

HONG KONG / JUDGMENT

HKSAR v. LO KOK LEONG

COURT

Court of First Instance

DECIDED

13 February 2007

CASE / FILE NUMBER

HCMA167/2006

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

bjbj HCMA 167/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 167 OF 2006 (ON APPEAL FROM TWCC NO. 5 OF 2006)

BETWEEN HKSAR Respondent and Lo Kok Leong Appellant

Before: Deputy High Court Judge E Toh in Court Date of Hearing: 13 February 2007 Date of Judgment: 13 February 2007 Date of Reasons for Judgment: 16 April 2007

J U D G M E N T

The Appellant was convicted after trial of one count of possession of an offensive weapon contrary to section 33(1) of the Public Order Ordinance, Cap. 245. After considering reports, the learned Magistrate sentenced the Appellant to a detention centre. The Appellant appeals against his conviction and sentence and on the date of the hearing, his appeals were dismissed. Here below are the reasons. Prosecution s case The trial was heard in Cantonese but on the application of counsel for the Appellant, the appeal was heard in English. The prosecution s case was that a police officer on patrol stopped the Appellant when he saw that the Appellant was acting nervously. A search of the white bag carried by the Appellant contained a cutter. Under caution, the Appellant explained to the officer that he had quarrelled with others in Tsing Yi a few months before the interception and he had bought the cutter for self-defence. The Appellant was brought back to the police station. At trial, the Appellant had challenged the voluntariness of his admission, but after voire dire, his admission was ruled voluntarily and thus admitted into evidence. The Defendant elected to give evidence on the general issue, the Appellant s evidence was that the cutter belonged to his friend s girlfriend and he did not know how it had come to be in his bag because his friend s girlfriend had initially asked to put the cutter in his bag after using

it for her arts and crafts work. The Appellant at that time had refused her request. The learned Magistrate had rejected the Appellant's evidence and at the end of the day, accepted the evidence of the police officer and the veracity of the admission of the Appellant under caution and therefore found that at all material times the Appellant had the cutter in his possession for the purpose of self-defence. And therefore at the material time, the cutter was used as an offensive weapon and since the Appellant did not have any lawful authority to possess it and having the cutter for self-defence was not a reasonable excuse, the learned Magistrate therefore convicted the Appellant of the charge. Appeal The first ground of appeal argued by counsel for the Appellant, Mr Wong, is that the trial Magistrate had failed to consider that section 33(1) of the Possession of Offensive Weapon Ordinance which placed the burden of proof on the Appellant to excuse his possession of the cutter in a public place was incompatible with the presumption of innocence and the right to a fair trial. Section 33 reads:

- (1) Any person who, without lawful authority or reasonable excuse, has with him in any public place any offensive weapon shall be guilty of an offence and the statutory definition of offensive weapon is in section 2(1) of the same Ordinance which reads: offensive weapon means any article made, or adapted for use, or suitable, for causing injury to the person, or intended by the person having it in his possession or under his control for such use by him or by some other person. It is to be noted that the words or suitable had been decided by the Court of Appeal in the case of HKSAR v Chong Ah-Choy [1994] 3 HKC 68 as no longer applicable in Hong Kong. As Mr Shiu correctly pointed out the structure of the definition of offensive weapon covers two categories of articles. Articles that are made or adapted for causing injury to another person are offensive per se and those that are not are articles that could be offensive but whether they are or not depend solely on the intent of the accused. The question being: did he have it with him with the intention to use it to cause injury to some other person. That intention must be proved by the prosecution. In the case of Chong Ah-Choy, the Court of Appeal was dealing with section 17 of the Summary Offences Ordinance, Cap. 228. The Court found that there were two alternative bases of liability under that section: alleged accused had possessed the article for unlawful purposes and the second was possession where the accused is unable to give a satisfactory account of his possession. The Court found that the first basis was consistent with the Bill of Rights as the onus is on the prosecution to prove an unlawful purpose and prove it beyond reasonable doubt. But the second basis was inconsistent with article 11(1) of the Bill of Rights Ordinance. Section 33 of the Public Order Ordinance, Cap. 245 was discussed in the Chong Ah-Choy case and counsel in the appeal had contrasted it with section 17 of the Summary Offences Ordinance, Cap. 228. Mr Justice Bokhary (Justice of Appeal as he then was) referred to the statement of the law by Lawton LJ in Reg. v Edwards [1975] 1 QB 27 at pp 39 who said: this line of authority establishes that over the centuries, the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments

