

HONG KONG / JUDGMENT

HKSAR v. LIMBU RISESH

COURT

Court of Appeal

DECIDED

4 August 2006

CASE / FILE NUMBER

CACC489/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj CACC 489/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 489 OF 2005 (ON APPEAL FROM HCCC NO. 49 OF 2005)

BETWEEN HKSAR Respondent and LIMBU RISESH Appellant

Before : Hon Stuart-Moore VP, Woo VP and Tang JA in Court Date of Hearing : 4 August 2006 Date of Judgment : 4 August 2006

J U D G M E N T

Hon Woo VP (giving the judgment of the Court):

Introduction

AUTONUMOUT The appellant, LIMBU Rishesh, was on trial as D2 with two other defendants, D1 and D3 in the Court of First Instance before Nguyen J and a jury on a count of robbery and a count of wounding that took place on 19 October 2004 at about 9.15 pm. D1 and D3 pleaded guilty to the wounding count but denied the robbery count. The jury was put in charge of deciding whether D1 and D3 were guilty of the robbery and whether the appellant was guilty of the robbery and the wounding. At the conclusion of the trial on 18 October 2005, the jury returned a verdict of guilty against D1 and D3 of the robbery and against the appellant of both the robbery and the wounding. On 11 November 2005, the judge sentenced D1, then aged 26 years, to 5 years imprisonment, and ordered both the appellant and D3, who were then aged 16 years, be detained in a training centre. AUTONUMOUT The appellant now appeals on the basis of a single ground against conviction on both counts, namely, that the judge erred in law when he allowed the case to continue upon the close of the prosecution s case when the evidence of identification against

the appellant was so weak and unreliable that under the Turnbull principle, there should have been a ruling of no case to answer on both counts. Since the appellant is appealing on a pure ground of law, no leave is required for his appeal. AUTONUMOUT It is necessary to set out sufficient details of the prosecution's evidence in order to examine the quality of the evidence of identification of the appellant as adduced by the prosecution, bearing in mind that no issue on the identification of D1 and D3 was taken at the trial because they had pleaded guilty to the wounding count whereby their presence at the scene of crime was implicit. The identification evidence AUTONUMOUT PW1 Mr YAKOOB Azeem was the sole victim of the robbery and wounding that occurred on 19 October 2004 in Yuen Long, New Territories, near a meat shop in Wang Fat Path, where PW1 was employed as a shopkeeper. His evidence was to the effect that at about 7.30 pm that evening, 3 Nepalese males came into the shop and accused him of ruining their trousers by dirty water thrown from his shop. They demanded monetary compensation but PW1 refused to pay. They left. AUTONUMOUT At about 9.15 pm, after PW1 had closed his shop, he walked down the street intending to deliver the day's income as well as some frozen chickens to his employer in Tsimshatsui. Having passed a few shops, he heard a shout asking him to stop. He turned and noticed the same 3 Nepalese males with a fourth male approaching him from behind and they began to assault him. In the process, one of the four males took his wallet out from his waist-bag and took away all the money, \$9,000, that he had inside the wallet. He ran into a grocery shop but was continuously hit by the 4 males. AUTONUMOUT The following formed part of the facts admitted by all parties at the trial pursuant to section 65C of the Criminal Procedure Ordinance, Cap 221. Two identification parades were held at the Yuen Long Police Station on 25 October 2004, the first one at 3.23 pm and the second one at 4.27 pm. PW1 identified D1 in the second parade and D3 in the first parade, as amongst the 3 Nepalese males. He failed to identify the appellant who participated in the first parade. PW2, referred to below, identified the appellant in the first parade. AUTONUMOUT In his statement to the police, PW1 described the 3 Nepalese males who demanded monetary compensation from him as A, B and C, A and B being indisputably D1 and D3. He also described in detail the third person C who was present during the encounter. C, as described by PW1, was aged 22-23 years, slightly taller than A and B, about 5 feet 6 to 7 inches, having essentially black short hair, but dyed gold all over the head and wearing a checkered T-shirt. However, PW1 was unable to identify the appellant at any identification parade in which the appellant participated. AUTONUMOUT PW2, Mr NASIR Khan, was the only witness who was able to identify the appellant as one of the assailants of the victim, and he made the identification in the first identification parade held on 25 October 2004. He also positively identified D1 at the second identification parade held on the same day. AUTONUMOUT According to PW2, he was visiting a friend at a shop named M A Trading Company in Wang Fat Path, at around 8.30 pm on 19 October 2004. He noticed that some Nepalese men were sitting in an area outside the shop. About 9 pm, he was outside the shop waiting for his friend who was closing the shop. At about 9.15 pm, he saw PW1 walking by, and one Nepalese told PW1 to stop. There was a scuffle between the Nepalese and PW1. Then another Nepalese came, holding an antenna in his hand with which he hit PW1 on the head. The Nepalese men were pulling PW1's waist-bag. PW1's head was bleeding. 3 or 4 more Nepalese males came up and joined in the assault of PW1. PW1 fell on the ground and was kicked and punched with fists. PW2 noticed PW1's waist-bag was

