

HONG KONG / JUDGMENT

## HKSAR v. KHAN TAIMOOR

COURT

Court of Appeal

DECIDED

21 July 2014

CASE / FILE NUMBER

CACC110/2013

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

CACC 110/2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO. 110 OF 2013

(ON APPEAL FROM HCCC 237 OF 2012)

-----  
BETWEEN

HKSAR

Respondent

and

KHAN TAIMOOR

Applicant  
-----

Before: Hon Lunn VP, Poon and Pang JJ in Court

Date of Hearing : 6 June 2014

Date of Judgment: 6 June 2014

Date of Reasons for Judgment : 21 July 2014

REASONS FOR JUDGMENT

Hon Lunn JA (giving the reasons for judgment of the court):

The applicant, an asylum seeker, whose application for the grant of legal aid was refused on 2 July 2013, was represented by Mrs Panesar and Mr Edward TC Chan assigned by the Hong Kong Bar Association's Free Legal Service Scheme. Mrs Panesar sought leave for the applicant to appeal against his conviction on 20 March 2013, after a trial by Bokhary J and a jury, of the robbery of Mr Pang Chung on 28 February 2012 in Ping Shun Street in Yuen Long, New Territories. The applicant, appearing in person, sought leave to appeal against the sentence of 8½ years' imprisonment imposed upon him by the judge in consequence of that conviction. At the hearing we dismissed both applications and said that we would give our reasons in due course. That, we do now.

## THE TRIAL

The issue at trial was whether or not the applicant was correctly identified by Mr Pang Chung as one of three robbers who had approached him from behind and, having struck him a blow to the side of his head, had wrestled from him a shoulder bag which contained \$137,000.

The prosecution case

### The victim: Mr Pang Chung

Mr Pang Chung testified that he worked assisting his brother-in-law in the operation of several fruit shops in Yuen Long. At about 8:30 to 8:35 p.m. on the evening of 28 February 2012 he left one of those shops, the Sun To shop at 48A, Fook Tak Street, and walked towards another of them, namely the Wing Hing shop, located at Chun Ying Square. Earlier, an employee of a third shop, the Lung Chun, had brought him \$120,000. Those monies were the takings from that shop. He pooled those monies with \$17,000 of takings from the Sun To shop, which he placed in a shoulder bag and set off for the Wing Hing shop. Having walked along On Ning Road and Ping Shun Street he turned from the latter into a lane on the right-hand side of which was a nursery school and a church.

As he walked along the lane, without warning, he was struck a blow to his head from behind. When he turned around he saw three males of South Asian appearance close to him. One of them, whom he identified as the applicant, was carrying a water pipe. The applicant turned back in order to flee, so that he was facing the direction in which he had been walking. However, he was grabbed around his waist from behind by someone who used both his arms to encircle his waist, whilst another person grabbed his shoulder bag, breaking the strap as he did so. Then, the grip around his waist was released and he turned around. He was confronted by the applicant brandishing a water pipe. He was about 5 feet away and was wearing a blue and white upper garment with a hood. He identified that garment as the one seized from the applicant after his detention. Of the light he said it was "Not too bright, not too dark. Bright enough for seeing a person." Behind the applicant were the other two men. Mr Pang yelled out "Robbery! Save life!" First, the two other men ran off. Then, the applicant dropped the water pipe and ran back down the lane towards its junction with Ping Shun Street. At the junction, the two men went left and the applicant turned right in Ping Shun Street.

For his part, Mr Pang said that he chased after the applicant, shouting “Robbery! Snatching!” as he did so. The applicant continued running without looking back. A person joined in the chase of the applicant and caught up with the latter outside the ground floor Fortress shop at Yuen Long Plaza. Mr Pang said that he never lost sight of the applicant during the chase. He recognised him as the person who had robbed him a little earlier. Mr Pang identified himself in a still photograph taken from a CCTV film recorded in a camera located at the Ground Floor entrance of 100-108 On Ning Road as he made his way towards Ping Shun Street. He pointed out that his shoulder bag was visible in the CCTV film. Further, he said that the person depicted in photographs 4 and 5 in side/back profile to the camera clad a broad striped hooded upper garment was the applicant.

