HONG KONG / JUDGMENT

HKSAR v. LEE HON LEUNG

COURT
Court of Appeal

DECIDED
20 December 2007

CASE / FILE NUMBER
CACC308/2006

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Before : Hon Ma CJHC and Suffiad J in Court Date of Hearing : 20 December 2007 Date of Judgment : 20 December 2007

J U D G M E N T

Suffiad J (giving the judgment of the Court) : AUTONUMOUT The applicant pleaded guilty in the District Court before HH Judge Lok to one count of attempted robbery (Count

1) and one count of theft (Count 2). AUTONUMOUT After calling for background and psychiatric reports as a result of what was said in mitigation by defence counsel, the judge sentenced the applicant to 40 months imprisonment on the 1st count and 3 months imprisonment on the 2nd count, the sentences to be served consecutively (and both taking into account the one-third discount for the pleas of guilty). AUTONUMOUT The applicant now seeks leave to appeal against the sentence imposed on him in the 1st count only. The facts AUTONUMOUT The facts as stated in the Summary of Facts in relation to both counts were admitted by the applicant when he pleaded guilty. AUTONUMOUT In relation to the 1st count of attempted robbery, at about 1:25 p.m. on 18 September 2005, the applicant followed the victim, a woman aged 25, into Lift No. 3 at the ground floor of Chin Kwai House, Kwai Chung Estate when the victim was on her way home. AUTONUMOUT The victim pressed for the 16th floor where she lived and the applicant pressed for the 17th floor in the lift. It is not disputed that the applicant lived on the 17th floor of that building. AUTONUMOUT When the lift reached the 16th floor, the applicant blocked the door of the lift to prevent the victim from going out, then he pressed the close door button. The victim told the applicant she wanted to go out. AUTONUMOUT The applicant made no reply but suddenly pulled the victim s handbag violently. When the victim resisted, the applicant grasped her neck forcefully. A struggle took place and the victim succeeded in pushing the applicant and

dashing out of the lift. The applicant then grabbed the victim s waist from behind. The victim shouted loudly for help which scared the applicant who fled empty handed. AUTONUMOUT The victim then went down to the ground floor to report the incident to the security guard of the building. AUTONUMOUT A report was made to the police who arrived at about 1:40 p.m. Soon after police arrived, the victim saw the applicant again near the entrance of the building, pointing him out to the police who arrested the applicant for attempted robbery. When cautioned, the applicant denied the allegation. AUTONUMOUT The victim sustained no injury in the incident. AUTONUMOUT Close circuit television (CCTV) in the lift captured the incident inside the lift including the struggle between the victim and the applicant. AUTONUMOUT In relation to the 2nd count, at about 1:30 p.m. on 24 October 2005, the deputy manager of Wellcome Supermarket located in Tai Wo Hau Estate Commercial Centre, Tai Ha Street, Kwai Chung, while on duty inside the supermarket, saw the applicant acting suspiciously and kept him under observation. He then saw the applicant take some products from the display racks and put them into an orange cloth bag. AUTONUMOUT A while later, the applicant went past the cashier s desk paying for a pack of eight cans of coke only. Thereafter the applicant attempted to leave the supermarket. AUTONUMOUT The deputy manager intercepted the applicant and asked him if he had anything which he had not paid for. The applicant replied in the affirmative and the deputy manager made a report to the police. AUTONUMOUT Upon police s arrival, the bag of the applicant was searched and inside was found a box of toothpaste, a pack of soap, two boxes of hair dyeing products, one bath towel and one pack of hair cream, all of which were confirmed by the deputy manager to belong to the supermarket and the property of Dairy Farm Company Ltd. The total value of the products found came to HK$274. AUTONUMOUT The applicant was then arrested for theft. AUTONUMOUT On the above facts being admitted by the applicant, the judge accepted the applicant s pleas of guilty to both counts. AUTONUMOUT In mitigation, counsel for the applicant told the court that his instructions were that both counts were committed by the applicant out of greediness and that the applicant was remorseful for what he had done. AUTONUMOUT A further matter which defence counsel indicated to the judge was that the applicant was attending some psychiatric clinic since 2004 and had constant and regular follow-up treatment, even during the time when the applicant was in Stanley Prison, he was being seen by a psychologist or psychiatrist. AUTONUMOUT In the circumstances, counsel for the applicant urged the judge to call for psychiatric report as well as a background report on the applicant before sentencing. AUTONUMOUT This request by defence counsel was acceded to by the judge and the matter was adjourned for sentence from 3 July to 14 July 2006. In the meantime, the judge called for a background report as well as a psychiatric report. Sentencing by the judge AUTONUMOUT At the adjournment hearing, in sentencing the applicant on the 1st count of attempted robbery, the judge, relying on the guidelines set down in Mo Kwong Sang v. the Queen, that if a knife or some similar weapon had been used in a lift robbery, that would have merited a starting point of six years. However, in the present case, since no weapon had been used by the applicant, the judge adopted five years to be the starting point. AUTONUMOUT Giving effect to the plea of guilty, that starting point was reduced by the

