

HONG KONG / JUDGMENT

HKSAR v. KWAI PING HUNG

COURT

Court of Appeal

DECIDED

30 January 2007

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CACC73/2005

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bjbj CACC73/2005, CACC219/2005 and CACC295/2005 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 73 OF 2005 (ON APPEAL FROM HCCC NO. 164 OF 2004)

BETWEEN HKSAR Respondent and KWAI PING HUNG (also known as GUAN DERONG) Applicant
3T/c7_) in Court Date of Hearing : 19 January 2007 Date of Judgment : 30 January 2007

J U D G M E N T

Burrell J (giving the judgment of the Court) AUTONUMOUT There are three applications for leave to appeal before the court. We shall deal, firstly, with the background and chronology in relation to all three. chronology and background AUTONUMOUT On 22 May 2001, in the early afternoon, three police officers had cause to stop a group of four Chinese males in Waterloo Road, Kowloon. That confrontation ended with two of the police officers being shot by one or more members of the group. One police officer was shot in the head, the other in the chest. Miraculously, both survived and have made good recoveries. The four males fled and were not caught.

AUTONUMOUT On 24 December 2003, two years and seven months after the shooting, a Police Special Duties Unit acting on information raided premises in Kowloon. At the time the two applicants were asleep inside the premises. Kwai Ping Hung, also known as Guan Derong became the 1st defendant at trial (). He was found on a mattress in a bedroom inside the premises. A self-loading pistol and ammunition were found on the floor about two to three feet away. Ng Chun Keung was in the other bedroom. He later became the 2nd defendant at trial (). Nothing suspicious was seized from the bedroom in which he was sleeping. In the sitting room a locked suitcase was seized. The suitcase was found to contain firearms, ammunition and explosives (grenades). AUTONUMOUT At the later trial before McMahon J, the following facts were proved by forensic evidence and were not challenged. The firearm found two to three feet from D1 s bed was the firearm that had discharged a bullet through one of the police officer s head on 22 May

2001. A plastic box inside the suitcase had D1's fingerprints on it. That plastic box contained, inter alia, the firearm that had discharged a bullet into the chest of the other police officer. It was also a fact that the explosives inside the suitcase (the grenades) were wrapped in packaging and not obviously visible on opening the suitcase. AUTONUMOUT Further evidence was gathered (including evidence of identification, immigration records and interviews) and, as a result, charges were laid against D1 and D2, and they were tried together (the first trial).

AUTONUMOUT The first trial commenced on 5 January 2005 on an indictment containing the following counts :

- (1) Against D1 alone : Attempted murder (the shooting of the police officer in the head).
- (2) Against D1 alone : Shooting with intent to resist lawful arrest, contrary to section 17(b) of the Offences Against the Person Ordinance, Cap. 212.
- (3) Against D1 alone : Possession of arms and ammunition contrary to section 13(1) and
- (2) of the Firearms and Ammunition Ordinance Cap.

238. This related to the firearm and ammunition seized from the floor near to where D1 was sleeping on 24 December 2003.

- (4) Against both D1 and D2 : Another Cap. 238 offence relating to the firearms and ammunition in the suitcase seized from the same premises.
- (5) Against both D1 and D2 : Possession of explosive substances, contrary to section 55(1) of the Crimes Ordinance, Cap.

200. This related to the grenades found in the suitcase. AUTONUMOUT The conclusion of the first trial was that D1 was convicted on Counts 3, 4 and

5. The jury was unable to reach a verdict in respect of Counts 1 and 2 against D1 and in respect of Counts 4 and 5 against D2. They were both later re-tried. However the indictment was severed and they were re-tried separately. AUTONUMOUT The sentences passed on D1 after the first trial were eight years on Count 3, 12 years on Count 4 and 12 years on Count
5. The sentences on Counts 3 and 4 were ordered to run concurrently. The sentence on Count 5 was ordered to be served partially consecutively, in that five years of it was added to the 12 years on Counts 3 and
4. The final sentence was therefore 17 years. AUTONUMOUT's retrial, also before McMahon J, concluded on 5 May 2005. He was acquitted of attempted murder but convicted of the alternative count of using arms with intent to resist arrest. It is noted that on this occasion he was charged with using the firearm, not shooting it. The prosecution therefore did not have to prove that he fired it. He was sentenced to 18 years imprisonment of which seven years were ordered to run consecutively to the 17 years imposed after the trial in January. AUTONUMOUT's retrial which was again before McMahon J, concluded on 29 June 2005. He was convicted on Count 4 (of the original indictment), namely the firearms in the suitcase,

