

HONG KONG / JUDGMENT

HKSAR v. LEPCHA DANIEL GYAMTSHO

COURT

Court of First Instance

DECIDED

21 March 2007

CASE / FILE NUMBER

HCMA975/2006

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bjbj HCMA975/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 975 OF 2006 (ON APPEAL FROM TWCC 3171 OF 2005)

BETWEEN HKSAR Respondent and LEPCHA DANIEL GYAMTSHO Appellant

Before : Hon Nguyen J in Court Dates of Hearing : 9 and 12 February 2007 Date of Judgment : 21 March 2007

J U D G M E N T

AUTONUMOUT The appellant was convicted by Mr John Glass sitting in Tsuen Wan Magistrates Court of the offence of assault occasioning actual bodily harm and was sentenced to 12 months imprisonment. He now appeals against the conviction. The facts of the case AUTONUMOUT On the day in question, the victim was walking along a street in Tsuen Wan at night when he was attacked from behind by three males. The learned magistrate said in his Statement of Findings that he found that when the attack began, there was a scattering of people with people running from the scene of the incident in different directions in order to protect themselves, and he found this had continued right up until the arrival of the police. AUTONUMOUT A lady (PW3) and her boyfriend were walking along the same street when they saw the victim walking slowly towards them. She saw three males rush out from behind the victim and began hitting him. One had a white stick-like object about 12 inches long, which he was using to attack the victim, and the others were using their fists. She believed the attackers were Asians but she did not know if they were Nepalese. She stepped backwards towards a shelter near a car park as she saw the victim escaping in her direction during the attack. When she stepped back again, she heard someone call the police. She saw one of the attackers run from the area of the attack towards a blue sign

near a book shop and when she turned back several seconds later, she saw a male apprehended by the police under that blue sign. AUTONUMOUT A police officer also gave evidence to the effect that whilst patrolling that evening, he saw a woman point and shout and then he saw a male running in his direction. He chased this male for 15 to 20 steps and apprehended him under the blue sign. This male was the appellant. AUTONUMOUT The magistrate accepted that the police officer had concentrated on the male that he was chasing and he had not noticed other people at the time, but he did notice there was only one male running. The magistrate accepted that if there had been more than one person running in the same direction, the police officer would have noticed that because he would then have faced the dilemma of whom to chase. Grounds of appeal AUTONUMOUT Mitchell on behalf of the appellant advanced five grounds of appeal.

These were :

- (1) the learned magistrate erred when he allowed the case to continue upon the close of the prosecution's case when the evidence that the appellant was one of the persons who attacked the victim was such that under the principles enunciated in *R. v. Galbraith* (1981) 73 CAR 124 there should have been a ruling of no case to answer;
- (2) in the alternative in allowing the case to proceed and in drawing an irresistible inference, the learned magistrate had erred by relying upon facts not proved in evidence or on evidence which was unclear or contradictory or inconclusive;
- (3) further and in the alternative, the learned magistrate erred in drawing from the facts he found proved that the appellant was one of the attackers when another inference was equally supportable and which he failed to consider;
- (4) further and in the alternative, the learned magistrate having found that the witness PW3 had made a mistake in agreeing that the appellant was not one of those involved in the attack went on to rely upon aspects of her identification without having shown that he was mindful of the principles in *R. v. Turnbull* [1977] 1 QB 224; and
- (5) that in all the circumstances, the conviction is unsafe or unsatisfactory. AUTONUMOUT The police officer who arrested the appellant had not witnessed the attack, and hence was not able to assist the prosecution with identity. As regards PW3 it was said that she had agreed that the appellant had not been one of the attackers. How the magistrate dealt with that is as follows : he said that PW3 had assumed that the male apprehended by the police under the blue sign was one of the attackers who had run from the area of the attack towards the blue sign. The magistrate said [she] did agree in cross-examination it was not one of the defendants (sic). I did not accept this agreement in cross-examination, as I believe she misunderstood the question and had thus given the wrong answer. I believed she believed it was one of the attackers. I found the man PW3 saw running from the Kodak sign to the blue sign was the same man. PW3 also said, and I accepted, that the male was Asian, and I found that this meant he was not Chinese. I found that the defendant was a Nepalese and Asian, which matched what PW3 meant. AUTONUMOUT All the grounds of appeal in fact revolved around PW3's alleged agreement in cross-examination that the appellant was not one of the

