HONG KONG / JUDGMENT

HKSAR v. LAU HEI CHOI

COURT
Court of Appeal

DECIDED
17 October 2000

CASE / FILE NUMBER
CACC14/2000

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bjbj CACC14/2000 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 14 OF 2000 (On Appeal from DCCC No.853 of 1999)

BETWEEN HKSAR Respondent and LAU HEI CHOI Appellant

Before : Hon Stuart-Moore, Ag CJHC, Rogers, V-P and Stock, JA in Court Date of Hearing : 17 October 2000 Date of Judgment : 17 October 2000

J U D G M E N T

Stock, JA : (delivering the judgment of the Court) The appellant appeared in the District Court before H.H. Judge Chua and pleaded not guilty to two charges : the first alleged that on 26 July 1999, he and some others robbed two couriers of 24 kilogrammes of gold; the second, in the alternative, that he dishonestly handled stolen goods on 26 July 1999, namely 4.08 kilogrammes of gold, knowing or believing the gold to be stolen. He was convicted on the handling charge and sentenced to 2 years and 8 months imprisonment. He was, on 12 May 2000, given leave by the single judge to appeal against conviction and sentence. This is that appeal. The evidence Most of the facts are not in dispute. There were two couriers employed by a jewellery company. Their names were Lau Ming and Chan Sum, and it was their job on 26 July to go to a company called Heraeus Limited (Heraeus) in Peninsula Square, Hung Hom, to collect for their employers 24 gold bars, each weighing 1 kilogramme. They collected the gold from Heraeus at about 12.15 pm. They said that they were attacked on the ground floor of the Peninsula Square building by three men. At about this time, a person delivering goods saw men running from Peninsula Square and board a vehicle which then drove off at speed and jumped a red traffic light. The delivery man, his suspicions aroused, noted the registration number of the speeding car FR4391. He reported

the matter to the police, and their investigations led them to this appellant because the appellant was the registered owner of that vehicle. It is also common ground that some 12 minutes or so after the collection of the gold from Heraeus, and therefore within about 10 minutes of the robbery, the same vehicle entered a carpark at Choi Ha Estate, which is on the Kowloon Bay side of the old airport. At 3.48 pm on the same day, that is some 3 hours after the robbery, a private vehicle, registration number FU1479, was driven into the same carpark and parked in the space immediately next to the appellant s car which had been used in the getaway from the robbery. A parking ticket was issued when FU1479 entered the carpark and it was later established that that ticket carried the appellant s fingerprints. That vehicle, FU1479, left the carpark very soon after it had entered; it left at 3.55 pm, that is only seven minutes after it had entered. That evening, the police went to the appellant s home, having no doubt traced the name and address of the registered owner of the vehicle which the delivery man had identified. The appellant arrived whilst they were there and he was carrying a large bolt cutter, as well as a paper bag which had in it nine pieces of gold, referred to in the proceedings as gold fragments. They weighed together 4.08 kilogrammes, the quantity referred to in the second charge. In relation to six of the nine pieces, the gold had in each case been cut across the line of the serial number impressed on the gold bar and the remaining three fragments were fragments which did not bear any part of the serial number of the bar or block from which each had been cut. So none of the segments carried an entire serial number. All but one of the nine pieces bore the name Heraeus . There was a dispute as to what was said by the appellant to the police at his home, though the admissibility of that piece of evidence was not challenged. It suffices to say that the trial judge did not rely on the evidence of what was said at his home save for such evidence as was not challenged, namely, that the appellant said to the police that Chan Sum had given the appellant the gold, and that he had lent his vehicle to Chan and to another man named Chai Leung . There was evidence about interviews at the police station at which admissions are said to have been made, but these were ruled inadmissible by the judge. A few other non contentious facts must be added. It was established by forensic evidence that the bolt cutter had been used to cut two of the nine pieces of gold carried by the appellant, or put more precisely, to cut those two pieces from larger pieces. Furthermore, the vehicle, FU1479, had been parked by the appellant, on his return, close to his residence. He took the police there and in that vehicle there was found more gold, the origin of which was explained to the police and receipts produced. That gold was returned in due course to the appellant. The appellant s own vehicle, FR4391, left the Choi Ha Estate Carpark at close to 1 am the following morning, 27 July 1999. At the trial, the appellant did not give evidence on the general issue. Evidence was called on his behalf in the form of a witness whose business is the gold trade. He spoke of the fact that it was commonplace to use segmented gold for transactions, and that one did not necessarily find serial numbers on each such segment. Serial numbers were not important to him because the gold was used to produce goods, rather than as commodities in themselves to be bought and sold. Heraeus was a very common brand in Hong Kong. He also said that it was a must for a gold trader to possess a bolt cutter. He looked at the gold that had been seized from the appellant and said he did not think there was anything suspicious about it. It was also established in the course of the prosecution case that Heraeus had not kept a record of the serial numbers of the stolen gold. The suggested shift in the burden of proof In her judgment, the