which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception. Bokhary JA after referring to the definition of offensive weapon given in section 2 of the Public Order Ordinance, Cap. 245 in comparison to the definition in the Prevention of Crime Act 1953 in England has this to say: If section 33 would come within the *Reg. v. Edwards* (supra) situation but for the inclusion of that formula in the legislative scheme in question, then it is not the whole of the scheme which is to be taken as having been Bill repealed, but only that formula. The result of that would be to leave the statutory definition of offensive weapon in this form: any article made, or adapted for use, for causing injury to the person, or intended by the person having it in his possession or under his control for such use by him or some other person. In practice, even such a reduced definition ought to afford adequate protection for the public. Therefore, Mr Shiu argued the present case involved a charge brought on the second basis, that is, the article was not offensive per se and the defendant's intention to have it to cause injury had to be proved beyond the reasonable doubt by the prosecution. There is no reverse onus on the accused to prove any element of the offence. Therefore, the Basic Law or Bill of Rights is not engaged in the present offence and it is the duty of the prosecution to prove all the elements of the charge beyond a reasonable doubt and that includes the mens rea of the offence. It is clear that the Appellant's argument that this Court should rely on the decision in *HKSAR v Lam Kwong Wai*, CACC No. 213 of 2003 is misconceived. As Mr Shiu pointed out that case went to all the way to the Court of Final Appeal as reported in 2006, 3 HKLRD 808. In the judgment of Sir Anthony Mason NPJ at page 829:

49. the English decisions *R v Matthews* [2003] 2 Cr App R 19 and *L v DPP* [2003] QB 137 are to be distinguished from the present case. There section 139 of the Criminal Justice Act provided for a reverse onus in relation to the offence of being in possession of a bladed knife in a public place. Here the offence of being in possession of an imitation firearm is not restricted as to place. It is an offence which can be committed anywhere. And whereas it may be said that being in possession of a bladed knife in a public place is naturally and rationally connected with the commission of an offence and a potential danger to the public peace, the same comment cannot be made with the same force about possession of an imitation firearm in a public place and even less so in private premises. I agree with Mr Shiu's submission that the Basic Law nor the Bill of Rights are not engaged in this case. Mr Wong in his second ground of appeal using a somewhat confusing and obscure phraseology appears to be complaining that the learned Magistrate was wrong to infer that the words of the Appellant under caution had meant that he had the knife with him for causing injury to another. Mr Wong seemed to be submitting that the learned Magistrate, relying on the words used by the Appellant after caution, could only reasonably infer a conditional intention on the part of the Appellant to use the said cutter to injure another. It is clear from

the learned Magistrate's findings that he accepted that the Appellant was telling the truth in his caution statement, that he had bought the cutter for self-defence because the Appellant explained he had quarrelled with someone in the past and he was fearful of revenge. So the learned Magistrate was entitled to draw the irresistible inference that the cutter was intended to be used for causing injury to another. As the Respondent submitted in the case of *R v Poon Sin-Bik* [1983] 2 HKC 207, the Court had considered the circumstances in which self-defence may be a reasonable excuse for possession of offensive weapon and the Court there held:

- (2) a person in immediate fear of attack might have a reasonable excuse for carrying offensive weapon if he did so in self-defence but there had to be an immediate and particular threat in the circumstances in which the weapon was carried. It was not a reasonable excuse to carry a weapon for use in self-defence to resist an attack which was no more than a contingency. There must be circumstances revealing a near certainty of an attack. The learned Magistrate was therefore entitled to find that the Appellant had no reasonable excuse for possession of the weapon for self-defence because there was no imminent danger of an attack and therefore the learned Magistrate could draw the reasonable inference from the Defendant's caution statement that he intended to use the cutter to cause injury to another should the occasion arise because he was in fear of an attack. I find no merit therefore in the appeal and the appeal against conviction is dismissed. Mr Wong also appealed against the sentence of the Defendant to a detention centre on the ground that since the last adjournment of the appeal he had reformed himself and because of that reformation the detention centre sentence was too harsh. This was a totally misconceived ground of appeal against sentence and I find that the sentence by the learned Magistrate, after relevant reports were called for, was reasonable in the circumstances and I also dismiss the appeal against sentence. (E Toh) Deputy High Court Judge Mr Gavin Shiu, SADPP, leading Ms Laura Ng, GC, for Respondent Mr Philip Wong, instructed by Messrs Chong, Fu & Co, for the Appellant
- PAGE - 1udk 1udk H
I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V i\$&'G hcma.dot setup
Microsoft Word 9.0 Judiciary Hong Kong 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=56738

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-lo-kok-leong-2007>

Prepared on 28 October 2026 · Esheria