

HONG KONG / JUDGMENT

HKSAR v. KO CHUN HUNG

COURT

Court of Appeal

DECIDED

21 November 2007

CASE / FILE NUMBER

CACC71/2007

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

bjbj

Before: Hon Stuart-Moore VP and Yeung JA in Court

Date of Hearing: 9 November 2007

Date of Judgment: 9 November 2007

Date of Handing Down Reasons for Judgment: 21 November 2007

Reasons for Judgment

Hon Yeung JA (giving the reasons for judgment of the Court):

Introduction

The applicant, Ko Chun-hung, pleaded guilty before Judge Geiser in the District Court to three charges, two of theft (pickpocket) and one of failing to surrender to custody without reasonable cause.

The judge, having referred to the applicant

s previous convictions, and that the planned theft offences took place in a crowded area and were targeted at tourists, adopted a starting point of 2 years

imprisonment on each charge.

The judge reduced these sentences by only 4 months on account of the lateness of the guilty pleas and sentenced the applicant to 20 months

imprisonment on each of the two theft charges with 10 months on the 2nd charge to run consecutively.

The judge adopted a 6-month starting point for the charge of failing to surrender to custody and reduced it by one-third to 4 months. The judge ordered the sentence to run consecutively to the sentences on the theft charges.

The total sentence on the applicant is therefore 34 months imprisonment.

The applicant sought leave to appeal against sentence. On 9 November 2007, we dismissed his application and indicated that we would hand down our reasons in writing, and this we now do.

The Facts

The applicant was part of a pickpocket group that targeted tourists in the Mongkok/Tsimshatsui area.

The two victims of the two theft offences were tourists, one from the Mainland and the other from Korea. On both occasions, a taxi driven by an accomplice would stop abruptly in front of the victims thereby causing distraction. The applicant would then steal from them.

The applicant, having been arrested, was granted bail on 24 September 2004 to appear for trial on 18 January 2005. He didn

t and was only re-arrested on 6 January 2007 upon his return from Macau.

The applicant is 54 years old and had 13 previous convictions, mostly involving dishonesty and at least 3 were offences of theft by pickpocket.

The judge declined to give a full one-third discount to the applicant for his guilty pleas on charges 1 and 2, pointing out that he did not enter timely pleas. Instead, he absconded and, after his re-arrest, he still indicated pleas of not guilty, resulting in the schedule of a three-day trial.

Grounds of Appeal

Mr Paul T T Lee, counsel for the applicant, put forward only one ground of appeal.

Mr Lee suggested that despite the fact that the applicant had absconded and only pleaded guilty after he was re-arrested, the discount of 4 months (16.66%) given by the judge for his guilty pleas was insufficient.

Mr Lee emphasized that the applicant had been separately punished for failing to surrender to custody and, when he was deprived of the full one-third discount again because of the absconding, he was in effect punished twice for the same facts.

Mr Lee drew our attention to HKSAR v Tong Chi Keung CACC 332/1997, Secretary For Justice v Chow Wing Wah CAAR 3/1998, HKSAR v Chiang Tsui-yan CACC 188/1999, HKSAR v Chan Ka Po CACC 29/2000, HKSAR v Lam Lai Chu, Patsy CACC 56/2003, HKSAR v Yip Kwok To CACC 352/2004, HKSAR v Kwok Shiu To, William CACC 474/2005 and HKSAR v Lo Chi-Man CACC 815/1995.

Mr Lee suggested that in these cases, the defendants had absconded and only pleaded guilty after they were re-arrested. Nevertheless, they were given a discount of sentence ranging from 20% to 25%.

Mr Lee argued that the discount of 16.66% was inadequate and the ultimate sentence of 34 months was manifestly excessive.

Discussion

It is the normal practice of this court to give a one-third discount of sentence to an accused who pleads guilty. In *HKSAR v Chui Chi Wai & Anor* [2000] 1HKLRD 704, Wong JA said at p 707:

Since the decision of *R v Ng wing Kwong*, unrep CACC 62/1995, this Court has on a number of occasions in recent years pronounced that a full one-third discount is the norm rather than the exception for a timely plea of guilty and it is in exceptional circumstances that a lesser discount than one-third should be given.