but acquitted on Count 5, the grenades in the suitcase. He was sentenced to 10 years imprisonment on Count 4. AUTONUMOUT On 22 November 2005, D1 s application for leave to appeal his conviction and sentence on Counts 3, 4 and 5 came before this court. At the hearing D1 abandoned his appeals against conviction on Counts 3 and 4. AUTONUMOUT Nothing of any value can be said about the hearing on 22 November 2005. Due to an appalling lack of information, planning, thought and preparation it became necessary to adjourn it. At this hearing we now have the following matters before us :

- (1) D1 s application for leave to appeal conviction on Count 5 and sentence on Counts 3, 4 and 5 from the first trial. In this matter he is represented by Mr Graeme Mackay of counsel who also represented him at the first trial (but not the second trial) and at the adjourned appeal hearing.
- (2) D1 s application for leave to appeal his conviction only for using a firearm with intent to resist arrest following the second trial. For this matter D1 appears in person.
- (3) D2 s application for leave to appeal his conviction only for possession of firearms following his second trial. He is represented by Mr John McNamara. AUTONUMOUT Each of the above matters involve discrete issues. We will deal with them in reverse order. D2 s application for leave to appeal conviction following his re-trial AUTONUMOUT D2 faced two counts, possession of firearms (Cap. 238) and possession of explosives (Cap. 200). All the articles were found in the same suitcase seized from the living room in a flat where D2 was sleeping in an adjoining bedroom. The jury convicted him of the firearms offence but acquitted him of the explosives offence. AUTONUMOUT McNamara s sole ground of appeal is that the verdicts are inconsistent. He, helpfully and properly, concedes that there would be no ground of appeal if D2 had been convicted on both counts. No criticism or complaint is made about the judge s summing up or the conduct of the trial. AUTONUMOUT The evidence against D2 can be summarized briefly. Both the firearms and the grenades were in the same suitcase. D2 was asleep in the flat at the time of his arrest. In an interview he told the police that he sensed the suitcase contained maybe guns. He had seen the suitcase in the flat but had not seen inside it. D2 had a key to the flat and was shown to have been in regular contact (by phone) with D1 since D1 s arrival in Hong Kong about a week before the arrest. AUTONUMOUT The suitcase was locked. Upon breaking it open the firearms were plainly visible. However the grenades (the subject matter of the explosives charge upon which he was acquitted) were packed below the firearms and were concealed inside socks and empty crisps tins. AUTONUMOUT The firearms charge (Count 4) was contrary to section 13(1) of Cap. (1) No person shall have in his possession any arms or ammunition unless- (a) he holds a licence for possession of such arms or ammunition or a dealers licence therefor AUTONUMOUT The explosives charge (Count

