

HONG KONG / JUDGMENT

HKSAR v. LIMBU BINOD

[2021] HKCA 1431

COURT

Court of Appeal

DECIDED

28 September 2021

CASE / FILE NUMBER

CACC64/2021

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bjbj CACC 64/2021

[2021] HKCA 1431 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CRIMINAL APPEAL NO 64 OF 2021 (ON APPEAL FROM HCCC
NO 153 OF 2020)

HKSAR Respondent v LIMBU BINOD Applicant

Before: Hon Zervos JA in Court Date of Hearing: 28 September 2021 Date of Judgment: 28
September 2021

J U D G M E N T

Introduction

The applicant was one of two defendants charged with having committed an armed robbery together with two other men. The applicant's designation in the court proceedings was D1 and the other defendant's was D2. Both defendants pleaded guilty to the offence of robbery, contrary to section 10(1) and (2) of the Theft Ordinance, Cap 210 (Count 1), while D1 also pleaded guilty to the offence of possession of a dangerous drug, namely 5.68 grammes of cannabis in herbal form, contrary to section 8(1)(a) and (2) of the Dangerous Drugs Ordinance, Cap 134 (Count 2). On 11 March 2021, the defendants appeared before Barnes J (the judge), who sentenced D1 to 9 years and 4 months imprisonment on Count 1 and 12 days imprisonment on Count 2. She ordered that the sentences on the two counts be served concurrently. On 24 March 2021, the applicant filed a notice of application for leave to appeal against his sentence. In the applicant's perfected grounds

of appeal against sentence, he advances only one ground of appeal in which it is complained that the enhanced starting point adopted by the judge of 14 years imprisonment on Count 1 was manifestly excessive. The brief facts The facts which the applicant admitted for the purpose of his sentencing provide a detailed account of a well-planned armed robbery by a gang of four men on two employees of a diamond trading company who were delivering a large sum of cash and cheques to a money exchange company. After one of the men slashed the two employees with a knife to their lower limbs so as to immobilise them, the gang robbed them of US\$740,000 and HK\$363,060 in cash and a total of US\$54,613 in cheques payable to the diamond trading company, none of which was ever recovered. The robbery took place in the morning of 21 September 2018, the two employees were variously carrying the cash and cheques in their backpacks. When they left the office of the diamond trading company, they were being monitored by D2 and another man (the fourth male). They appeared to have known the route of the two employees as D2 and the fourth male boarded a private vehicle which was driven to a nearby location. They waited for them to turn into a street where D1, D2 and another man (the third male), who was armed with a 10-inch long knife, alighted from the vehicle wearing facial masks and caps. They set upon the two employees with the third male slashing the back of the knees of one of the employees. D1 and D2 immediately snatched his backpack and fled. The other employee attempted to get away but the third male caught up with him and slashed his left thigh with the knife and threatened him to surrender his backpack, which he did. After the robbery had taken place, D2 and the third male boarded the vehicle with the fourth male at the wheel ready to make a quick getaway. However, D1 did not get to the vehicle in time and he hailed a taxi to make good his escape. The vehicle was later located by the police, who found inside, amongst other things, the 10-inch long knife with bloodstains, a red plastic bag containing another knife with a paper cover, various items of clothing and a used face mask. D1's DNA was found on a bracelet and T-shirt and D2's DNA was found on the face mask and two items of clothing. The bloodstained knife had the DNA of one of the employees. D1 and D2's fingerprints were also found inside the vehicle, with D1's fingerprints on the red plastic bag containing the knife. The police were also able to recover the car cameras of other vehicles that captured the robbery and the abandonment of the private vehicle used in the robbery. The two victims sustained injuries and trauma as a result of the robbery. One of the victims received three open wounds to both his legs and left thigh. He was hospitalised for several weeks but had to undergo lengthy physiotherapy as a result of his injuries. He also suffered psychological trauma but with counselling was able to improve and stabilise emotionally. The other victim sustained a laceration to the back of his left thigh and eventually left Hong Kong, returning to his normal life. The mitigation The applicant was 26 years of age at the time of sentencing. He was born in Nepal and educated up to Form 6. He had previous convictions of two offences of possession of an offensive weapon in 2014, for which he was fined a total of \$500, and one offence of breach of condition of stay in 2016, for which he was sentenced to 4 weeks imprisonment. It was submitted on the applicant's behalf, that he came to Hong Kong in 2011 when he was 17 years old to join his family. He entered Hong Kong on a dependency visa and was allowed to work. However, his father subsequently declined to renew his dependency visa. He then applied for asylum and remained in Hong Kong as a Form 8 recognizance holder. The judge was urged to treat the applicant differently from other Form 8