The rationale for a reduction of sentence for guilty plea was examined by the High Court of Australia in *R v Cameron* [2002] 187 ALR 65. In a joint judgment of Gaudron, Gummow and Callinan JJ at p 67, the relevance of a plea of guilty is stated as follows:

It is well established that the fact that an accused person has pleaded guilty is a matter properly to be taken into account in mitigation of his or her sentence. In *Siganto v R*, it was said:

..a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case.

It should at once be noted that remorse is not necessarily the only subjective matter revealed by a plea of guilty. The plea may also indicate acceptance of responsibility and a willingness to facilitate the course of justice.

Kirby J was more explicit when he said at p 81:

The true foundation for the discount for a plea of guilty is not a reward for remorse or its anticipated consequences but acceptance that it is in the public interest to provide the discount. Nevertheless, where genuine remorse is established to the satisfaction of the sentencing judge, it may be in the public interest to mitigate further as a reinforcement for the prisoner

s resolve to avoid repetition of such a conduct in the future and as an example to others.

However,

remorse

is not, as such, a precondition for the provision of a discount for a plea of guilty. There are other features of the public interest that need to be given weight.

The main features of a public interest, relevant to the discount for a plea of guilty, are purely utilitarian

. They include the fact that a plea of guilty saves the community the cost and inconvenience of the trial of the prisoner which must otherwise be undertaken. It also involves a saving in costs that must otherwise be expended upon the provision of judicial and court facilities; prosecutorial operations; the supply of legal aid to accused persons; witness fees; and the fees paid, and inconvenience caused, to any jurors summoned to perform jury service

it is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps ease of congestion in the courts that delay the hearing of such trials as must be held. It also encourages the clear-up rate for crime and so vindicates public confidence in the processes established to protect the community and uphold its laws. A plea of guilty may also help the victims of crime to put their experience behind them; to receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered. Especially in cases of homicide and sexual offences, a plea of guilty may spare the victim or the victim

s family and friends the ordeal of having to give evidence.

The judge, in refusing to give a full one-third discount to the applicant, put forward the following justification:

A one-third discount is only given to those defendants who enter a timely plea of guilty. At no stage has this defendant ever, until this morning, indicated a plea of guilty. When the matter first came before the court on 24 September 2004, a plea of not guilty was indicated by the defendant s then lawyer. The defendant of course then absconded, and when he next appeared after his arrest in January of this year, he again indicated through his lawyer that he would plead not guilty to charges 1 and 2, as a consequence of which three days for trial were set aside, starting today.

What the applicant did, namely absconding for over two years by sneaking out of Hong Kong, would certainly have hindered the course of justice and would make it more difficult and costly for its administration, particularly when the case involved tourists and when the applicant maintained his pleas of not guilty until the very last moment, leading to the waste of three days of the court

s time.

As Stock JA observed in HKSAR v Chow Tak-fuk, CACC 428/2004, unreported:

those might be minded to flee should not be led to believe that if ultimately they return they will be in no worse a position than had they not fled in the first place.

We accepted that having been sentenced to 4 months

imprisonment for absconding and then not being granted the full one-third discount for pleading guilty again because of absconding, the applicant appeared to have been punished twice for the same facts. However there was a logical foundation for it.

By absconding, the applicant had committed a fresh offence and had to be punished separately. By absconding, the applicant also rendered the administration of justice more costly and more time-consuming, and the judge was entitled to exercise his discretion by reducing the percentage of discount that he would otherwise obtained.

The discount of less than 20% to reflect his guilty pleas was not a generous discount. However there was a valid reason for it and we were not persuaded that such discount justified our interference.

In any event, we were not persuaded that the total sentence of 34 months imprisonment imposed on the applicant was manifestly excessive.

Sentence on theft by pickpocket was recently considered by the Court of Appeal in HKSAR v Ngo Van Huy [2005] 2 HKLRD 1.

Ma CJHC laid down the following guidelines and principles:

- (1) Theft by pickpocketing can be regarded as the type of offence that society severely and rightly condemns. Although in many cases, the value of the items stolen may not amount to much, the significant degree of inconvenience, the relative ease with which it can be effected by a direct invasion of or about the person and privacy of those minding their business in public places, and the adverse reputation that this type of crime collectively brings upon a city makes this offence a particularly serious one. It is one which attracts, justifiably in our view, a heavy penalty.
- (2) The guideline sentence of 12-15 months after trial is therefore appropriate for a first time offender. This is an immediate custodial sentence, not a suspended one.
- (3) Of course, account must be taken of the existence of any aggravating, or particular mitigating, features before the court.
- (4) Aggravating features include:

The presence or use of a weapon (such as a razor-blade or knife used to cut open, say a handbag or, worse still, intended to be use on the victim): see R v Vy Van Kien & Another [1991] 1 HKLR 422.