- 5) was contrary to section 55 of Cap.
- (1) Any person who makes an explosive substance or, whether or not he knows it to be an explosive substance, knowingly has in his possession or custody or under his control anything which is an explosive substance shall, unless he can show that he made it or has it in his possession or custody or under his control for a lawful object, be guilty of an offence
- (2) Where in any prosecution for an offence under subsection it is proved that the accused knowingly had in his possession or custody or under his control anything whatsoever, other than premises, containing any explosive substance, then, unless the accused can show that he had reasonable grounds for believing that the thing did not contain anything or contained only something other than an explosive substance, he shall be presumed knowingly to have had in his possession or custody or under his control the explosive substance contained in that thing AUTONUMOUT The ingredients of the two offences differ slightly. Under the explosives charge (Cap.
- 200) the prosecution does not have to prove that the defendant knew the thing was an explosive substance. The judge correctly directed the jury as to the ingredients of each offence and also, in our view, correctly directed them that they had to give each count their separate consideration. The prosecution did not rely on any presumptions (i.e. those contained in section 24 of Cap. 238 and section 55(2) of Cap. 200). The law concerning presumptions played no part in either the original trial or the re-trial. AUTONUMOUT Again correctly, in our opinion, the judge did not direct the jury that, in reality, they could only return either guilty or not guilty verdicts in respect of both counts. AUTONUMOUT Having been properly directed, the jury must have been satisfied so that they were sure that D2 knew there were firearms in the suitcase and that he and D1 were in joint custody or control of them. However they must have been less than sure that he knew there were things in the suitcase that were explosive substances. AUTONUMOUT McNamara s simple argument is that as the evidence in support of D2 s possession of the offending items was, for all practical purposes, the same for each count then the jury could only have either convicted on both or acquitted on both. The verdicts actually returned, he submits, are irreconcilably inconsistent. The law relating to inconsistent verdicts AUTONUMOUT There is a burden on the applicant to show both that the two verdicts were in fact inconsistent and also that the inconsistency is such that the appellate court cannot permit it to stand. To demonstrate inconsistency it must be shown that no reasonable jury, having applied their minds to the case, could have come to the verdicts they reached (HKSAR v. Li King Sing Ivan [2001] 2 HKC 539 at p. 546). AUTONUMOUT It is important to remember the role and function of the jury in criminal trials and to place it in context in this trial. No criticism is made, on its own, of the conviction on Count
4. The jury were properly directed and were entitled to convict on the evidence. We are reminded that the court has to be very careful not to usurp the role of the jury who had heard the witnesses and considered the matter long and hard (R. v. Van der Molen [1997] CLR at p. 605). The comment made in the Australian case of R. v. MacKenzie (1996) 90 A.

Crim. R. at p. 483 is also apposite. Juries cannot always be expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them, and courts, I think, must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with the verdicts which had been reached by the jury with respect to other charges. AUTONUMOUT We reject Mr McNamara's submission. In our judgment the verdicts are not inconsistent. Even if they were, this would not be a case in which it was necessary for the appellate court to interfere. No complaint has been made that the judge should have directed the jury to either convict on both or acquit on both and no complaint has been made about the correctness of the conviction on Count 4. AUTONUMOUT The reason we do not consider the verdicts to be inconsistent is simply because there is a factual basis for different verdicts. The jury must have inferred that D2 had knowledge of the firearms in the suitcase. The judge had given a correct direction on the law relating to the drawing of inferences from primary facts. The factual matters relating to the inference that D2 knew about the firearms were that he admitted sensing that the suitcase maybe contained firearms; D1 had asked him to join him in the commission of robberies and the firearms were easily on view when the suitcase was opened. As far as the grenades were concerned however, D2 made no similar admission about his suspicions; firearms are commonly used in robberies whereas grenades are not and the grenades were hidden in socks and tins at the base of the suitcase and not visible even if the case was opened. AUTONUMOUT We find it logical that the jury were able to draw the necessary inference for proof of a Cap. 238 offence but not for a Cap. 200 offence. AUTONUMOUT We finally observe that if it was the defence view that D2 could only be guilty of either both or neither counts, we would have expected them not to have opposed the prosecution's application, made in the first trial but rejected by the judge, to put all the items (both firearms and explosives) into one count under section 13(1) of Cap.

238. In fact they did oppose the application. It is assumed therefore that they wanted separate counts and wanted separate consideration by the jury (an extract from the judge's ruling on this matter is referred to at paragraphs 71 and 72 hereafter). AUTONUMOUT Accordingly, for the above reasons, D2's application for leave to appeal his conviction is dismissed. D1'S APPLICATION FOR LEAVE TO APPEAL HIS CONVICTION FOR USING A FIREARM WITH INTENT TO RESIST ARREST FOLLOWING HIS RETRIAL IN MAY 2005 AUTONUMOUT This trial concerned the incident which occurred in Waterloo Road, Kowloon in May
2001. At about 1 p.m. on 22 May 2001, three police officers were attacked by a gang of four Chinese males. Firearms were produced and used and fired by members of the gang. It was the prosecution case that D1 fired a bullet through the head of one of the police officers (PW1). He was acquitted on Count 1 of the indictment, the attempted murder charge but convicted on Count 2, using a firearm with intent to resist arrest. AUTONUMOUT D1 now seeks leave to appeal against his conviction on Count

