determining whether or not it is appropriate to exercise its power to suspend the operation of the sentence of imprisonment. What Mr g considered carefully the whole circumstances of the case, I considered it a proper and correct decision. AUTONUMOUT The Magistrate had been asked to consider imposing a Community Service Order (). He did not think fit even to seek a suitability report. AUTONUMOUT In any case, I had considered whether the immediate custodial term should be set aside and replaced by a CSO. AUTONUMOUT The appellant meets all the personal criteria of a candidate for CSO as set out in R v Brown . However, as held by the Court of Appeal in SJ v Lin Min Ying , a court should not conclude that the accused must be given a CSO simply because all of the factors identified in Brown are identified. In deciding whether CSO is appropriate, the court has to consider both the circumstances pertaining to the offender and the circumstances pertaining to the offence. If the offence is of serious nature, exceptional circumstances are required to justify CSO. In HKSAR v Chou Yau-pun here the circumstances of the offender make him a viable candidate for a community service order, there must be most unusual circumstances before such an order or any other form of non-custodial sentence can be regarded as an appropriate alternative to a custodial sentence for an offence against section 161 of the Crimes Ordinance AUTONUMOUT In HKSAR v Wan Ka-kit , Stuart-Moore and overall circumstances in the individual case. Having considered the whole circumstances of the present case, in my judgment this case was of such a severity that it would be unduly lenient to impose CSO. Committing this offence by possessing a potentially lethal weapon in the overall political climate and the circumstances as in the present case calls for a sentence with deterrent effect. AUTONUMOUT nsider an otherwise appropriate sentence should be disturbed for this reason. Ground 5 AUTONUMOUT By reason of the matters aforesaid, I did not find the sentence imposed wrong in principle or manifestly excessive.

CONCLUSION

AUTONUMOUT Accordingly, I dismissed the appeal against sentence. (A Wong) Judge of Court of First Instance High Court Mr h{-b hYCI hOdW {t{tm h{-b h.Ts yrg\ gd;n gd;n gd;n gd;n gd;n zp_T_T_T hcX. hcX. hcX. ~s~s~ ~[~P~ &`#\$ gd;n B\* ph phf3f [Content\_Types].xml \_rels/rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q\_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /,EE} theme/theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/>C g, IXx 7Vbr E2Ofd C;hg [%qg A[dj [%qg E2Of A[dj C;hg g, `I ;!m(PS@Q HwfQ 'cTAs ;!m(i,T) ,/}t4 /}t4 .A,7 VIFil PS@Q HwfQ/}t4 \r.x Imbf cTAsr.x CACV Jeannie MY MokSo ABC.dot Windows User Microsoft Office Word Judiciary CACV Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/

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Prepared on 28 October 2026 · Esheria