already opened. PW2 called the police and while he was doing so, he noticed that PW1 was rushing into a grocery shop and pursued by Nepalese boys. AUTONUMOUT PW2 identified the appellant at the identification parade as one of the 3 or 4 Nepalese men who came up to assault PW1. He said that the appellant was using kicks and fists to assault PW1. PW2 identified the appellant as C who were amongst the 3 or 4 males running towards PW1 and joining in the assault at the stage as he described. AUTONUMOUT In his statement to the police made on the same night of the offences, PW2 described C as being aged 18 to 19 years, wearing dark sport shorts, above knee-length, who was of stronger build than PW2, of height of 160-165 cm and had short, curled and mixed black and white hair, like that of naturally aged white hair, the two colours about half-half in proportion. He confirmed all these in his testimony. AUTONUMOUT PW2 stated that although he was able to see the frontal face of C when C was running towards PW1 from a distance of 8 metres, he was only able to see the right side of C's face during the assault. AUTONUMOUT It was common ground that at about 9.27 pm on 19 October 2004, the police arrested both D1 and the appellant together in the streets near Tai Tong Road and Mau Tan Street, in the vicinity of the crime scene. At that time, the police radio message described 4 wanted persons involved in an assault in the following manner: suspect 1 was wearing black shorts, suspect 2 was having long hair and suspect 3 was carrying a guitar bag; suspect 4 was not described. AUTONUMOUT It was undisputed, however, that at the time of the arrest, the appellant was wearing full-length blue jeans and he had short, curly and completely black hair. Moreover, the appellant was of the height of 5 feet 1 inch or 155 cm, which was quite different from the height of C as described by both PW1 and PW2. The submission of no case AUTONUMOUT Cecilia Liang, counsel for the appellant at trial and also appearing for him before us, submitted to the judge that the evidence of PW2, the only witness who identified the appellant at the identification parade, was of such poor quality that the case against the appellant should be withdrawn from the jury. AUTONUMOUT After hearing submissions, the judge rejected the submission of no case to answer. He gave the following brief reasons: The 2nd defendant's counsel has submitted that the 2nd defendant has no case to answer because the quality of the identification of him by the sole witness against him, PW2, is so bad that the case should be withdrawn from the jury. All the criticisms of the identification by PW2 are set out in some detail in Miss Liang's written submission. In the case of *Daley v R* [1994] 1 AC 117, it was held by the Privy Council that where the strength of the prosecution evidence depended on the determination of a witness's reliability and on one possible view of the facts, there was evidence upon which a jury could properly convict, the judge should not stop the trial even if he regarded the prosecution evidence as uncreditworthy, but should leave the case to the jury. In the subsequent case of *R v MacMath* [1997] Crim LR 586, the Court of Appeal in England applied the mentioned case of *Daley v R* and drew a distinction between submissions of no case based on the lack of credibility of the identifying witness which was a matter for the jury and the quality of the identification opportunity which, in that case, the court thought was good. The conviction in that case was quashed because of a breach of the Police and Criminal Evidence Act in that there was a failure to hold an identification parade. In my view, on one possible [view] of the identification evidence of the 2nd defendant by PW2, the jury could properly convict. I therefore rule that the 2nd defendant has a case to answer. AUTONUMOUT Before us, Ms Liang relies on the well-known

authority of *R v Turnbull* [1997] QB 224 in support of the ground that the judge should not have left the case to the jury. In that case, Lord Widgery CJ, delivering the judgment of the English Court of Appeal, noted that a number of appeals raised problems relating to evidence of visual identification in criminal cases. Lord Widgery suggested ways by which trial judges in their summing-up could reduce the danger of miscarriages of justice in visual identification cases, including warning the jury of the special need for caution before convicting the accused, and directing the jury to examine closely the circumstances in which the identification by each witness came to be made. In regard to stopping the case from being considered by the jury, the Lord Chief Justice said at pages 229H to 230A: When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. AUTONUMOUT Some assistance as to how a judge should exercise his power to stop a case can be drawn from the following passage of the judgment when the Lord Chief Justice dealt with one of the appellants before the Court, at page 236C-D: No suggestion was made that the identifying witnesses were dishonest. It is conceded that Miss Kennedy [an identifying witness] in particular was an impressive witness. But the quality of the identification was not good, indeed there were notable weaknesses in it and there was no evidence capable of supporting the identifications made. We think it would have been wiser for the trial judge to have withdrawn the case from the jury. In the circumstances the verdict was unsafe and unsatisfactory and for that reason we have allowed the appeal, applying the general principles enumerated earlier in this judgment. AUTONUMOUT In *R v Galbraith* (1981) 73 Cr R 124, Lord Widgery CJ pointed out that trial judges should not use the criterion of whether a conviction would be unsafe or unsatisfactory, which was the criterion applicable to the consideration of the Court of Appeal, when considering whether a case should be left to the jury, because it was not a judge's job to weigh the evidence or decide on credibility of witnesses, otherwise he would be usurping the functions of the jury. The Lord Chief Justice went on at page 127: How then should the judge approach a submission of no case? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge. AUTONUMOUT It can be noted that there seems to be a difference in approach on the submission of no case between *Turnbull* and *Galbraith* in that on the one hand where the visual identification evidence was poor,