2. For this part of these proceedings he appears in person. AUTONUMOUT In short, the prosecution evidence in support of Count 2 was as follows. AUTONUMOUT One of the three police officers, WPC56074 (PW3) saw the face of the man who drew a pistol and pointed it at PW1. She saw his face clearly for about two seconds. The man was about four feet away from her. She heard three shots being fired in all. The gang fled. Both PW1 and PW2 lay on the ground having been shot. AUTONUMOUT On 5 July 2001, approximately six weeks later, PW3 identified a photograph of D1 from an album containing 12 photographs as the man who had pointed a pistol at PW1. The photograph had been taken eight years earlier when he was 33 years old. AUTONUMOUT On 24 December 2003, D1 was arrested in premises in Kowloon together with D2. Ballistics evidence proved (and it was not challenged) that the firearm which was used to shoot PW1 was lying on the floor two to three feet from where D1 was sleeping and another firearm, also used in the attack on May 2001, was inside the suitcase found in the same premises. D1 s fingerprints were found on items inside the suitcase. D1 had keys to the flat and had been seen carrying a similar suitcase into the flat three days earlier. AUTONUMOUT On 29 December 2003, PW3 picked out D1 at a Police Identification Parade as the person who shot PW1. She paused for about 10 minutes before picking him out. She said she wanted to be sure before making a positive identification. At the same parade neither PW1 nor PW2 made positive identifications. AUTONUMOUT Immigration records showed that D1 had been in Hong Kong from 17 May to 8 August 2001. His next return to Hong Kong was on 16 December 2003, eight days before his arrest. AUTONUMOUT Based on the above evidence defence counsel submitted, at the end of the prosecution case, that there was no case to answer because of the poor identification evidence. The judge was right to reject the submission. He accepted that the identification evidence on 21 May 2001 was in the nature of a fleeting glimpse but the fact that there was compelling supporting evidence in that the firearm used at the time was found next to D1 while he was sleeping in December 2003 meant it was a matter for the jury to decide. D1 elected not to give or call any evidence. AUTONUMOUT The applicant, in two written grounds of appeal and also by his oral submissions, makes four complaints about his trial. We now deal with each of them. A. Identification evidence AUTONUMOUT s renews the submission of no case to answer, made on his behalf at the trial. There is no doubt that the identification evidence contained weaknesses. It was a brief sighting at the time. It was a confusing and frightening incident. At the identification parade, there may have been a risk that PW3 picked the man whose photograph she had selected on 5 July 2001 rather than the man she had seen on 22 May 2001. The identification parade was 2 years 7 months after the incident and PW3 paused for 10 minutes before picking out D1. AUTONUMOUT The points in favour of her identification at the time were that she got a clear look at his face, she was very close to him, nothing obstructed her view and it was in clear daylight. AUTONUMOUT More importantly, the correctness of the identification was supported by the fact that the gun in question was seized from D1 s side at the time of his arrest. AUTONUMOUT This was classically a matter for a jury. By their verdict they rejected the sole defence of mistaken identity. We do not think it would be proper to interfere with that decision provided they were properly directed as to both the evidence and the law as laid down in the case of *R. v. Turnbull* [1977] 1 QB