### **Pursuers: (i) Mr Wai Ka Ming**

Having arrived at Long Ping station by West Rail at about 8:35 p.m., Mr Wai Ka Ming said that he was walking with his wife along On Ning Road near the junction with Ping Shun Street when he heard shouts from behind of “Snatching!” At about that time a man ran past him in the direction of On Shun Street. Then, he turned around and saw that a man had fallen onto the ground. Mr Wai marked a sketch with an ‘X’ with his position at that time, namely on the pavement of On Shun Street at the junction with On Ning Road and with an ‘A’ for the position of the fallen man, namely on the pavement in On Ning Street next to the pedestrian crossing. For his part, Mr Wai said that he chased after the man who had run past him, shouting “Snatching!” Although in the course of the chase he estimated that he got within about 25 feet of the fugitive, another person who had joined in the chase overtook him and caught hold of the fugitive outside the Fortress shop at Yuen Long Plaza. He went up to them, where they were joined by another person who claimed to have been robbed. Then, he responded to requests from someone to call the police by doing so.

### **(ii) Mr Wu Yat On**

Mr Wu Yat On, an off-duty fireman, said that he was parking his car in On Shun Street in Yuen Long that evening when he saw two men chasing after a third man. The pursuers were about 20 to 30 metres away from the third man. They were all running along On Shun Street in the direction of Yuen Long Plaza. The pursuer who was farthest away from the fugitive, said “He robbed me!” and shouted out “Robbery! Robbery!” So, he too joined in the chase. He caught up with the fugitive and grabbed hold of his shoulder. The fugitive turned around and landed a blow with his fist to Mr Wu’s chest. However, with the assistance of the other two pursuers he was able to pacify him. It was an admitted fact that the applicant was arrested at that place by PC 8405.

### **Police officer witnesses**

DPC 7682, Wong Kam Fung, testified that at 00:10 on 29 December 2012 he had seized a water pipe that was lying on the ground in the rear lane next to the Yuen Long Church. It was an admitted fact that no attempt was made to discern or lift any fingerprints on the water pipe and that it was found to contain no DNA.

**WPC 12392, Cheung Ka Yan**

WPC 12392, Cheung Ka Yan testified that in response to the call made for police assistance she was one of the police officers who had attended the scene of the detention of the applicant. She gathered information about the sequence of events from various sources, including from Mr Pang.

**Video record of interview**

It was an admitted fact that the applicant had been interviewed under caution by DPC 54189 on the afternoon of 29 February 2012 and the DVD, transcription and translation of the transcription of the interview were adduced into evidence. The applicant was reminded that he had been arrested at about 8:58 p.m. on 28 February 2012 in the vicinity of the Yuen Long Plaza in connection with a robbery which had occurred at about 8:45 p.m. in a lane near a church next at 5, Ping Shun Street. He was told that in the robbery one of three South Asian men had hit and injured a man with a pipe and then the three of them robbed him of his shoulder bag, which contained \$100,000. The victim had given chase and the applicant had been caught, the police called and he had been arrested. The applicant said that at 8:45 p.m. on 28 February 2012 he was near the Yuen Long Plaza when he was beaten by some Chinese people, who kicked and punched him. He did not know why they did so. He did not remember what he was doing prior to that assault. When shown the water pipe, which police had recovered in the lane, he denied ever having seen it, adding that he “did not know anything”.

**Defence case**

The applicant did not testify or call any evidence in the defence case at trial. It was the case for the applicant advanced in cross-examination, and emphasised in the closing speech made on his behalf, that Mr Pang wrongly identified him as one of the robbers. It was suggested by Mrs Panesar in her closing speech that Mr Pang had lost sight of the person who had dropped the water pipe, turned and fled and after whom he had given chase. On behalf of the applicant reliance was placed on the evidence of Mr Wai Ka Min that when his attention was attracted by shouts of “Snatching!”, immediately after which he had seen a person, who was clearly Mr Pang, sprawled out face to the ground. Also, the defence pointed to injuries to Mr Pang’s knees and hands that were consistent with having sustained such a fall. Furthermore, the defence relied on the evidence of WPC Cheung who said that Mr Pang had told her that he had suffered injuries during the struggle with the three robbers when he fell on the ground.

