

HONG KONG / JUDGMENT

HKSAR v. LE VU PHONG

[2025] HKCA 635

COURT

Court of Appeal

DECIDED

8 July 2025

CASE / FILE NUMBER

CACC106/2024

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CACC 106/2024 [2025] HKCA 635

On appeal from [2024] HKCFI 1601

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO 106 OF 2024

(ON APPEAL FROM HCCC NO 122 OF 2021)

BETWEEN

HKSAR

Respondent

and

LE Vu Phong

Applicant

Before: Hon Zervos JA in Court

Date of Hearing: 4 July 2025

Date of Judgment: 8 July 2025

J U D G M E N T

On 8 May 2024, following a trial before Deputy High Court Judge Woodcock (as she then was) (the judge) and a jury, the applicant was convicted by majority verdicts of two counts of possession of arms and ammunition without a licence, contrary to section 13(1) and (2) of the Firearms and Ammunition Ordinance (Cap 238) (Counts 1 and 2), and a unanimous verdict of one count of trafficking 410.6 grammes of a crystalline solid containing 406.2 grammes of methamphetamine hydrochloride (commonly known as Ice), and 2,458 grammes of a mixture containing 2,050 grammes of heroin hydrochloride contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance (Cap 134) (Count 3). On 13 May 2024, he was sentenced to a total term of 31 years and 4 months' imprisonment.

On 27 May 2024, the applicant filed a notice of application for leave to appeal against conviction and sentence (Form XI). On 4 September 2024, he was granted legal aid to appeal against his conviction but not against his sentence. On 7 November 2024, Mr Richard Donald and Ms Nisha Mohamed, for the applicant, filed the perfected grounds of appeal against conviction.

The applicant appears in person in his leave application for sentence. The applicant did not provide any grounds of appeal in his Form XI, nor did he file any subsequent grounds of appeal or written submissions.

The prosecution case

On 2 March 2020, the applicant was intercepted by a team of police officers at the landing of the staircase on the 1st Floor of No. 187 Yee Kuk Street, Sham Shui Po, Kowloon (the building). He attempted to insert his right hand into his shoulder bag, but was prevented from doing so by the police officers who subdued and handcuffed him. The police officers searched him and found inside his shoulder bag one self-loading pistol with one magazine loaded with four rounds of ammunition (Count 1). They also found in his possession keys to the main door of Room B on 1st Floor of the building (Room B); and a photocopy of his Form 8 document in a wallet. The applicant was arrested at around 5:59 pm that day by DPC 15607 (PW1) and remained silent under caution. When he was asked where he lived, he said in Chinese "up one floor".

The applicant was escorted to Room B, which the prosecution alleged was occupied and controlled by him. The police officers attempted to enter Room B with the key in his possession, but it broke and they had to enter by force. Inside Room B, they found two additional firearms and ammunition, including one self-loading pistol with one magazine loaded with two rounds of ammunition; one primed cartridge case; one self-loading pistol without ammunition; and five rounds of ammunition (Count 2). The police officers also found the following items: HK\$112,500 cash; a large quantity of small transparent resealable plastic bags; an electronic scale; a metal spoon with traces of powder on top of a cupboard; and a locked safe, containing five packets of Ice and seven bricks of heroin (Count 3). The agreed street value of the Ice was HK\$258,267 and

the heroin was HK\$2,126,170. During the search of Room B, other items were seized, including an imitation pistol; a samurai sword; three foldable knives; a pair of handcuffs; a Rolex box containing a service receipt issued under the applicant's name and Form 8 number; and the applicant's original Form 8 document.

It was an admitted fact that the applicant's fingerprints were found on various items, including the tape attached to the plastic wrapping of one packet of heroin; a wooden door; a rental receipt; and a samurai sword. His DNA was found on two toothbrushes and a mug in the bathroom.

Mr Liao (PW11), who resided on the same floor of the building from 2017 to 2020, identified the applicant as a neighbour living next door. Ms Su (PW12), a staff member of the property agency that owned Room B, identified the applicant as the paying occupant whom she had personally collected monthly rental payments for Room B for three years. She testified that, although she signed a tenancy agreement for Room B with a man surnamed TRANG, she had never seen TRANG or collected rent from him.