224. In a carefully constructed and clear summing-up, the judge dealt with every aspect of this issue and did so with complete fairness to the applicant. The jury were left in no doubt about the various circumstances in which it would be proper for them to acquit the applicant. They did not do so. AUTONUMOUT With regard to the identification issue, complaint is also made about the fact that PW3 was invited to look at 12 photographs in July
2001. This, it is argued, could have soured the quality of the identification parade evidence. AUTONUMOUT Firstly, we do not think that the police fell into error when showing PW3 a set of photographs. As a result a wanted poster was published. This was all part of the police investigation and detection process. The propriety of such a procedure was commented upon by Mortimer JA in *R. v. Hoang Duc Hoa and others* [1997] HKLRD 12 when he said Lest it be thought that there is something wrong in showing photographs to victims or witnesses, let it be said that photographs, of course, can be shown after an offence has been taken place. But it is important that the person who is showing the photographs should do so in a proper manner. If the identity of any person to be charged is known, unless it is intended to hold a structured identification by means of the photographs, no photograph of any person held for the offence should be shown to a witness. Of course, in the course of investigation, in order to find or identify the person responsible for an offence, witnesses may be shown photographs as part of the investigation. It is important, therefore, that those who show photographs to witnesses should first determine whether the purpose is to provide evidence in the case, or whether it is to further the investigation. AUTONUMOUT Once again, these important issues were not overlooked by the judge in his summing-up. In particular he said If you think it possible that her identification of him at the identification parade may have been made because it was influenced by her earlier viewing of his photograph when she was shown exhibit P4 [the photo album] on 5 July 2001 and possibly was not made from her recognition of him as the man she saw produce a gun on 22 May 2001 then you must reject her evidence of identification of the defendant as the person who pointed a gun at PW1. That would mean there was no evidence against the defendant in respect of the 1st and 2nd counts and you would have to find him not guilty of both counts. He later continued In other words, do you think it possible that rather than pick out the defendant at the identification parade on 29 December 2003 because she remembered his face from the incident on 22 May 2001, she may have picked him out simply because she had seen his photograph, firstly in exhibit P4 [the photo album], and later in wanted posters in police stations in Hong Kong many times before the identification parade. If so, then, as I say, you must ignore her evidence of identification and acquit the defendant of counts 1 and 2. AUTONUMOUT We are satisfied that in respect of all issues relating to the evidence of identification none of the complaints or criticisms have been made out. The first ground of appeal is rejected. B. Pre-trial publicity AUTONUMOUT The first ground of appeal in his first written grounds (dated May

2005) complains that wide press coverage of his case, at the time of the incident, made a fair trial impossible. No improper reporting is alleged. It is simply the amount of coverage which the case attracted which forms the basis of the complaint. AUTONUMOUT The volume of press reporting was a matter which it was incumbent on the judge to deal with in his summing-up. There had been extensive coverage both at the time of the incident and at the time of the trial. It would have been wrong to ignore it. AUTONUMOUT The fact of the reporting, in this case, cannot amount to a reason for quashing the verdict. It was plainly a newsworthy item but in view of the judge's clear and correct warning given to the jury we are satisfied that no prejudice was caused. This ground is dismissed. C. Inconsistencies in the police evidence AUTONUMOUT In his first written grounds, the applicant states that the police evidence was full of lies and that the three officers gave contradictory evidence. No further particulars were given. AUTONUMOUT We assume that the contradictions to which he refers are those specifically dealt with by the judge in his summing-up. He directed the jury to bear them in mind when assessing a witness's credibility. He gave the usual directions which advise the jury how to evaluate the evidence in general terms and the specific direction concerning previous inconsistent statements. AUTONUMOUT It is thus apparent that the summing-up dealt with the issues of inconsistencies in both general and in specific terms. This ground lacks any detail or substance and is dismissed. D. Complaints about his own counsel's final speech to the jury AUTONUMOUT The applicant was represented by Mr Nicholas Adams on his retrial. Mr Adams successfully persuaded the jury to acquit on the count of attempted murder. However, the applicant complains that Mr Adams' final speech to the jury misled them. It is submitted that the speech was made on the basis that the applicant was indeed present at the scene at the material time. AUTONUMOUT We have been provided with a transcript of Mr Adams' final speech. In his second (undated) written grounds of appeal, the applicant has extracted various parts of it which, he submits, demonstrate that it was being conceded that he was actually at the scene, contrary to his instructions and contrary to the sole defence of mistaken identity. AUTONUMOUT We have also read an affidavit from Mr Adams dated 6 December 2006 which is in response to the allegations made against him. AUTONUMOUT We are satisfied that this ground of appeal is wholly misconceived. AUTONUMOUT It is plain that the totality of the final speech urges the jury, firstly, to reject the identification evidence (and therefore to acquit on both counts) and secondly, only if the jury were sure about the correctness of the evidence that the applicant was one of the gang of four, to conclude that the applicant may not have been one of the gang which drew a pistol when resisting arrest. AUTONUMOUT It was never more than the second alternative limb to his submissions to the jury. All references to the applicant being at the scene were in the context of the jury having already satisfied itself that the identification evidence was true, accurate and reliable. AUTONUMOUT Adams, as any competent counsel would do, kept open the possibility that a jury might acquit on Count 1 but nonetheless convict on Count 2, which was the very measure of success he achieved. Mr Adams would have been failing in his duty to address the jury in any other way. AUTONUMOUT's application for leave to appeal his conviction for using a firearm with intent to resist arrest is dismissed. D1 S