In her closing speech, Mrs Panesar invited the jury to conclude that in the video record of interview the applicant was denying having taken part in the robbery, asserting by contrast that at 8:45 p.m. on 28 February 2012 he was near the Yuen Long Plaza when he was beaten by some Chinese people, who kicked and punched him. He did not know why they did so.

**GROUNDS OF APPEAL AGAINST CONVICTION**

### **Summing Up: unfair and unbalanced**

It was submitted on the applicant's behalf that the judge's summing up was "unfair and unbalanced", in that the judge did not remind the jury of the other evidence that undermined the testimony of Mr Pang, in particular the reliability of his identification of the applicant as one of the robbers. It was contended that the judge had failed to remind the jury of all the material evidence in respect of the issue of whether or not Mr Pang had fallen down at any time after he had been attacked. It was submitted that the judge failed to direct the jury that evidence "impacted" on the reliability of Mr Pang's evidence that there was a continuous chase, in particular his testimony that he had never lost sight of his attacker.

### **The applicant's telephone**

Next, it was submitted that there was no evidence to support the submission made in closing by counsel for the prosecution that the telephoned calls reflected as having been received on the telephone seized from the applicant on his arrest at about the time of the attack on Mr Pang and the pursuit of his attacker might have been calls received on 'Voicemail' and that telephone calls made to the telephone after the applicant's detention might have been calls enquiring as to his whereabouts.

### **Criticisms of the applicant's response to his detention**

Then, it was contended that the judge had erred in failing to give the jury appropriate directions as to the rhetorical questions posed in closing by counsel for the prosecution as to why the applicant was unable to provide an explanation for why he had been set upon and beaten at the place of his arrest and yet had made no complaint of assault at the scene.

## **GROUND OF APPEAL AGAINST SENTENCE**

In a statement attached to Form X1, by which the applicant gave notice on 13 April 2013 of his intention to apply for leave to appeal against sentence, the applicant asserted simply that it was "manifestly excessive".

In written submissions handed to the Court on the day of the hearing, the applicant invited the court to note that the guidelines suggested in the judgment of this Court in the Secretary for Justice v Ma Ping Wah, for a case of robbery in the course of which the victim's head was attacked with a weapon, was a minimum sentence of 8 years' imprisonment. Also, he invited the Court to have regard to the sentence of 8 years' imprisonment imposed on the defendants by Deputy High Court Judge Geiser in HKSAR v Qadeer Ahmad & Another. In that robbery the victim's head had been attacked by the co-accused with a wooden board, whilst Qadeer Ahmad succeeded in wrestling from him a briefcase containing diamonds. The judge described the victim as having been rendered "virtually unconscious". However, the robbery was thwarted by the arrival of police officers and nothing was lost. The applicant suggested that the judge had erred in taking a starting point for sentence of 9 years' imprisonment.

## A CONSIDERATION OF THE SUBMISSIONS

In her summing up the judge directed the jury of the vital importance to the prosecution case of the evidence of Mr Pang Chung and how they were to approach that evidence:

“

The prosecution’s case, which depends on the evidence of Mr Pang Chung, who gave evidence as PW13, is that of a continuous chase of the 1st accused ending with his capture. As to that, you have to consider whether you are sure that Mr Pang’s evidence is accurate. Was he honest? Even if he was, was he mistaken? You have to be sure that he was honest, and not mistaken and that the 1st accused was a robber chased and captured.”

Then, the judge gave the jury a ‘Turnbull’ direction as to identification, reminding them of the dangers of mistaken identification and directing them no less than four times of the need for special caution in relying on Mr Pang’s identification of the applicant.

Of Mr Pang’s observation of the robbers, having reminded them that he had testified of being struck a blow from behind on the head after which he had turned around, she said:

“

Turning round, he saw three South Asian men about 3 feet away. One of these men was carrying a water pipe. Feeling that he was to be robbed, he, that is Mr Pang, turned round, intending to run away, but another of the three men held his waist. He shouted for help, struck out and yelled “robbery”. His bag was snatched away from behind. The grip on him was released and he turned around. The holding of his waist and the snatching of his bag were carried out by two persons. He saw the same person with the water pipe at his front about 5 feet 4 inches away preventing and scaring him from going forward. ....