Where the offence is committed in a place in which the public is at particular risk, such as crowded places like the MTR or the racecourse, crowded shopping areas where the pedestrian traffic is heavy.

If the accused commits the offence in conjunction with another, the sentence should be higher. Where he is part of an organized and professional ring of thieves a substantial increase in sentence may be called for

For example, where professional pickpockets from overseas (whether individually or in a group) come to Hong Kong to carry out this type of activity (no doubt tempting owing to the number of crowded places here), an increased sentence can be imposed: see HKSAR v Ho Minh Cong, (unrep HCMA No 547 of 1999). In giving the judgment of the Court of Appeal, Patrick Chan J made the following remarks about organized pickpocketing:

We take this opportunity to indicate that in our view, because of their seriousness, organized crimes of this nature including group pickpocketing, even without international ramifications, might in future properly attract a starting point of at least 2

years

imprisonment.

Where the accused is a repeat offender, or worse still, a persistent

One: See R v Chiang Pok Wing (unrep., HCMA No 589 of 1996..),

We should just elaborate on the aspect of an accused

s previous convictions as being an aggravating feature. It used to be at one stage

sentencing policy that a person would not receive an increase sentence by reason only of a poor record of like offences. The passage of the judgment of Penlington JA in R v Vy Van Kien & Another [1991] 1 HKLR 422 at p 427C-D provides an example of this. Rather, the accused would simply not receive any discount from which a person of clear record might benefit. This has not changed. Sentencing policy in Hong Kong (and, it should be noted, elsewhere in the world including United Kingdom and Australia) recognizes that where there are repeated offences of the same kind, a person

s previous record is likely to be an aggravating feature where this demonstrates in particular either the need to impose a deterrent sentence on the particular accused (the previous ones not having apparently had this effect) or the need to protect society from criminal like him: see the judgment of Stuart-Moore VP in HKSAR v Chan Pui Chi [1999] 2 HKLRD 830 at pp 833-834. Where a poor previous record for similar offences exists, a court will be justified in imposing a substantially higher sentence: see HKSAR v Chan Pui Chi at p 833 F-I, referring to R v Billam & Others (1986) 82 Cr App R 347.

Whilst these guidelines cannot be applied to an offence which pre-dated them, their relevance to this case is that we do not consider that the judge exceeded them. Clearly all the aggravating factors identified by Ma CJHC in Ngo Van Huy (supra), and more, existed in the present case.

The applicant committed the offences in conjunction with others; he was part of an organized and possibly professional ring of thieves who committed the offences with the use of a taxi; the offences were committed at the busy street corner of Nathan Road/Changsha Road in Mongkok; and the offences were targeted at tourists, thus damaging the reputation of Hong Kong; and the applicant was of course, a repeat offender.

In all the circumstances, despite the applicant

s guilty pleas, the individual sentences, far from being excessive, were in fact quite moderate. If thefts had been committed after the decision of this Court in HKSAR v Yip Chung-man [2007] 4 HKC 48, which provided a 4-year guideline sentence for pickpocketing offences involving potentially dangerous consequences to the public, the applicant could have expected a substantially longer sentence.

The judge was entitled to order a 10-month consecutive term for the 2nd charge of theft, and to impose an additional 4 months for the offence of failing to surrender to custody.

The total sentence imposed on the applicant was neither wrong in principle nor manifestly excessive.

We therefore dismissed the application for leave to appeal against sentence.

(M. Stuart-Moore)

Vice-President

(W Yeung)

Justice of Appeal

Ms Mary Sin, SADPP and Ms Mimi Ng, SGC of the Department of Justice for the Respondent.

Mr Paul T. T. Lee assigned by the Director of Legal Aid for the Applicant.

PAGE

-

A

1udk

1udk

1Vt^

H; <

& 6"

ABC final.dot

setup

Microsoft Word 9.0

Title

Source

Erica

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=59250

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-ko-chun-hung-2007>

Prepared on 26 October 2026 · Esheria