APPLICATION FOR LEAVE TO APPEAL HIS CONVICTION ON COUNT 5 AND SENTENCE ON COUNTS 3, 4 AND 5 FOLLOWING THE FIRST TRIAL AUTONUMOUT D1 is represented by Mr Graeme Mackay for this part of these applications.

- (a) Against conviction AUTONUMOUT It eventually became clear at the adjourned hearing of this application on 22 November 2005 that the sole ground of appeal was that the indictment should not have contained a separate Count 5 (under section 55 of Cap.
- 200) which particularized the applicant's possession of the grenades and fuse plugs (both being explosive substances as defined in Cap.
- 200) found in the suitcase on 24 December 2003. AUTONUMOUT The ground as it appears in the original amended perfected grounds of appeal is as follows :
- (i) If grenades and fuses are indictable under the provisions of both Cap. 200 and Cap. 238, then Count 5 is duplicitous with Count 4 in that the grenades and fuses were found in a single container with several other items, which fell within the definition of ammunition in Cap. 238, section 1 and explosives under Cap. 200, section
- 52. The grenades and fuses are specifically defined in Cap. 238, as arms and ammunition. They were found with other items, also being arms and ammunition, in one suitcase. They were all properly indictable as a single act of possession. (ii) The indictment upon Count 5 is further in breach of section 58 of Cap. 200 in which it is provided that no person may be punished twice for the same criminal act of possession. The inclusion of Count 5 is further unfair and an abuse of process in common law, in that the defendant was put in jeopardy of being punished twice in respect of one criminal act of possession. AUTONUMOUT In short, the complaint is that Count 5 should not have appeared in the indictment. All the contents of the suitcase, both firearms and grenades, should have been the subject of one count, contrary to section 13 of Cap.
- 238. The indictment was in breach of section 58 of Cap. 200 which provides that This Part [Part V] does not exempt any person from any indictment or proceeding for any offence which is punishable at common law or by Ordinance other than this Part, but no person shall be punished twice for the same criminal act. AUTONUMOUT The issue of whether or not there should be one count or two counts relating to the contents of the suitcase emerged twice during the trial. The indictment contained both counts but during the trial (on Day
- 11) and also just prior to the jury going out (on Day
- 16) applications were made to the judge to consolidate the two counts into one under Cap.
- 238. In other words, the grenades should be included in Count 4, contrary to section 13 of the Firearms and Ammunition Ordinance, Cap. 238. AUTONUMOUT Both applications were made by the prosecution. However it is fair to state at the outset that the first application was made not because the prosecution considered it necessary as a matter of law but in an attempt to simplify the issues for the jury. In other words, the application was motivated by

practical not legal considerations. AUTONUMOUT The second application was prompted by the judge who wanted to hear more argument on the issue before the jury retired to consider its verdict. AUTONUMOUT As earlier stated in this judgment, the practical difference between the two sections was that under section 55 of Cap. 200, the prosecution had to prove that the applicant knew the things, i.e. the grenades, were inside the suitcase but they did not have to prove that he knew they were explosive substances. However, under section 13 of Cap. 238 it was necessary to prove that the applicant knew not only the existence of but also the nature of a particular item before he could be found guilty of it. Section 13 contains an additional ingredient to be proved by the prosecution.