This witness then described that the man with the water pipe was wearing a blue and white striped upper garment with a hood, identifying the jacket, Exhibit P3, as the one worn by the man holding the water pipe. Members of the jury, it is an admitted fact that this jacket, P3, is the jacket worn by the 1st accused at the time of his arrest on 28 February last year. It is a jacket, as you can see, with a hood and with blue and white stripes.”

Having reminded the jury that Mr Pang testified that, after the man wielding the water pipe had dropped it and had run off, he had pursued him the judge said:

“

There came a time when somebody, a man, joined in the chase to assist him, that is, Mr Pang. Eventually, the man who was being chased was captured by the man who had joined in the chase to assist. After the fleeing man had been captured, he, that is the fleeing man, was surrounded by a lot of people. He, that is Mr Pang, approached and saw that the earlier fleeing now captured man was the man who had attacked him earlier. Mr Pang had not lost sight of that man at any time during the chase.”

The judge reminded the jury of the evidence from Mr Pang of his injuries, which were depicted in photographs introduced into evidence in admitted facts. Also, in that context she went on to say:

“

You can nevertheless convict if you feel sure that this was in effect a continuous chase by Mr Pang of a man who participated in robbing him and stood in front of him holding a water pipe. But before you come to a sure conclusion that that is the position, also consider carefully defence counsel's reliance on the evidence of WPC Cheung that Mr Pang told her that he had fallen down and the defence counsel's reliance on the evidence of PW16, Mr Wai, that he saw the person who had shouted “snatching” fall down when he looked around.

In his testimony, Mr Pang denied falling down. How does the evidence of WPC Cheung and Mr Wai on the matter of falling down affect his reliability? Does that make you feel unsure that this was a continuous chase resulting in the capture of the right man? Consider that with care.”

Earlier, the judge had reminded the jury of the evidence of Mr Wai, in respect of the issue whether or not Mr Pang had fallen down:

“

This witness spoke in his evidence-in-chief of seeing the person who shouted “snatching” fall to the ground and of joining the chase and about capture.”

Of WPC Cheung Ka Yan's evidence of what she was told by Mr Pang after the detention of the applicant, the judge reminded the jury:

“

One of the points which emerged from this cross-examination is that Mr Pang had told this witness that he had fallen down during the struggle and also that this witness agreed with Mrs Panesar that Mr Pang did not tell her, that is this witness, that the 1st accused is the person who held the water pipe.”

Although the judge was correct to say that Mr Pang had denied having fallen down, that answer was given in evidence-in-chief in the context of being asked about injuries to his temple and chin, in which he was asked if he had fallen down “during the struggle”. Shortly afterwards he said that he didn't know how he had injured his knees. In cross-examination, Mr Pang confirmed that he did not have any of his injuries, including those to his knees, before the robbery. When asked if he had fallen down after being struck a blow with the water pipe, Mr Pang said, “I do not think so”. When it was suggested to him that the injuries to knees were consistent with having fallen down and when it was asserted that he must have fallen down he said that he did not know. Finally, when asked at the end of his evidence, if he had fallen down during the chase of his assailant he said, “I don't know”. He went on to say that he did not have any recollection of having said that he had fallen down to a police officer or to anyone. He repeated that evidence towards the end of his testimony.

At the conclusion of the summing up Mrs Panesar, who also represented the applicant at trial, submitted to the judge that she had “put the prosecution’s case quite forcefully”. Having acknowledged that the judge had invited the jury to take into account the points made by Mrs Panesar on behalf of the applicant, nevertheless she went on to say:

“

in order to make it fairer, well, may I ask your Ladyship to address the jury or at least direct the jury on the fact-the impact of this evidence that Mr Pang told PW19 he had fallen down in the rear lane.”

The judge responded by saying, “Well, I have already told them that.” She went on to add that she believed that she had covered all the points and had sufficiently reminded the jury of all the evidence.

