

HONG KONG / JUDGMENT

HKSAR v. LEE CHI MAN

COURT

Court of Appeal

DECIDED

15 June 2007

CASE / FILE NUMBER

CACC387/2006

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bjbj : Hon Stuart-Moore VP and Beeson J in Court Date of Hearing: 15 June 2007 Date of Judgment: 15 June 2007 Date of Judgment handed down: 25 June 2007

J U D G M E N T

Beeson J (Giving the judgment of the Court) The Applicant pleaded guilty in the District Court on 4 September 2006 before Judge Whaley to three offences of Theft (Charges 4, 5 and 6) and was sentenced to a total of 3 years and 4 months imprisonment. On 15 June 2007 we refused his application for leave to appeal against sentence and advised the Applicant we would hand down our reasons at a later date These are our reasons. The thefts occurred in the afternoons of 26 April, 5 June and 12 June 2006. The modus operandi in each case was the same. The Applicant snatched a necklace from the neck of each female victim. On the 1st and 2nd occasions, he snatched a necklace and on the 3rd occasion, he snatched a necklace and pendant. The total value of the stolen property was \$11,200. In his Video Interview, the Applicant made full admissions to the charges. He said he committed the offences out of greed; that the offences were committed by him alone; that he sold the property and had spent the proceeds. The Applicant has a poor record starting in 1990. Twenty two court appearances are listed and the offences include 6 robberies and 8 thefts, 6 of the thefts were committed between November 2001 and September 2003; the judge was told they were all shoplifting offences. Other convictions were for offences of violence and dangerous drug offences. Most of the offences had been dealt with either by short prison sentences or by DATC orders. The most severe punishment, imposed in 1997, was a total of 16 months imprisonment for theft and s.19 wounding charges. Counsel for the Applicant accepted that the nature and extent of the criminal record were aggravating factors which the judge was entitled to take into account in determining the starting point for sentence. The judge considered the offences were serious, in part because of force used by the Applicant in snatching the necklaces from the victims. His sentence therefore included a substantial element of deterrence to make it clear to the Applicant, and anybody else who might be tempted similarly to commit this type of crime, that they would be punished heavily if they were caught. He noted

HKSAR v Chan Sin Leung CACC 48 of 2006 which involved a sentence for a similar case. The judge considered the appropriate starting point was 2 years imprisonment after trial for each offence and he gave the full discount of one-third for the Applicant's pleas of guilty which reduced each sentence to 16 months imprisonment. There were no other mitigating factors. As these were separate and distinct offences, in principle they should have received consecutive sentences, subject to the totality principle. On the 3rd charge, the judge sentenced the Applicant to 16 months imprisonment. On the 4th charge, he imposed a sentence of 16 months and he ordered 12 months to be consecutive to the sentence on the 3rd charge. On the 5th charge, he imposed a sentence of 16 months and ordered 12 months to be consecutive to the sentences imposed on the 3rd and 4th charges. The total sentence was 3 years and 4 months imprisonment. The Perfected Grounds of Appeal were that generally the sentences were manifestly excessive and/or wrong in principle, because:

- (1) the starting point of 2 years imprisonment adopted by the judge for each of the three offences was too high;
- (2) the judge failed adequately to consider the totality principle in deciding an overall sentence of 3 years and 4 months was appropriate;
- (3) the aggravating factors present were multiplicity of offences and a criminal record of 30 previous convictions, of which 14 were offences of robbery or theft;
- (4) although the judge had referred to HKSAR v Chan Sin Leung (Supra), he imposed a sentence far in excess of the 15 months starting point adopted for each of the three charges in that case;
- (5) in adopting a starting point of 2 years imprisonment, the judge had failed to recognise that this was not the worst case of its type, as there was no evidence of any threats to the victims and each offence was entirely opportunistic;
- (6) for the deterrent element of each offence, the judge had taken a starting point that was not proportionate to the actual offence and the degree of enhancement adopted to meet the objective deterrent criteria was not reasonable. The Applicant complains that although the judge was referred to Chan he failed to adopt the same starting point and, further, did not give any reasons for not following Chan. There is no tariff sentence for this type of offence and, whatever principles one can deduce from Chan, each fact situation must be examined individually. The Court of Appeal in Chan considered that the judge had failed to take proper account of Chan's previous record, which resulted in the comment at para 6:- No complaint can be made about the individual sentences imposed in relation to the theft offences. Indeed, we think it would have been appropriate for heavier sentences to be imposed to reflect the aggravating feature that we have identified. Even though he has not spelled it out in his Reasons for Sentence, it appears that the judge did follow Chan by adopting a higher starting point because of the Applicant's poor record. The only criticism of the individual sentences might be that the starting point was not high enough. Counsel submitted that it was the duty of the sentencing judge to give reasons for his choosing to depart from the

starting point in Chan. We disagree. The judge was not obliged to give reasons why he did not adopt the same starting point, particularly as Chan was neither a guideline case, nor a precedent. On Ground (2), counsel did not complain about the passing of partially consecutive sentences, but he submitted that the starting point was too high and the total sentence offended the totality principle. Grounds (5) and (6) related to deterrence. Counsel submitted that substantial deterrence was not required and that the judge had failed to note that this was not the worst case of its type, nor was there evidence of threats to the victims. Threats to the victims were not needed, given the violence used in snatching the necklaces. It is fortunate that the victims did not suffer injuries as a result of the necklaces being ripped from their necks. Further, although this might not be the worst case of its type, it is certainly high on the scale and the incidents were very close to robberies. At the time of the snatching the 1st victim was walking with her daughter and son. The 2nd victim was waiting for the LRT when the Applicant and a female approached to ask directions. The 3rd victim was walking with her two daughters, when her necklace and pendant were taken. Although the selection of the victim was arbitrary, the number and nature of the offences, show they were not opportunistic, as the Applicant was looking for suitable victims over a period of time. He targeted women who were alone, or who were hampered by their children. Nor was it costume jewellery that was stolen, but quite expensive necklaces; clearly, the Applicant was selective in choosing what to snatch. The Applicant was 30 years of age and his many convictions showed he had not learned his lesson from any of the penalties imposed on him. The starting point adopted by the judge was 2 years imprisonment for each offence. The judge stated, correctly, that consecutive sentences were appropriate, and contrary to the Applicant's submission, he did consider totality and made the sentences partially consecutive. We note that the total sentence is higher than any imposed on the Applicant before, but we are satisfied that a total of 3 years 4 months imprisonment is not a day too long given the nature of the offences and his previous history. Accordingly, we refused leave to the Applicant to appeal against sentence and confirmed the sentences passed by the judge. (M. Stuart-Moore) (C-M Beeson) Vice-President Judge of the Court of First Instance High Court Ms Grace Chan, SGC of the Department of Justice, for the Respondent Mr Shaun Kelly, instructed by Messrs Tsang, Chan & Woo, assigned by Director of Legal Aid, for the Applicant

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