The prosecution case was that the applicant had knowingly possessed the firearms and ammunition without a licence, and the dangerous drugs for the purpose of trafficking.

The defence case

The applicant elected to give evidence but did not call any witnesses. His case was that he did not reside in Room B, and was not in possession of any of the items found inside. He had never met PW11 or PW12, who he alleged had mistakenly identified him as a long-term occupant of Room B. He claimed that his friend, TRANG, was the tenant of Room B and that all items found there belonged to TRANG. He maintained that the police officers had assaulted him prior to his arrest and fabricated their evidence regarding the arrest and searches.

The applicant said that he had been living with his girlfriend and moved out on 29 February 2020 after an argument with her. TRANG offered to let him to stay in Room B for a few days and left for Vietnam on 2 March 2020. He had moved into Room B for three days and was there alone before his arrest. Immediately prior to his arrest, he had been to Tuen Mun and Sham Shui Po to buy petrol for testing a jet ski he previously purchased. He had arranged to collect HK\$115,000 which was transferred to him by his younger sister via a money exchange shop, and eventually received the sum from a staff member of the money exchange at Sham Shui Po MTR Station. He then exchanged HK\$2,500 of that sum into smaller notes, which he placed into his bag and wallet. On his way back to Room B, he visited two shops to purchase leather colorant and spray paint.

The applicant claimed that he had been assaulted by the police officers before his arrest. He said that when he was walking up the staircase of the building, he was confronted by several men coming down and was punched by them, without being informed that they were police officers. Someone took his bag and the keys for Room B from his back pocket, after which he shouted in Chinese "Help, robbery." On the way to Room B, he saw someone breaking a CCTV camera on the landing of the upper floor as they went upstairs. On three occasions, something was put in his hands behind his back, and his fingers were pressed onto an unknown object. He was assaulted

again until he collapsed and lost consciousness. He said he was not arrested and did not witness the search conducted in Room B, as he only woke up in the hospital after losing consciousness. Regarding the various items found in Room B, he explained that the cash allegedly found by the police on the table was the sum transferred from his sister, which he had placed in his shoulder bag. He said that the Rolex box had been sold to TRANG and no longer belonged to him. He denied possession of a gun in his bag, nor any knowledge of the drugs in the safe.

In cross-examination, the applicant claimed that he did not know PW11 and PW12, nor understand why his fingerprints were found on one of the packets of heroin. He claimed that the police officers had exerted pressure on PW11 and PW12 to fabricate their identification evidence. Despite his testimony about TRANG, he was unable to locate TRANG after his arrest. Regarding the cash and Rolex box found in Room B, he explained that his sister was a teacher in Vietnam who was able to transfer large sums of money to him, including HK\$115,000 on 2 March 2020, HK\$170,000 for the purchase of a Rolex watch, and other sums for the purchase of a jet ski and an electric wakeboard. He further explained that these sums were his own proceeds from reselling second-hand telephones in Vietnam, and acknowledged that conducting such exporting business in Hong Kong was in breach of his Form 8 recognizance conditions.

The issues at trial

At trial, the issue on Count 1 was whether the applicant knowingly carried a gun with bullets in his bag. The issues on Counts 2 and 3 were whether he occupied and controlled Room B, and was therefore in possession of the firearms, ammunition and dangerous drugs found inside; and whether he knowingly had possession of those items.

The jury's questions

After the jury retired to deliberate their verdict, they returned with the following questions:

“1.

We would like see (examine) again: Photo Book 1, #10, 11, 12, shoulder bag, swimming suit + vast”

2(a).

For trafficking, there are several factors. So if any 1 of the factors match mean he/she is trafficking? (import, export, procuring, dealing, supplying, storage/possession ...)

2(b).

If we believe LE know there is drug in the safe, and have touched/packed the drug, but he has no control of the safe (no key). There are scale, spoons, small plastic bags. Can we assume LE has been dealing with the drug in the safe.

2(c).

If we believe LE has keys of Room B, is it means LE has partial control of the safe, i.e. fulfilled possession of the safe and drug trafficking?” (Emphasis added)

The judge discussed the questions with counsel, and gave the following answers to the questions below.