usual one third arriving at 40 months. This was then the sentence passed on the applicant by the judge in respect of the 1st count. The appeal AUTONUMOUT Two grounds have been advanced for this appeal by the applicant. AUTONUMOUT In the 1st ground, the complaint is that the judge was wrong to have relied on the guidelines in Mo Kwong Sang to the effect that if there was an invasion of private premises including common areas or lifts in the building, that should normally merit a sentence of six years. AUTONUMOUT The reason put forward for this complaint was that the applicant himself also lived in the same building, namely Chin Kwai House in Kwai Chung Estate on the 17th floor, therefore there was no invasion of private premises and those words said in Mo Kwong Sang had no application to this case. AUTONUMOUT In the circumstances, it is submitted that the five-year starting point used by the judge was inappropriate and excessive. AUTONUMOUT The 2nd ground of complaint is that the judge failed to take into account any of the personal circumstances of the applicant since the one-third reduction to the starting point was only given in relation to the plea of guilty alone. AUTONUMOUT The personal circumstances of the applicant which it is said that the judge should have also taken into account included the mental abnormality of the applicant, that he had not been in trouble with the law for over 20 years (from 1983 to 2006), his wife having deserted the family in 1997 and the fact that the applicant had since that time taken to drinking alcohol, contracted lung tuberculosis in 2002, lived on Comprehensive Social Security Allowance (CSSA) and also started to abuse organic solvents since 2004 while at the same time having to bring up his 13-year-old son. Decision AUTONUMOUT In so far as the attempted robbery charge is concerned, counsel for the applicant cited the following words of Roberts CJ in the case of Mo Kwong Sang at page 611 where he said We suggest that, in future, the appropriate sentence in an ordinary case of armed robbery, where the accused was carrying a knife or other dangerous weapon which he displayed to his victim, should normally be five years. If such a robbery also involves an invasion of private premises (which includes domestic and business premises and the common parts of premises such as lifts and staircases) we suggest that a sentence of six years would be appropriate. [Emphasis added] AUTONUMOUT It was submitted that because the applicant lived on the 17th floor of Chin Kwai House in Kwai Chung Estate, the very building where the attempted robbery took place, those words of Roberts CJ were not strictly applicable in the present case since there was no invasion of private premises by reason of the fact that the applicant also lived in that same building. AUTONUMOUT In submission Miss Chan now accepts that the building of a common area including the lift of that building did constitute private premises. However, in so far as it was submitted that there was no invasion of private premises because the applicant lived in that very same building, and therefore those words cited of Roberts CJ had no application in this case, we cannot agree with that submission. AUTONUMOUT It would appear that the distinction which Roberts CJ sought to draw in the words cited above, was between an ordinary case of armed robbery and one involving an invasion of private premises . The distinction there can only mean a robbery committed in the open public such as the street or a park or an alley as opposed to one committed inside a building including the common areas in that building. AUTONUMOUT It would be wholly illogical if the distinction was between a building in

which the culprit lived and another building. There can be no good reason for such a distinction. The highest that can be said in the present case was that because the applicant also lived in that building, there is nothing to indicate that this was a pre-meditated case of robbery, because he did not carry any weapon. AUTONUMOUT In our view, the judge in this case had adopted a proper approach in reaching the starting point and we do not see that the judge can in any way be criticised for it, particularly where he took into consideration and gave allowance for the absence of any weapons used, when formulating that starting point to be used. AUTONUMOUT We see no merit at all in the 1st ground of appeal. AUTONUMOUT Turning to the 2nd ground of appeal, it was urged upon this court that the judge failed to take account of a number of mitigating factors all of which relate to the personal circumstances of the applicant when sentencing the applicant. AUTONUMOUT It was submitted that the judge ought to have taken into account the applicant s psychiatric problem, the desertion of his wife from the family leaving the applicant with his now 13-year-old son, his previous drinking problem which has now changed to abuse of organic solvents, as well as his lung tuberculosis. Also the fact that the applicant has not had any conviction record between 1983 and 2006. AUTONUMOUT As for the personal problems of the applicant, these were all matters before the judge as they were contained in both the background report and psychiatric report called for by the judge. AUTONUMOUT Not surprisingly the judge quite obviously did not place much weight on these factors since in our view such matters could not carry very much weight by way of mitigation in an offence of this nature. AUTONUMOUT Given the criminal record of the applicant which showed that the applicant was convicted of two robberies and a rape albeit back in 1983 for which he was sentenced totally to five years imprisonment and a conviction for arson in January 2006 which we accept took place after the present offences for which he was sentenced to six months imprisonment. The fact that the applicant has kept away from any trouble with the law between 1983 and 2006 would, in our view, not count for very much by way of mitigation either. AUTONUMOUT As we see it the only real mitigation in this case was the applicant s remorse reflected in his plea of guilty and for which he was given the normal one-third discount by the judge. AUTONUMOUT We find no merit either in the 2nd ground of this appeal. AUTONUMOUT For the reasons given, we have reached the conclusion that we ought not to grant leave for the appeal against sentence on Count 1 and accordingly leave is refused. (Geoffrey Ma) (A.R. Suffiad) Chief Judge, High Court Judge of the Court of First Instance Mr David Leung, SGC of the Department of Justice, for HKSAR Miss Terry Chan, instructed by Hong Kong Bar Association s Free Legal Service Scheme, for the Applicant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U 1udk 1udk F G H I J K L M N O P Q R S T U V &`#$ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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