trial judge said this Macrae has submitted the defendant, being in the business, there is nothing suspicious about his possession of gold nor the bolt cutter, a necessary tool to cut gold. No presumption of recent possession arises until it is proved beyond reasonable doubt the nine fragments of gold in the defendant s possession was part of the stolen gold. At a later stage of her judgment, she commented that In the absence of an innocent explanation from the defendant, I judge there are compelling and irresistible inferences to be made from the circumstantial evidence. Mr Macrae, who appears on this appeal as he did for the appellant at trial, puts these passages together and asserts that they disclose a flawed approach. He says that they suggest that the judge shifted the onus of proof onto the appellant. We do not agree. The submission is to take the judges comments out of context. The reference to a presumption of recent possession was a reference, so it seems to us, made purely in the context of the judges brief rehearsal of a submission made by defence counsel, namely, the contention that the issue of recent possession could not arise at all unless and until it was proved that the gold was stolen. In any event, whilst the use of the word presumption was perhaps unfortunate, we are satisfied that it was used loosely. We do not think that the use of the word presumption rather than doctrine , indicates that the judge somehow assumed that once recent possession was shown, the appellant was to be presumed guilty of handling stolen goods unless he showed otherwise. The fact is that the judge took some trouble, immediately after the passage about which complaint is made, to spell out those factors which drove her to the conclusion that the appellant was guilty, factors which all add significantly, especially when taken in combination, to the mere fact of recent possession. She itemised the following facts :

(1) The manner in which the gold had been cut, concluding that it was hardly coincidental that none bore a clean serial number, and that six of the nine pieces had the serial numbers at the point of severance or cutting.

(2) The fact that the gold in the appellant s vehicle left near his residence did not bear any feature suggesting that the serial numbers had been cut.

(3) The fact that the appellant had, as she found (and this is a point to which we shall have to return), himself cut the gold, an oddity if the gold had been given to him in repayment of a debt; the more so since four entire bars, uncut earlier that day, would have sufficed to repay the alleged debt.

(4) The fact that the appellant drove the second vehicle, FU1479, to the carpark where his own or other vehicle was parked, to pick up the gold and cut it himself; a decidedly odd thing to do. Why not simply ask those to whom he had lent his vehicle to return it to his home? It seems clear enough to us that the judge was neither assuming some burden upon the appellant, nor concluding that she was bound, in the absence of a credible explanation from the appellant, to conclude from the fact of recent possession alone that he had stolen the gold or had dishonestly handled it. On the contrary, she pointed to specific evidence which, in addition to the fact that the gold in the appellant s possession was stolen and had been recently stolen, showed that he must have known full well that the gold he went to collect from his own vehicle, and which he then set about cutting in the way described, was stolen

gold. Mr Macrae points out in argument that the learned judge, rather oddly perhaps, asked at the end of the prosecution case and after the appellant elected not to give evidence, whether the voire dire evidence by the appellant was to be adopted by him on the general issue. It is argued that this is indicative of an assumption that in the absence of such evidence, guilt is to be presumed. We think not. Whilst it was an odd thing to do, we do not think that it suggests anything more than a realisation of the proper boundaries of the doctrine of recent possession. The reference by the judge to the inferences to be drawn in the absence of an innocent explanation from the defendant is unexceptionable. She is not there saying that there is a burden upon the appellant to prove his innocence. She is stating the obvious, for which there is ample authority, namely, that a trial court is entitled to draw inferences from established primary facts, and that a court may more readily draw such an inference adverse to a defendant in the absence of testimony from him. There is accordingly nothing in the first ground of this appeal. Suggested contradictions The second ground of the appeal is that the conclusions which the judge drew were unwarranted, speculative and contradictory. Mr Macrae prays in aid two specific aspects of the judgment. Under the heading