AUTONUMOUT The applicant opposed the first application to consolidate but supported the second application. Both were refused. D2's position had remained consistent in that both applications were opposed by D2's counsel. His position throughout was that the indictment was not defective by virtue of it containing separate counts for the firearms and grenades. It is of some interest to note (particularly in the context of D2's application covered by paragraphs 14 to 29 above) that the judge concluded his ruling on the matter with these words Further, in the circumstances of this case, I can see some benefit also in the separation of the items in the suitcase with the hand grenades being the subject of a separate charge, particularly so far as the 2nd defendant is concerned. AUTONUMOUT This must be a reference to the more serious nature of the grenades which might attract a higher sentence. It was therefore in D2's interest (and also D1

- s) to keep open the possibility of a conviction on Count 4 only being returned by the jury. AUTONUMOUT The applicant, in these proceedings, now contends that the counts should, as a matter of law, have been consolidated. The respondent submits that separate counts are not objectionable in law and that there has been no breach of section 58 of Cap. 200. AUTONUMOUT In short, Mr Mackay's submission is that the possession of the contents of the suitcase constitutes a single criminal act of possession and as all the items inside the suitcase come within the definition of arms and ammunition in Cap. 238, then that ordinance and that ordinance alone should be relied on in the indictment. Section 13 covers the single criminal act alleged against D1. AUTONUMOUT Moreover, by subjecting D1 to the risk of convictions under both Cap. 200 and Cap. 238, the final clause in section 58 is breached, namely . But no person shall be punished twice for the same criminal act . Put simply, it is argued that D1 received two sentences for the single act of possessing the contents of the suitcase. AUTONUMOUT We disagree with Mr Mackay's submissions for the following two reasons. AUTONUMOUT
- (1) Mr Alain Sham, counsel for the respondent, has set out in his written submission the history of the two ordinances in question in some detail. We do not propose to recite or analyse it here. Suffice it to say that the original reason for a separate ordinance dealing with explosive substances was the inadequacy of the punishment provided for in earlier legislation. Since its original introduction in its original form the two ordinances have co existed. The various changes and amendments which took place through the 20th century have resulted in the definitions of ammunition under Cap. 238 and explosive substances under Cap. 200 both

covering the grenades and fuse plugs in these proceedings. AUTONUMOUT That fact alone does not mean that the prosecution has to elect to proceed on one ordinance or the other. It is by no means unique for one act to contravene more than one legislative provision. It is open to the prosecution to choose under which to proceed. AUTONUMOUT The two ordinances co exist and the fact that it gives the prosecution the choice whether to charge a defendant under one ordinance or the other offends no legal principle. It may be that, even though the maximum sentence is the same, an offence under section 55, Cap. 200 is regarded more seriously than an offence under section 13, Cap.

238. This could be a factor in deciding which ordinance under which to proceed. AUTONUMOUT Naturally what cannot be done is to allege possession of a grenade under both ordinances. Section 58 of Cap. 200 ensures that a person cannot be punished twice for the possession of the same grenade. AUTONUMOUT
- (2) On the facts of this case the prosecution was perfectly entitled to engage both Cap. 238 and Cap. 200 with regard to the contents of the suitcase. Possession of the suitcase was not the offence, it was the possession of its contents. Possession of different items inside the suitcase constitute separate acts of possession. Carrying the suitcase into the room may be one criminal event for sentencing purposes, but, as a matter of law, the possession of the firearms and the possession of the grenades were separate acts of possession for charging purposes. AUTONUMOUT Although strictly unnecessary, there was in this case the additional factual basis for separate acts of possession in that the grenades were wrapped and concealed inside the suitcase. The firearms could be seen, the grenades could not. AUTONUMOUT On this basis no more needs to be said about section 58, Cap.
200. The concept of a single criminal act does not arise. AUTONUMOUT For the above reasons D1's application for leave to appeal his conviction on Count 5 is dismissed. (B) Against sentences AUTONUMOUT D1 was sentenced to a total of 17 years imprisonment on Counts 3, 4, and 5. Eight years was passed on Count 3 and 12 years each on Counts 4 and 5. He made Counts 3 and 4 concurrent but ordered that five years of the 12 years sentence on Count 5 be served consecutively to Count 4, thus making 17 years in all. AUTONUMOUT In passing sentence the judge said for the purpose of achieving a proper totality, the sentences imposed in respect of the 4th and 5th counts, should also be served, in my judgment, partially concurrently. In my view, however, given the additional danger posed to the community by the seven hand grenades, it will be wrong to impose wholly concurrent sentences for the 4th and 5th counts. I order that 5 years of the sentence imposed in respect of the 5th count be served consecutively to the sentences imposed in respect of Counts 3 and 4. That is a totality of sentence of 17 years imprisonment imposed in respect of the 1st defendant. AUTONUMOUT The judge was right in his attempt to achieve proper totality. However, in achieving that totality we are of the opinion that he made an error in principle. AUTONUMOUT The maximum sentence permitted for either of the offences before the court was 14 years imprisonment. Where the facts relating to two offences arise out the same transaction they should, in principle, be concurrent. Here Counts 4 and 5 plainly arose

