

HONG KONG / JUDGMENT

HKSAR v. LUI CHO YIU

COURT

Court of Appeal

DECIDED

17 December 1998

CASE / FILE NUMBER

CACC363/1998

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bjbj IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL 1998, No. 363 (Criminal) BETWEEN HKSAR Respondent and LUI CHO YIU Applicant

Coram: Hon. Power, V.-P., Leong and Stuart-Moore, JJ.A. in Court Date of hearing: 17th December 1998 Date of delivery of judgment: 17th December 1998

J U D G M E N T

Leong, J.A. (giving the judgment of the Court): The applicant was convicted in the District Court before Judge Longley of one count of attempted burglary and two counts of assaulting a police officer in due execution of his duty. He was sentenced to 2 1/2 years imprisonment for the attempted burglary and 3 months consecutive on each of the assault charges, making a total of 3 years imprisonment. He now applies for leave to appeal against conviction. In his first ground of appeal, the applicant complained that the District Judge favoured the police and did not consider his cautioned statements. He also complained that the judge had suggested to the prosecution to call further witnesses without prior notification to his lawyer. The second ground is that the police officers discussed among themselves first before they wrote their statements. He was not cautioned before he gave his own statements. The third ground is that the paint fragment on the screwdriver was not 100% the same as that on the iron gate and the judge did not consider this point. The final ground is that the judge did not take into account his injury was far more serious than the officers and the judge was partial towards the witnesses and was not fair. Before this court he made a further point that the two charges of assault were laid by the prosecutor because of his complaint to CAPO to protect the police. The prosecution evidence is this. Shortly after 5:30 a.m. on the 25th February 1998, three police officers PW1, 2 and 5 were on foot patrol. When they were at the junction of Tung Choi Street and Nelson Street, they saw the applicant standing in front of a tea shop facing the metal gate and looking from side to side. They heard the sound of prising something coming from the direction of the applicant. PW1 went up to behind the

applicant and he saw the applicant was holding in each hand a screwdriver which had been inserted into the gap between the iron gate and the door frame. PW1 put his hand on the applicant's shoulder and said, Police! What are you doing here? The applicant then attempted to flee but PW1 put his arms round the applicant and told him he was under arrest. The applicant dropped the screwdrivers to the ground and swung PW1 around and throwing PW1 against the gate, injured his little finger. The applicant then ran but PW2 caught up with him and pushed him to the ground. As PW2 was about to subdue him, the applicant kicked PW2 on the face. The applicant was eventually subdued with the assistance of other police officers. The applicant was searched by PW5 and a torch and a pair of gloves were found on him. The screwdrivers he dropped were recovered. Paint fragments recovered from the tip of one of the screwdrivers were found to match the paint on the gate of the tea shop. It was an admitted fact that the applicant had not been given permission to enter the shop or to prise open the gate. The applicant was interviewed after his arrest. In the interviews he denied that he had tried to prise open the gate. He also denied that he had assaulted the police officers. He explained that the screwdrivers, torch and gloves were his tools of trade and at the time the police officers saw him he had just picked up the screwdrivers that he had dropped when he was looking for money in his back pack. The applicant did not give evidence. The District Judge accepted the evidence of the police officers. He said in his reasons for verdict that even if the evidence of the analysis of the paint samples had not been adduced, he would still have accepted PW1's evidence. He found the attempted burglary proved. He also found the assault charges proved. The contents of two records of interview of the applicant were admitted into evidence at the request of the applicant and with the consent of the prosecution. The judge had in his reasons for verdict referred to their contents which appeared to be the applicant's defence. When assessing the evidence, the judge said that there was nothing in the two records of interview that led him to doubt the veracity of the evidence of the police officers. Thus, the judge had fully considered the applicant's statements. As regards the calling of further witnesses, the applicant had not been able to show how that actually occurred and had prejudiced his case. The first ground must fail. As regards the second complaint, the police officers admitted in evidence that their statements were made after a discussion. The evidence is that they sat together in the same room when they made their respective statements but they did not actually discuss as to what should be put in the statement. They had only sat together to verify among themselves the accuracy of the time and location of the incident. Their evidence was accepted by the judge. Both records of interview commenced with a preamble. This recorded the caution usually administered to an arrested person and that it had been administered to the applicant. The applicant had signed to indicate that he understood the caution and was willing to answer question. The records were adduced in evidence at his own request. The complaint in ground two is therefore totally unfounded. On the third ground, it is an admitted fact that the paint on the screwdriver matched the paint from the shutter and could have come from the same source. In relation to this, the judge said I would only add that insofar as the evidence of the analysis of the paint is concerned, the chances of the tip of one of the screwdrivers being contaminated by paint similar to that on the shutter as it lay on the ground outside the shop is so remote that I believe it can be discounted. The judge had thus considered the issue carefully and his conclusion that the screwdriver had been used to prise open the metal

gate is not open to doubt. On the final ground, there was undisputed evidence that the applicant was found to have injuries on his body when he was examined in the Queen Elizabeth Hospital after his arrest and when he was admitted to the Lai Chi Kok Reception Centre. The judge referred to these injuries in his reasons for verdict. But he discounted the suggestion that these were caused by the officers assaulting the applicant. He did not find anything inherently unlikely that the applicant suffered those injuries when he was trying to escape and when he was stopped and eventually subdued by the police officers. He found PW1 was injured by the applicant when he threw PW1 against the iron gate. He also found the applicant had kicked PW2 on the face. These are findings of fact after he had considered the evidence of the injuries of the applicant and the police officers. This conclusion is not open to challenge. As to the other matters raised by the applicant this morning, we see no merit in them and they are of no substance to the appeal. On the evidence the judge was entitled to find all the three charges proved beyond reasonable doubt and to convict the applicant. The application for leave to appeal is dismissed. (N.P. Power) Vice-President (Arthur Leong) Justice of Appeal (M. Stuart-Moore) Justice of Appeal Mr. Albert Wong, S.G.C. (D.P.P.) for Respondent Lui Cho-yiu, Applicant in person - PAGE - @\\SSLAI\\HP LaserJet 4 Plus Ne02: winspool HP LaserJet 4 Plus \\SSLAI\\HP LaserJet 4 Plus \\SSLAI\\HP LaserJet 4 Plus IN THE COURT OF APPEAL user Normal Microsoft Word 8.0 user IN THE COURT OF APPEAL Title _PID_GUID Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 29 October 2026 · Esheria