Conclusion

, the judge said this It seems to me if the defendant had lent his car without knowing why CHAN required it, he would have asked for it to be returned conveniently to the car park opposite his home. But towards the end of the same section of the judgment, she stated that Since it is possible from the facts to infer also that the defendant only learned of the robbery after it occurred, but before he went to the car park, the benefit of that doubt is given to the defendant. These two passages are said to be contradictory. Again, we disagree. In the latter passage, the judge was addressing the first charge, in other words, had it been proved that the appellant had been party to the robbery itself; if he had provided the getaway vehicle knowing the purpose for which he was providing it, he rendered himself the more liable to conviction in respect of the first charge. The judge was not prepared to make such a finding. The first of the two highlighted comments, said to evidence a contradictory approach were, however, comments made by the judge for an altogether different point. They were not made to pinpoint the time at which the appellant knew that a robbery was to take place, but rather to highlight the culpability that is suggested by the fact that the appellant did not ask for the vehicle which he had lent out to be returned to his home, but rather was content for it to be left at a carpark away from his home and deliberately went to that carpark with a second vehicle, obviously to collect something from his own car. What may thereby be inferred is that when he went to his vehicle in the carpark, he by that stage must have had a guilty mind. The judge was there drawing attention to one of the several highly suspect features presented by the evidence. We accept that as phrased there is a suggestion in the first passage that the appellant probably knew what was afoot at the time he lent the vehicle, but the phraseology, in context, is not significant. What is of significance are the different points which the judge was addressing at the two stages of her judgment to which we have been taken. The second significant aspect of the judgment which Mr Macrae uses to suggest

that the judge s conclusions were speculative and unwarranted was that part of the judgment which ran as follows It also seems to me if he had received the gold fragments already cut he would not have the bolt cutter with him, nor would he bring back a bolt cutter which did not belong to him. Mr Macrae says that it is difficult to understand what the judge meant by this and that the evidence of the defence witness, the trader, was that bolt cutters were an indispensable tool of the trade. There was, in other words, he says, nothing odd about the appellant having this cutter, not least when one recognises that he had other gold in the vehicle parked near his residence. This point loses such minimal force as it might have had when one appreciates that it was admitted as a fact in the course of the trial that the cutter had been used to cut some of the gold which the appellant had with him when he returned to the flat. The fact is that he brought the cutter into the flat with that gold. He had not left it with the untainted gold in the car nearby. He had that very afternoon travelled with one vehicle to a distant carpark, there to park the vehicle in which he had travelled immediately adjacent to his own which, we know, had been the getaway car. The judge was perfectly entitled to conclude that he himself had cut the gold, and in the light of that conclusion, she was entitled to ask why, in the suggested circumstances of a mere repayment of a debt, would he travel to his own vehicle in which gold had been left and himself cut the gold, and she was bound to view it as a highly suspicious circumstance. There is nothing in this second ground. The inferences drawn The third and final ground of this appeal, in so far as it relates to the appellant s conviction, is that the judge drew inferences that she was not entitled to draw. The first is referred to in the grounds of appeal, although not developed in argument. It is the judge s comment or finding or inference that it was the appellant who drove the second vehicle to the Choi Ha Estate with his bolt cutter to pick up the gold equivalent of Chan s debt. It was said in the grounds of appeal that this inference is unwarranted, given that such a conclusion would mean that the gold had remained unattended in the carpark for some hours. It has not been developed in argument, and it suffices to say that the fact that the gold was left unattended, if it was, is a fact that hardly renders the inference unwarranted. The appellant himself left other gold unattended that very evening in the vehicle near his home, and the defence witness gave evidence that only the day before he had done the very same thing. The learned judge then said that she was satisfied or drew the inference that the nine pieces of gold were stolen that day in the robbery, and the grounds of appeal suggested that no one could identify the gold as having come from the quantity stolen from Heraeus. The inference to be drawn from the evidence is irresistible, and Mr Macrae today recognises that this was an inference that could properly be drawn and does not pursue the point. Then the judge s approach is attacked because she said that the manner the pieces were cut, two of which with his bolt cutter, the defendant knew they were stolen gold. It is argued that this gives no credence to the evidence of the defence witness that there was nothing necessarily odd about the cutting of gold in this way, and that it conflicts with indicia held out by the judge earlier in the case that the manner of cutting was open to a number of inferences. But the judge s judgment is one that must be read as a whole, and in the light of all the facts which were clearly found to have been proved. We are satisfied that the judge was not relying merely upon the cuts to the gold as themselves being the sole evidence from which guilty knowledge was to be inferred. She refers even in the very passage to which our attention has been specifically drawn to the fact that the appellant