As noted from the passages of the summing up set out above, the judge was correct to say that she had already reminded the jury of the evidence of WPC Cheung that Mr Pang told her that in the course of the struggle with the robbers he had fallen down. Also, she had reminded the jury that Mr Wai testified that he had seen a person sprawled out on the ground, clearly having fallen. The significance of that evidence was her reminder to the jury that “Mr Pang denied falling down”. Of the impact of that evidence, the judge invited the jury to consider the “reliability” of Mr Pang’s testimony, in particular whether it was a continuous chase, by which she meant clearly that the applicant was within Mr Pang’s sight throughout.

Counsel for the prosecution's closing speech

telephone records

The telephone records in respect of the telephone seized from the applicant on his arrest on the evening of 28 February 2012 adduced into evidence as an Admitted Fact. The information provided described the phone numbers of the Calling Party and the Called Party; the Date/Time of Call; the Call Duration; and the Call type, namely Outgoing/Incoming/Short message. No other information was provided. In the video record of interview, the applicant had said the phone number 6271 5371 was that of a friend whom he knew as Jony. The phone records described 4 incoming calls from that telephone to the applicant’s telephone in the period 20:39:30 and 20:49:13. The ‘Call Duration’ of the calls varied between 10 and 74 seconds.

In his closing speech, counsel for the prosecution said:

“

Telephone calls. You have those in the back of the admitted facts and it would appear there were incoming calls in the general timeframe of this robbery. Now, we don’t know much about those, members of the jury. We don’t know whether the phone was on voicemail, we don’t know. In short, we don’t have enough evidence concerning them..”

However, counsel went on to draw the jury's attention to the phone calls made from the telephone number 6271 5371 to the applicant's telephone, urging that the party had been "constantly trying to contact" the applicant and appear to have an "urgent need" to do so during that time. Notwithstanding those observations, counsel concluded by suggesting to the jury:

"

Now, it's our submission that these telephone records don't take you anywhere. There is insufficient evidence to give weight to them..."

In her summing up, having reminded the jury of the submission made by the prosecution that there was insufficient evidence to give any weight to the records of telephone calls to the applicant's telephone, the judge reminded the jury of the position taken by the defence in its closing speech:

"

Defence counsel says that the absence of such evidence should lead you to proceed on the basis that the 1st accused had answered those telephone calls. And she makes the point that since nobody said that the 1st accused had appeared to be seen speaking on the telephone whilst being pursued, the telephone record points to his not being a robber. You should consider that with care."

On any view, that was a generous direction to give in favour of the applicant. The absence of evidence was just that. No doubt, it would have been simplicity itself to have called evidence from the telephone company to explain whether their records permitted it to be known whether the telephone call was received or whether it was a 'missed' call. But, that was not done. There was no relevant evidence.

### **The applicant's video record of interview**

Of the applicant's account in the video record of interview of his presence in the vicinity of the Yuen Long Plaza, in the context of his assertion that he did not know what he was doing before he was assaulted or why he was at that place, counsel for the prosecution submitted to the jury in his closing speech:

"

Now, members of the jury, ask yourself this question in considering the plausibility of his excuse, is it realistic that he couldn't possibly -- he can't recall what he did or was doing prior to this so-called assault by these Chinese people, so he said? Why is it that he can't recall why he was even there at the plaza, as he says in his statement there. Why is it that he can't offer any explanation as to why he was allegedly beaten by these Chinese people and why would three people, Mr Pang, Mr Wu and Mr Wai, who up until that time didn't know each other it appears, suddenly pick on the accused to attack and why, members of the jury, why did he not complain to the police when they first arrived on the scene saying, "Look, I have been assaulted by these men"? You heard the

evidence of Mr Wu, Mr Wai and Mr Pang. There was never any allegation put to them that they had assaulted, unprovoked, the accused in this case.”

The judge corrected counsel for the prosecution’s assertion that it had never been alleged to Mr Pang, Mr Wai or Mr Wu that they had assaulted the applicant. Of counsel’s mistake, the judge directed the jury:

“

He did make a mistake in his recollection when he said that no allegation of assaulting the 1st accused was put in cross-examination to the pursuers. In fact such allegations were put and were denied.”

In fact, that allegation was put to and denied by Mr Pang and Mr Wu, but not put to Mr Wai.