recognizance holders because of his circumstances when considering an enhancement for this factor. It was accepted that the robbery offence was a serious one and that D1 committed the offence jointly with the other men. The judge was urged to take into account that the applicant was not armed and did not inflict any direct injuries on any of the victims during the robbery. The sentence After an extensive overview of the facts and circumstances of the robbery, including the impact on the two victims and the loss of property, the judge reviewed the sentencing authorities. She referred to the sentencing guidelines in *Mo Kwong Sang v R* [1981] HKLR 610, and noted that in an ordinary robbery where the robber displayed a knife or other dangerous weapon to the victim, a sentence of 5 years would be correct. However, if physical violence is used, a sentence of 7 years would be appropriate. The judge went on to note that if there were other aggravating circumstances, including more than one person taking part, the sentence should be increased. The judge was of the view that this was a bad case of robbery. It involved a gang of four men and was well planned and executed. The two victims were subjected to physical violence and attacked with a 10-inch long knife. The lower limbs of the two victims were slashed to immobilise them and take their backpacks, containing the cash and cheques. The second victim was chased and threatened with the knife and made to surrender his backpack. The robbery involved two employees of a diamond trading company conveying a substantial quantity of cash and cheques to a money exchange office, none of which had been recovered. The judge considered that the applicant carried out the robbery jointly with the other men and was jointly culpable for the way the robbery was planned and executed, even though he was not the one who wielded the knife and caused injury to the victims. Having considered all the circumstances and the seriousness of the case, the judge adopted a starting point of 13 years imprisonment. She specifically mentioned that she would not enhance the sentence for the applicant's previous record. However, as the applicant was a Form 8 recognizance holder at the time of the offence, she considered that this was a serious aggravating factor and enhanced his sentence by 12 months. This resulted in a notional starting point of 14 years imprisonment on Count 1, which she reduced by one third for the applicant's guilty plea to 9 years and 4 months imprisonment. The submissions Mr H Y Wong, for the applicant, submits that the starting point of 14 years imprisonment for the robbery Count was manifestly excessive when compared with sentences imposed on other offenders in similar, if not more serious, cases. He refers to five cases by way of comparison: *HKSAR v Leung Kam Chiu*, unrep., CACC 30/2002; *HKSAR v Chan Wai*, unrep., CACC 285/2004; *HKSAR v Wong Kam*, unrep., CACC 520/2011; *HKSAR v Man Siu Ming*, unrep., CACC 318/2011; and *HKSAR v Yang Xingyun*, unrep., CACC 155/2016. Mr Wong accepts that the loss in the present case was over HK\$6 million, that the applicant acted in concert with the three other men, the victims suffered serious injuries, and the robbery was a well-planned and executed. He argues, however, that after a comparison with the other cases that he submitted, the initial starting point of 13 years imprisonment was manifestly excessive. In oral submissions, Mr Wong abandoned his complaint against the enhancement of one year for the applicant's status as a Form 8 recognizance holder at the time of the offence and only took issue with the starting point adopted by the judge. He argues that on a review of the authorities that he submitted the starting point should have been at most 12 years imprisonment. Ms Noelle A Chit, for the respondent, submits that the sentence was not manifestly excessive. She refers to the case of *HKSAR v Singh Gursevak* [2019] 2 HKLRD 274,

which was submitted by the prosecution to the sentencing judge without demur from defence counsel. She contends that there are a number of similarities with that case and the present one. It involved the robbery of the owner of a money exchange shop. The victim was carrying \$350,000 in cash, who was attacked by two robbers with knives from behind, slashing his legs to immobilise him. In the course of struggling with the robbers, the victim sustained a deep chop wound to his arm. The property that was stolen was never recovered and the victim sustained serious injuries. In that case, the judge adopted a starting point of 15 years imprisonment. The sentence was further enhanced by 2 years for the fact that the appellant was a Form 8 recognizance holder at the time of the offence. The Court of Appeal did not find the starting point, nor the enhancement to be manifestly excessive. Ms Chit also makes reference to other cases in which the Court of Appeal has noted or discussed factors or features in the robbery case under consideration that justified a substantial starting point being adopted by the sentencing judge. Discussion There is always going to be difficulty mounting an appeal against sentence on the basis of a comparison with other cases. As experience has shown, no two cases are exactly alike and there will be differences between them to explain the differences in sentences. However, more importantly, the issue for an appellate court is whether a fair and just sentence was passed in the circumstances of the case, applying the relevant sentencing principles and guidelines. In robbery cases, a sentencing court when assessing the starting point to be adopted will take into account aggravating factors or features that reflect the gravity of the offence and the culpability of the offender, such as the circumstances and location of the robbery, the target of the robbery, the degree of planning and execution involved, the level of force or violence, the extent of the injuries sustained by and impact on a victim or victims, the nature and use of a weapon, the number of offenders, the use of clothing to disguise the identity of the offenders, and the items or property taken. The cases that have been referred to deal with a variety of factors or features that have resulted in substantial starting points being adopted because of their nature and level of seriousness. Each case will depend upon their own particular facts and circumstances. As acknowledged, this is a very bad case of robbery and I cannot find fault with the judge's determination of a starting point of 13 years imprisonment for the factors and features that were present in this case. Even Mr Wong had to accept, on the cases that he put forward, that the starting point should have been at most 12 years imprisonment. I am not satisfied that the ground of appeal advanced by the applicant is reasonably arguable and his application is therefore refused. The applicant is reminded of his right to renew his application for leave to the Court of Appeal, but he is also informed of the consequences of doing so, which may include a direction for any loss of time spent in custody pending his appeal, if the Court were to come to the view that there was no justification for the renewal of his application. (Kevin Zervos) Justice of Appeal Ms Noelle A Chit, SPP, of the Department of Justice, for the respondent Mr H Y Wong, instructed by Massie & Clement, Solicitors, assigned by the Director of Legal Aid, for the applicant PAGE

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