Question 2(b):

“If we believe Le knew there is drugs in safe and has touched/packed the drugs. But he has no control of the safe, no key. There are scales, spoons, small plastic bags, can we assume Le has been dealing with the drugs in the safe? Now, if you believe he knew there were drugs in the safe and that he had touched/packed the drugs but he had no key, the fact that there is no evidence he had a key at that time does not mean he didn’t have control of the safe. It doesn’t mean he did not have control.”

Now, we know there was no evidence of the key, but members of the jury, there could be other possibilities. He deliberately hid the key, he gave it to someone else to look after, he lost the key. But it doesn’t mean he did not have control anymore because there was no key found. There are many possibilities and it’s a matter for you. But the fact that the police did not find a key and had to break it open does not mean he did not have control of it.”

Question 2(c):

“If we believe Le had keys of the Room B, now if you believed, there is no dispute he had the keys. You can believe because the defendant said he had keys, the prosecution said they found keys and they fit them. If we believe Le had a key to Room B, does it means Le has partial control of the safe. I think that’s what, partial? Yes, thank you. Partial control of the safe, i.e. fulfilled possession of the safe and drugs equals trafficking. I think that’s what that means. All right.”

If you mean did he only have partial control because he didn’t have a key, then I think we have, I have answered that question just now. If you mean partial control in that somebody else also had control or may have known about it or about the drugs then I did explain this morning that, or yesterday, the definition of possession, it was today, the definition of possession means more than one person can have possession of an item. More than one person can have custody and control. There is a shared -- it is possible to share possession.

So if that ‘partial’ means another person, that’s my answer. If that partial means, he only had partial control because he couldn’t open it or there was no key found, then I repeat my answer above, just because there is no key does not mean he loses control of the items.”

The conviction appeal

The applicant advances three grounds of appeal against conviction.

Ground 1 alleges that the judge erred in her directions in response to Question 2(b) as (i) putting forward other possibilities as to what had happened to the key was an invitation to the jury to speculate without evidence; (ii) the judge had usurped the role of the jury and expressed her own views; and (iii) the judge should have directed the jury that they had to be sure and could not simply assume evidence. During oral submissions, Mr Donald reformulated Ground 1 and filed Amended Ground 1 in the following terms:

“The question raised by the jury in Question 2(b) by reference to their use of the word “assume” could have been wrongly interpreted by the jury that they could consider the evidence/matter without the requisite standard of proof.”

Ground 2 contends that the judge erred in her directions in response to Question 2(c) as (i) to break down the question into different interpretations was confusing; and (ii) the effect of her directions was that having the key to room be equated to custody and control of the drugs in the safe.

Ground 3 complains that the jury could have convicted the applicant on Counts 1 and 2 simply based on their finding on Count 3.

Ms Angel Yuen, for the respondent, has comprehensively addressed the three grounds of appeal and I agree with her submissions, except for the Amended Ground 1, which I am satisfied is reasonably arguable.

As for Ground 1, it is submitted by the applicant that from the jury’s Question 2(b), they were not sure about what was needed for custody and control, and the judge should have repeated her directions on the elements of possession. The judge had already given detailed directions on the requirements of possession in her summing-up. She stressed that possession required knowledge, physical custody or control, and the intention to have custody or to exercise control over an item or items. Given the emphasis that was placed on the subject of possession by the judge in her summing-up, it would have been clear to the jury what was required. As pointed out by Ms Yuen, it is apparent from the wording of the question that they were well aware of the need to prove knowledge and control in order to find that the applicant was in possession of the drugs inside the safe.

As for Amended Ground 1, the issue concerning the reference to the word “assume” by the jury in Question 2(b) was discussed between the judge and counsel:

“COURT: If they mean by ‘assume’, an inference, then yes they can.

MR DELANEY: Yes. Because -- yes.”

...

“MR CHENG: ...finding such facts, can they assume, I mean assume is not right. So can they infer...

COURT: Yes.

MR CHENG: ...that the accused has been dealing with the drug?

COURT: Yes.

MR CHENG: Now, of course, I wouldn't have argued that they cannot infer. Of course they can infer. But the question is they must be sure that the only reasonable inference that they draw from those finding of facts.

So they should be cautious about it. Because they use the word 'assume' that he has delivered it. That is not, as suggested by the word 'assume', as to like -- the word that I am comfortable with. So that is 2(b), my Lady.

2(c), again, that they if they found, my Lady, that he has keys to Room B, I think that we don't have issue relating to the keys to the room.