Given that the applicant had chosen to answer questions in the video record of interview as to why he was at the Yuen Long Plaza and what he was doing prior to being assaulted, notwithstanding the fact that he had been cautioned as to his rights, the prosecution was entitled to raise a metaphorical eyebrow at his answer. However, given that the applicant had been cautioned, he was entitled to avail himself of his right of silence in respect of the issue of why it was that he had been assaulted at all. He was under no obligation to offer an explanation as to that or anything else.

In her summing up, the judge gave the jury directions as to their approach to the applicant’s exercise of his right of silence:

“

Members of the jury, in so far as the 1st accused exercised his right of silence, such exercise is not to be held against him in any way whatsoever. His exercise of the right of silence cannot amount to an admission of any kind, nor can it be taken to reflect a guilty conscience.”

Earlier, the judge directed the jury specifically to examples of the applicant availing himself of his right of silence in the record of interview, including his negative response to the question as to whether he wanted “to say anything about this incident.”

Of the applicant’s arrest, the judge directed the jury:

“

PC Ip is the officer who arrested the 1st accused. He told you that the 1st accused remained silent under caution. As to that, I direct you that the fact of a person’s silence under caution involves the exercise of a legal right, the exercise of which is not to be held against him in any way whatsoever.”

The parties have not put before us a transcript of the evidence of PC Ip. However, it appears from what was asserted to the applicant in the video record of interview that the applicant’s arrest occurred at 8:58 p.m. WPC Cheung said that she received news of the report of the commission of

the crime at 20:55 at the Yuen Long Police Station, a one-minute walk from the place of the detention of the applicant at Fortress. It follows that it appears that the applicant was arrested and cautioned immediately on the arrival of the police. Accordingly, the judge's repeated directions to the jury of his right of silence were operative.

There is no merit whatsoever in the submission that the judge's summing up was unfair and unbalanced.

## Conclusion

For the reasons set out above, we were satisfied that there was no merit in the grounds of appeal against conviction. Accordingly, we dismissed the application.

### Sentence

In her reasons for sentence, the judge said:

“

All things considered, for this robbery in which a substantial sum of money was taken, a number of robbers were involved and the victim was both struck on the head and then menaced with a pipe made of metal, I adopt a starting point of 9 years imprisonment.

Having regard to all circumstances, including your previous good character, I will discount that by half a year to arrive at a sentence of 8½ years' imprisonment.”

As the judge made it clear in her reasons for sentence, the applicant used the water pipe not only to strike Mr Pang a cowardly blow from behind at the beginning of the robbery but also brandished it so as to keep Mr Pang at bay whilst his two confederates began making good their escape, before he too tried to escape. The applicant was successful in gaining time for his confederates who escaped with \$137,000.

The sentence imposed by the judge in Qadeer Ahmad is of no assistance to this court. The reasons given by the judge are brief. In any event, the factual circumstances of offences of this nature vary significantly from one case to another. It is to be noted that in giving the judgment in Ma Ping Wah, Stuart-Moore VP observed of the guideline sentence of not less than eight years' imprisonment:

“

This is not, of course, a straight-jacket, and there may be some offences where a lesser penalty can be imposed depending on all the circumstances. Equally, depending on how severely the victim is injured there will be other cases for which greatly increased sentences will be required.”

In all the circumstances, we were satisfied that the judge was entitled to stipulate in a starting point for sentence of 9 years' imprisonment and to impose a sentence of 8½ years' imprisonment on the applicant.

**Conclusion**

47. For the reasons that we have given, we dismissed the application for leave to appeal against sentence.

(Michael Lunn)

Vice-President

(J. Poon)

Judge of the Court of

First Instance

(Derek Pang)

Judge of the Court of

First Instance

Mr Francis Lo, SADPP and Mr Ivan Shiu, PP, of the Department of Justice, for the respondent

Mrs M. Panesar and Mr Edward T. C. Chan, assigned by the Bar Free Legal Service Scheme, for the applicant (re. Conviction)

Applicant appeared in person (re. Sentence)

---

**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=93967](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=93967)

CASE PAGE              <https://chat.esheria.ai/case-law/hong-kong/hksar-v-khan-taimoor-2014>

Prepared on 26 October 2026 · Esheria