out of the same facts. All the items were in the same suitcase and there was no evidence to show that they were part of some separate act of criminality. Consequently, there are no grounds for making the sentences consecutive. AUTONUMOUT The fact that the judge did order consecutive sentences resulted in the total sentences on Counts 4 and 5 exceeding the statutory maximum of 14 years. It was wrong in principle to sentence D1 to a total of 17 years imprisonment on Counts 4 and 5 alone. AUTONUMOUT In our view, the sentences on Counts 4 and 5 must be concurrent. However, pursuant to section 83I(3) of the Criminal Procedure Ordinance, Cap. 221, we substitute sentences of 14 years imprisonment for both offences to be served concurrently. We are satisfied that an arsenal of firearms and grenades of the magnitude found in this case warrants a maximum sentence. AUTONUMOUT We note that the judge, after sentence, remarked that the maximum sentence of 14 years imprisonment was inadequate. We share his concern. To take this very case as an example, it is difficult to imagine why anyone would possess grenades other than with a view for use, or possible use, of a kind that was likely to cause extensive damage to life and property. Moreover, in recent years, there have been many instances of large quantities of explosives being traded and used to lethal effect. We note Mr Sham's assurance that the issue of the maximum sentence is presently under active review. AUTONUMOUT When considering the 3rd Count, the judge said Given that, as it seems to me, the pistol, magazines and ammunition, the subject of the third count though found beside him in his bedroom in the premises, were likely part of the same hoard of weapons contained in the suitcase, the subject of the 4th count, I order that the sentences imposed in respect of the 3rd and 4th counts be served concurrently. AUTONUMOUT Whilst it may be that it had come from the same arsenal, there can be no question but that it was separated from the arms in the suitcase and was there and then, at the time of D1's arrest, engaged upon a particular and specific and separate purpose. AUTONUMOUT It was next to D1, at his bedside, in the middle of the night, with ammunition at the ready, in working order and available for immediate use if the occasion so required. It had either always been separated or had been separated from the suitcase contents. In our judgment it is appropriate to make the sentence for Count 3 partially consecutive to those passed on Counts 4 and 5. AUTONUMOUT We shall order that three years of the sentences on Count 3 be served consecutively to the 14 years passed on Counts 4 and 5, making 17 years in total. AUTONUMOUT Accordingly, as to sentence we :

- (1) give leave to D1 to appeal against sentence and treating the hearing of the application as the appeal, we allow the appeal to this extent that we set aside the order of McMahon J by which he directed that part of the sentence on Count 5 run consecutively to that passed on Count 4; and in the exercise of our power under section 83I of the Criminal Procedure Ordinance, we set aside the sentences of 12 years imprisonment in respect of Counts 4 and 5 and substitute in each instance a term of 14 years imprisonment to run concurrently and we order, further, that three years of the term of 8 years imprisonment imposed in respect of Count 3 shall run consecutively to the remainder concurrently with, the term imposed by us on Counts 4 and 5, making a total of 17 years imprisonment. (M. Stuart-Moore) (Frank Stock) (M.P. Burrell)

Vice President Justice of Appeal Judge of the Court of First Instance CACC73/2005 Mr Alain Sham, SADPP and Miss Janice Kwan, GC of the Department of Justice, for the Respondent Mr Graeme A. Mackay instructed by Messrs Hobson & Ma, for the Applicant (D1) CACC219/2005 Mr Alain Sham, SADPP and Miss Janice Kwan, GC of the Department of Justice, for the Respondent Applicant (D1) in person CACC295/2005 Mr Alain Sham, SADPP and Miss Janice Kwan, GC of the Department of Justice, for the Respondent Mr John McNamara instructed by Messrs S. Y. Chu & Co., for the Applicant (D2) PAGE - PAGE A B C D E 1udk 1udk &`#\$ <(z& u)4q& u)4q & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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