COURT: Yes, I will correct them on that. Yes."

...

"COURT: All right. I don't really want to go back into the definition of inferences but I will say, you know, can we assume. Here I am making the assumption that they're talking about inferences.

MR DELANEY: Yes.

COURT: But I will not clarify, but I will...

MR DELANEY: Call it assumption, you know, assuming.

COURT: If they mean by assume, they are referring to inferences...

MR DELANEY: Well, my Lady, I think that the jury here are probably just using the layperson's term for inference.

COURT: Yes.

MR DELANEY: And any discussion at any legal level would be if you say, 'Well, can we assume' and you say, 'Yes, it is a lawful inference to make for sure', all right. That's my robust approach to that.

COURT: All right."

Mr Donald submitted that the judge in her answer to Question 2(b), did not correct the jury on the reference to the word "assume," despite having agreed with defence counsel's suggestion to do so.

Mr Donald further submitted that the judge in her answer should have repeated the following direction given in the summing-up and reminded the jury that they had to be sure and could not simply "assume" evidence:

“As for the 3rd charge, the prosecution alleges the defendant possessed the dangerous drugs found in Room B for the purposes of trafficking in those drugs. For Charge 3, trafficking dangerous drugs, you cannot convict the defendant unless you are sure of the following three things.

You cannot convict the defendant unless you are sure the prosecution have proved that on 2 March 2020 that, first, he possessed the ‘Ice’ and the heroin in question. Secondly, that he knew what he possessed or what was in his possession were dangerous drugs. And thirdly, he possessed them for the purposes of trafficking.”

Ms Yuen pointed out that the judge, throughout her summing-up, had made it abundantly clear to the jury that they had to be sure that the applicant was knowingly in possession of the drugs inside the safe for the purpose of trafficking before convicting him on Count 3, and had repeatedly reminded them not to speculate. Ms Yuen stressed that the word “assume” as used by the jury in the context of Question 2(b) clearly meant “infer” in layman’s terms, and there was nothing to suggest that any actual assumptions had been made by them.

In the summing-up, the judge gave the standard directions to the jury on the burden and standard of proof, and the drawing of inferences from circumstantial evidence, in which they were reminded that any inference to be drawn from the facts they found proven must be the only reasonable inference. Regarding the issue of possession and knowledge of the drugs in the safe, the judge explained at length the matters relied on by the prosecution to draw the irresistible inference of guilt. She also directed the jury to consider the applicant’s explanation on those matters, and the defence position that the inference of possession and knowledge which the prosecution invited the jury to draw was not “the only reasonable inference”.

It is unfortunate that the jury in its question used the word “assume”. It is arguable that when considered in the context of the terms of the question, they meant “infer”. The question was framed on the basis of proven facts, namely, the applicant knew there were drugs in the safe and had touched or packed the drugs. The judge in her summing up was meticulous to ensure that the jury understood its task and how they should approach evaluating the evidence. She reminded them that they only needed to decide matters which enabled them to say whether each charge had been proved, so that they were sure of the applicant’s guilt. She stressed that it was for them to decide what or who was reliable or what or who was not. She went to great lengths to explain circumstantial evidence and inferential reasoning. When explaining the drawing of inferences she emphasised that it was based on facts that they found proved. She said:

“... you are entitled to infer the existence of another fact from facts you find proved. And before you actually draw an inference against the defendant you must satisfy yourself that the inference must be based on a clear finding of primary facts based on the evidence, and that inference must be the only inference that can be drawn on that basis of those facts. So you may only do so if the inference is the only inference to draw from the proven facts.”

The jury's question concerned the element of "dealing", which the judge addressed in her summing-up. In the course of her directions, she explained to the jury that if they were sure that the prosecution had proved that the applicant was in possession of the drugs in the safe and he knew there were drugs in the safe, then in the circumstances, they may infer that he was trafficking in the drugs.

Whilst there is a reasonable argument as described in Amended Ground 1, it will necessarily be considered in the context of the question, the directions to the jury and the case overall.

As for Ground 2, as pointed out by Ms Yuen the judge in her answer to Question 2(c) had not answered in the affirmative after reciting the question as alleged by the applicant. She merely said, "I think that's what, partial? Yes, thank you." because there was a spelling mistake of "partial" in the written question.