the judge should withdraw the case from the jury (Turnbull), whereas on the other hand, insofar as the strength or weakness of the identification evidence depends on the view to be taken of a witness's reliability, the judge should leave the case for the jury to decide (Galbraith). This apparent disparity was explained in Daley, the case cited by the judge in his Ruling. Daley was a decision of the Privy Council on appeal from Jamaica. Lord Mustill delivering the advice of the Privy Council said at page 129D-G as follows: Their Lordships doubt, however, whether it is necessary to explain the two lines of authority in this way [identification cases are outside the general principle that the jury, and not the trial judge, are judges of facts]. A reading of the judgment in Reg. v. Galbraith [1981] 1 W.L.R. 1039 as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery C.J. had put it, was not his job. By contrast, in the kind of identification case dealt with by Reg. v. Turnbull [1977] Q.B. 224 the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as Reg. v. Turnbull itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the quality of the evidence, under the Turnbull doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their Lordships see no conflict between them. (Emphasis added.) AUTONUMOUT Liang has submitted that the identification evidence of PW2 was of such a poor quality that the judge was wrong to have left the case to the jury. She submits that there was no supporting evidence for the identification made by PW2. On the other hand Ms Louisa Lai, acting on behalf of the respondent, has argued that there were the following items of supporting evidence, namely, The written record of interview of the appellant which stated that he was playing guitar with D3 in the vicinity of the crime scene at around 9 pm, that there were only the two of them, that he did not witness any assault or robbery, and that the incident might have happened after he left Wang Fat Path where PW1's shop was situated. The appellant and D1 were together when they were arrested by the police at 9.27 pm, shortly after the assault and robbery. AUTONUMOUT Lai suggests that these pieces of evidence supported PW2's identification of the appellant because an inference can be drawn that the appellant was present during the assault and robbery. AUTONUMOUT With respect, we do not agree. Indeed, the judge in his summing up had told the jury that both these pieces of evidence did not support PW2's identification evidence. AUTONUMOUT Although Ms Lai accepts that there are discrepancies in PW2's description in his statement of the man C whom he subsequently identified as the appellant and the appellant's physical appearance, she stresses that both the age and height of a person is very subjective to the observer and the differences as those in the present case are really insignificant. While we are inclined to agree that age, and perhaps even height, may be subjective to the observer, we are of the view that the colour of the hair and the trousers that the appellant was described as wearing at the time of the assault and robbery were so seriously at odds with what he was in fact wearing at the time of his arrest minutes after the event that the

judge should not have left the case for the decision of the jury. Both PW1 and PW2 described the man C as having hair of two different colours, either golden or white and black during the assault starting at 9.15 pm, but when the appellant was intercepted at 9.27 pm by the police, his hair was entirely black. Also, PW2's description of the man C as wearing a pair of shorts, of length shortly above the knees, was greatly different from the full length blue jeans that the appellant was found wearing at the time of his interception. These were very significant discrepancies. Moreover, PW2's evidence was that he only saw C's frontal face when the 3 or 4 Nepalese came up to join in the assault of PW1 when they were about 8 metres away, and that during the whole of the subsequent course of the assault involving various persons' motions, PW2 was only able to see the right side of C's face. It is difficult in all the circumstances to accept that PW2 could have made a mistake in describing the colour of C's hair and the length of the trousers that C was wearing in PW2's statement given to the police on the night of 19 October 2004 when the offences were committed, but he could not have made a mistake in identifying the appellant at the identification parade on 25 October 2004. In our judgment, the discrepancies were so serious as to render the identification evidence of PW2 so unreliable that it was dangerous and might lead to a miscarriage of justice to leave the case against the appellant to be decided by the jury.

Conclusion

AUTONOMOUT In the circumstances, we have come to the conclusion that the judge erred in having ruled a case to answer against the appellant and left the case to the jury. The appellant should have been acquitted upon the conclusion of the prosecution's case. There can be no basis for a retrial because there is no possibility of the prosecution's case against the appellant being strengthened. Accordingly, we allow the appeal, quash the convictions and order the appellant to be discharged. (M Stuart-Moore) (K H Woo) (Robert Tang) Vice-President Vice-President Justice of Appeal Ms Louisa Lai, SGC of the Department of Justice, for the Respondent Ms Cecilia Liang, instructed by Messrs Joseph Li & Co, 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 &`#\$ PHbn ]85 q \M68 UiS< MyY?d @eqHt 1V1KD B!B` (~g| B!B` (~g 1V1K MyY? UiS< @eqH Lphr], ^ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=53556

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-limbu-risesh-2006-hksar-v-limbu-risesh>

Prepared on 28 October 2026 · Esheria