attackers. The grounds of appeal advanced are, with respect, ramifications of that vital question : Did she in fact agree that the appellant was not one of the attackers or was it as the magistrate put it, a case of the witness misunderstanding the question? AUTONUMOUT In trying to resolve this matter, with counsel s agreement, the tape of PW3 s evidence and that of the police officer was played in court. I reproduce PW3 s evidence to show exactly what was asked and said PW3 (evidence-in-chief) : I saw a foreigner (hereinafter referred to as X) walking towards me. Three people (hereinafter referred to as D, E and F) rushed towards X from behind. D, E and F should be foreigners, they were quite dark and wearing dark clothes. D, E and F rushed towards X and started to hit him. One held a 12-inch white coloured stick-like thing. He kept hitting X. The other two punched X. I stepped back. X was escaping in my direction. I continued to step back. I heard someone shout police. The fight continued. One minute later the police came from the car park. D, E and F immediately fled. One of them, I am not sure who he was, was arrested under the blue sign Kai Shing Book Store . I saw the police coming and I left. Q: Who was this person who was stopped by the police? A: Not sure. Q: What happened to the person who ran towards the blue sign? A: Not very clear, after a few moments the police pressed him down and he knelt. Q: Who is he? A: One of D, E and F but I am not sure who he was. Q: What was the distance between you and X when X was assaulted by D, E, F, what was the closest distance? A: About 10 feet. Q: Did anyone obstruct your view? A: I turned around and then looked back and saw a person arrested by police. There were some people around us and they were leaving in different directions. People saw the police and they fled. D, E, F saw the police and they fled. When someone shouted police we were backing off. They were fighting and came closer to us. The police arrived. D, E, F spread in different directions. Q: How long did you turn away and then turned back? A: Several seconds. Cross-examination : Q: You saw many pedestrians run away? A: Yes. Q: People were going in all different directions? A: Yes, including me. I went inside a yellow shelter in photo

2. I kept retreating until I went into the yellow shelter. From the moment I saw X being assaulted until I saw the police it was 10 odd seconds. The police arrived within 20 seconds, a very short time. Q: When you turned back the police had already stopped a man at the blue sign outside the bookstore? A: I saw it after a few moments. Q: That evening, there was a great deal of confusion and people were running around? A: Yes. But the situation was stable very quickly. Q: You ne of the persons who escaped, he was just a person stopped by the police. A: Agree. AUTONUMOUT My view of PW3 s evidence is that she was saying that one of the three assailants ran towards the blue sign and he was stopped by the police officer underneath that blue sign. There is no challenge of the interpretation of the answer I think yes , but my view is that the answer given in Chinese was just as capable of meaning I think or I believe (that he was one of the assailants). My view is also that her final answer could be construed as meaning that she was agreeing to the second half of the question namely he was just a person stopped by the police and that she was ignoring or had forgotten the first part of the question namely he was not one of the persons who escaped . AUTONUMOUT My view of the effect of PW3 s evidence is fortified by the fact that the prosecution was also

relying on the police officer whose evidence was that he was on the street when he heard a woman shouting something and he saw a man wearing a brown top and trousers running towards his direction. He then chased the man and stopped him at Dun Fat Street. He said his attention was focused on the male who was running and he only saw one person running. How the magistrate dealt with the police officer's evidence was as follows PW4 said, and I accepted, that he had concentrated on the male he chased and he had not noticed other people at the time, but he did notice there was only one male running (in the same direction as the male he chased). I accepted this was the position even though he did admit in cross-examination that there could have been others in the vicinity running or moving quickly, as I believed he would have noticed if there had been two males running in the same direction and he would have thereby been faced with a dilemma for chasing.

AUTONUMOUT Wan appearing for the respondent submitted that within a very short time frame, PW4 apprehended the appellant under the blue sign and PW3 had observed one of the attackers fleeing in that direction. She said it was not PW3's evidence that she saw other persons running in the same direction as the attacker. She said it was not PW4's evidence that he saw other persons running and he randomly chose to chase after the appellant. She said the link was clearly established and proved by evidence and she submitted that without any evidence to undermine, contradict and/or otherwise explain the prosecution's evidence, an irresistible inference could be drawn, and it was rightly drawn, that the appellant was one of the attackers. AUTONUMOUT As regards PW3's alleged agreement in cross-examination, Ms Wan submitted that the learned magistrate was there in court who heard all the evidence, including all the questions posed to and answered by PW3, and he observed how PW3 gave her evidence. She submitted that when placing the evidence in context, the learned magistrate was in the best position to make findings on PW3's evidence and he did make a specific finding on this aspect of the evidence, that is, she misunderstood the question and accordingly gave a wrong answer. AUTONUMOUT I agree with those submissions by Ms Wan and I find that the magistrate was justified, in the light of the evidence, to come to the conclusion that the appellant had indeed been one of the attackers of the victim. My view is that the conviction is neither unsafe nor unsatisfactory. This finding by me effectively disposes of all the grounds of appeal. There were no other matters relied upon by counsel which can in any way substantiate the grounds of appeal. The appeal against conviction is therefore dismissed. (Peter Nguyen) Judge of the Court of First Instance, High Court Ms Polly Wan, SGC of the Department of Justice, for HKSAR Mr Neil S. Mitchell, SC, assigned by the Director of Legal Aid, for the Appellant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$"@AB & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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