It is further submitted by the applicant that breaking down Question 2(c) into three parts was confusing as the question was simple and clear, namely whether by having the key to Room B, the applicant had partial control of the safe despite not having the key to the safe. However, given the jury's query about the absence of the key as seen from Question 2(b) and the use of the word "partial" control in Question 2(c), this may have been raised because the applicant did not have the key to the safe. There can be no complaint about the judge breaking down the question into parts in order to address each interpretation. The judge's direction that "just because there is no key does not mean he loses control of the items" is unobjectionable and the direction that more than one person could have custody and control was merely a reiteration of the standard directions regarding possession which she gave to the jury.

It is finally submitted that the effect of the judge's directions was that having the key to the room be equated to custody and control of the drugs in the safe. This was not the case, and the judge gave clear directions on the requirements of possession. She did not suggest that the applicant had possession of the drugs in the safe just because he had the key to the room. It is also important to note there was considerable body of evidence on which the prosecution were inviting the jury to infer that the applicant was in possession of the items in safe, including: (1) the applicant's original Form 8 document inside the Rolex box in the safe; (2) the presence of the applicant's fingerprints on one of the packets of heroin in the safe; (3) the applicant's DNA and fingerprints on other items inside Room B; (4) the evidence of PW11 and PW12 that the applicant was the sole occupant of Room B; and (5) the electronic scale, considerable quantity of small resealable plastic bags, and cash of HK\$112,500 found in Room B.

As rightly pointed out by Ms Yuen, the judge made it abundantly clear to the jury that in order to convict, they had to be sure that the applicant knew there were drugs inside the safe, that he had physical custody or exercise control of them and that he intended to have custody or to exercise control over them.

As for Ground 3, the applicant contends that the jury could have convicted the applicant on Counts 1 and 2 based on the conclusion they had reached on Count 3. This contention is without basis. The judge had specifically directed the jury to consider the evidence against the applicant on each of the three counts separately and that their verdict need not be the same for each count.

It follows from my analysis of the grounds that only Amended Ground 1 is reasonably arguable, for which leave is granted. Leave is refused for the other grounds.

The sentence appeal

The applicant came to Hong Kong from Vietnam in 2014 as an asylum seeker. He was a Form 8 recognizance holder at the time of the offences. He was a university graduate, divorced with three children, and had a clear record in Hong Kong.

As for Counts 1 and 2, the judge found this case to be “a very bad case of this type” given the number of firearms and ammunition involved, the fact that the applicant had one of the guns loaded in his bag, and was in possession of drugs, valued at over HK\$2 million. Applying the relevant authorities, she adopted a global approach and imposed 12 years’ imprisonment for both Counts 1 and 2, to be served concurrently.

As for Count 3, the judge adopted a starting point of 24 years and 4 months’ imprisonment by application of the combined approach on the narcotic weight of the Ice and heroin involved, having regard to the similar sentencing guidelines of these two types of drugs. She found the applicant’s role as a storekeeper or courier, and enhanced the starting point by 1 year for his status as a Form 8 recognizance holder. Having considered there was no meaningful mitigation in his favour, she sentenced the applicant to 25 years and 4 months’ imprisonment for Count 3.

Applying the totality principle, she ordered 6 years of the sentence on Count 1 to be served consecutively to Count 3, resulting in a total sentence of 31 years and 4 months’ imprisonment.

It is noted that, in accordance with the new sentencing guidelines laid out in *HKSAR v Huang Ruifang*, the starting point adopted by the judge would be significantly lower for 406.2 grammes of Ice and 2,050 grammes of heroin.

I am prepared to grant the applicant leave to appeal his sentence in light of the new sentencing guidelines for trafficking in large quantities of drugs and the high sentence he received for the offences in which he was convicted. However, I note the firearm offences are of a very serious nature. Accordingly, I grant the applicant an appeal aid certificate to be legally represented in his sentence appeal.

(Kevin Zervos)

Justice of Appeal

Ms Angel Yuen, SPP, of the Department of Justice, for the respondent

Mr Richard Donald and Ms Nisha Mohamed, instructed by Eric Cheung & Lau, assigned by the Director of Legal Aid, for the applicant (for conviction only)

The applicant appeared in person (for sentence only)

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