himself cut the gold; and what she was saying was that it could in all the circumstances have been no coincidence that he cut these very pieces, or had in his possession pieces, which were cut in such a way that six of them were cut across the serial numbers and that the remainder displayed no part of any serial number. That in itself was thoroughly suspicious and put with the evidence as a whole, the inference of guilty knowledge was there to be drawn as the only reasonable inference. We have today had the advantage of seeing the gold found in the appellant s possession, as well as the photographs of gold that was in the vehicle near his residence the legitimate gold, we shall call it. Frankly, these hard exhibits and these photographs speak volumes in themselves. It is as plain as plain can be that the cutting of these stolen pieces was a dishonest exercise, designed to conceal identification of the bars, and it must have been obvious to anyone that that was so, whether to a layman in these matters or to a dealer. Whilst there was plenty other evidence, this evidence alone, in our opinion, suffices to establish guilty knowledge. We are satisfied that there is nothing in this third ground of appeal either.

Conclusion

The evidence against the appellant was overwhelming and this appeal against conviction is accordingly dismissed. We take this opportunity to say that the action of Mr Chan Keung who delivered the goods to Peninsula Square, noted the number of the fleeing car, and reported the matter to the police, was the action of a public spirited and quick thinking member of the public which is highly commendable. We would hope that his public spirited conduct has been, or at least will be, acknowledged by the authorities. Sentence We turn now to the question of sentence. At the date of his conviction, the appellant was aged 31 years and had no previous convictions, a fact which the judge expressly took into account. The matter about which Mr Macrae makes specific complaint is the fact that the learned judge referred to the principle of sentencing which enables a court to have regard to the circumstances of the theft and the handler s connection with it in deciding the appropriate sentence for handling. She referred to the case of R.

v. Tang yeung [1980] HKLR 357 and R. v. Winterflood (1978) 68 Cr.App.R.291. She said that the robbery was well planned, referred to the violence used in the course of the robbery, the use of the appellant s vehicle, and that the appellant himself went to the trouble of cutting gold from the stolen haul. She sentenced him to a term of 2 years and 8 months imprisonment. She might have added that the value of the gold stolen was $1,536,000, so that the value of the gold dishonestly received by the appellant must have been in the region of $250,000. It is said by Mr Macrae that it was wrong of the judge to take into account the nature of the robbery given that she had concluded in her Reasons for Verdict that he may only have learnt of the robbery after it had taken place. It is not necessary, in our judgment, in this case, to go into the question of the application in this particular case of the Winterflood principle. We say that because the fact is that it cannot, by any stretch of the imagination, be said to be a sentence which is excessive, regardless of any consideration of that principle. The appellant was himself a proactive handler in this case, which is to say that he was quick to go for the gold within a short time of its theft, to go himself to fetch it, to cut it, and to take care that the vehicle in which it was kept his own vehicle was not driven to his home. The

value of the gold was significant. The appellant knew full well that one of the thieves had gravely breached trust reposed in him, and that this was an inside job. The sentence imposed in this case was not a day too long. Accordingly, the appeal against sentence is also dismissed. (M. Stuart-Moore) Acting Chief Judge of High Court (A. Rogers) Vice-President (F. Stock) Justice of Appeal Mr A.A. Bruce, SC, SADPP, leading Miss Anna Lai, SGC for DPP, for the Respondent Mr Andrew Macrae, SC, instructed by Messrs K.Y. Woo & Co., for the Appellant - PAGE - "@AB & 6" Normal.dot Microsoft Word 8.0 Title _PID_GUID Microsoft Word Document MSWordDoc Word.Document.8

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