

HONG KONG / JUDGMENT

HKSAR v. MAHMOOD AZHAR

COURT

Court of Appeal

DECIDED

5 August 2016

CASE / FILE NUMBER

CACC45/2016

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bjbj cacc 45/2016 in the high court of the hong kong special administrative region court of appeal criminal appeal no. 45 of 2016 (on appeal from DCCC NO. 800 of 2015) BETWEEN HKSAR Respondent Mahmood Azhar Applicant Before: Hon Macrae JA in Court Date of Hearing: 5 August 2016 Date of Judgment: 5 August 2016 J U D G M E N T The applicant pleaded not guilty to a single charge of burglary, contrary to section 11(1)(b) and (4) of the Theft Ordinance, Cap

210. On 28 January 2016, following a trial before HH Judge Woodcock (the judge) in the District Court, the applicant was convicted as charged and, on the same day, sentenced to 2 years imprisonment. On 16 February 2016, a Notice of application for leave to appeal (Form XI) was filed by the applicant. He now seeks leave in person to appeal against both his conviction and sentence. The prosecution case It was alleged that at about 3:30 am on 27 July 2015, the applicant broke into shop premises situated at No. 430 Portland Street, Mongkok, Kowloon (the Shop) through the front entrance. There the applicant stole a trolley, a bag and 11 rolls of electrical wire, before exiting the Shop through its rear door. The applicant was thereafter seen by PW1, a police officer on patrol in the area, pushing the trolley with the stolen rolls of wire to a nearby recycling shop. PW1 testified that she kept a close observation on the applicant, since she found it suspicious that he would be pushing a trolley of this type of goods around the streets at 4 clock in the morning. Accordingly, she followed the applicant and saw him bang on the metal roller shutter of a shop, which she described as a recycling shop. A woman opened the roller shutter and the applicant went inside with the trolley. The lights were on and PW1 was able to see into the shop. She saw the applicant sit down; she was positive that it was the same man with the trolley that she had earlier followed. PW1 was able to describe the applicant s appearance and clothing in considerable detail. She saw that the applicant sold everything on the trolley to the lady in the recycling shop for HK\$500. When the applicant left the recycling shop, he was intercepted by PW1 and her colleagues, including PW6, outside a park by the flyover in Tung Chau Street. Upon enquiry, the applicant said he had just been to the recycling shop to sell some metal. Upon search, a HK\$500 bank note with other papers was found in the applicant s pocket. The police officers then escorted the applicant back to the recycling shop where PW2, the owner of the recycling shop, confirmed in the applicant s presence that he was the

person who had sold her the items earlier on and that she had given him HK\$500 in exchange. PW2 said the applicant had come to her shop and told her that the items were leftovers and that he wanted to sell them. The applicant was arrested and brought back to the police station. At trial, PW2 was unable to identify the applicant. Later, PW3, a renovation contractor of the Shop reported a burglary and, later at the police station, identified the items the applicant had sold to the recycling shop as his belongings. The defence case The applicant elected not to give evidence and the Defence did not call any witnesses to testify. Much of the prosecution s evidence was not challenged by the Defence. However, the Defence took issue with the identification of the applicant, suggesting that the applicant was not the male who broke into the Shop and later sold some items belonging to PW3 to the recycling shop. Reasons for verdict The judge having carefully considered the evidence presented at trial, as well as the submissions made on behalf of the applicant, found no discrepancies significant enough for her to doubt the evidence of PW1 and PW6. The judge accepted their evidence in its entirety. Moreover, the judge was satisfied that PW1 s description and identification of the applicant as the male she followed was reliable, accurate and truthful. The judge also found that the CCTV footage taken from a shop next to No. 430 Portland Street and one at the rear lane had strengthened PW1 s evidence considerably. The applicant was seen entering the Shop, from which he emerged with stolen items, and immediately proceeding to the recycling shop to sell the items. The applicant was effectively caught red-handed and the evidence against him was described by the judge as overwhelming . Mitigation The applicant was 34 years of age at the time of his sentence. He was originally from Pakistan and had come to Hong Kong in 2007. He is an asylum seeker. He had three previous convictions, including two for theft. He was married in 2012 to a woman from the Mainland who holds a two-way permit for Hong Kong. He was said by counsel to live intermittently with his wife. The couple had a 12 year-old step-daughter, who was living in an orphanage at the time of the applicant s sentence. Counsel for the applicant at trial submitted that the offence could be characterised as a non-domestic burglary, with no attendant aggravating features. The stolen goods were of modest value. Furthermore, the applicant did not use any force to break into the Shop, hence no damage was caused to the property. In the absence of any aggravating features to the offence, the court was invited to pass a lenient sentence. Reasons for sentence The judge accepted that it was a burglary of non-domestic premises. As such, and in the absence of aggravating features, she considered that the starting point should be 2 years imprisonment. Although the judge was of the view that the applicant, by committing the offence as an asylum seeker, had abused the hospitality of the people of Hong Kong, she decided not to enhance the starting point for this factor. She further determined that there was no mitigation justifying any reduction of the starting point. Accordingly, the applicant was sentenced to 2 years imprisonment. Grounds of appeal against conviction In his initial ground of appeal attached to his Form XI, the applicant maintained that he was not the person captured on the CCTV footage, and that the true culprit happened to be wearing something similar to what he was wearing at the time of his arrest. In a further letter dated 20 June 2016, the applicant said he did not break into the Shop, the door was already open. Therefore, the offence should have been theft ,

and not robbery (sic). Grounds of appeal against sentence With regard to sentence, the applicant complained that 2 years imprisonment was too severe for a first offender. He asserted that other similar cases have been dealt with more leniently. He also suggested that his sentence should be for theft not robbery (sic). Respondent's submissions Ms Denise Chan ADPP (Ag), on behalf of the respondent, submits that the judge had thoroughly considered the evidence placed before her and the submissions made on behalf of the applicant. The judge had considered and found PW1's evidence to be reliable, accurate and truthful. She had also considered the CCTV footage, which was shown in open court during the trial, and the photograph album which contained still images taken from the CCTV footage; and found that the applicant was the burglar who had been captured on CCTV and followed by PW1. Contrary to what the applicant claimed in his home-made grounds attached to his Form XI, the photographs revealed clear images of the applicant. The respondent submits that the judge did not fall into any error of law or fact in reaching her verdict. The evidence was indeed overwhelming and leave to appeal against conviction should be refused. In respect of sentence, Ms Chan submits that the starting point adopted by the judge was in line with the guidelines for cases of this nature: see HKSAR v Sim Ka Wing (unrep., CACC 450/2000, 30 May 2001). Although the judge would have been entitled to increase the starting point by virtue of the applicant's status as an asylum seeker who had committed a serious criminal offence, she did not enhance the sentence. Hence, there could be no conceivable complaint about the sentence and the application for leave to appeal against sentence should likewise be refused. Consideration I would agree that the evidence in this case does appear to have been overwhelming. Indeed, as the judge put it, the applicant is literally filmed committing this offence. The applicant can hardly complain now if the judge drew obvious conclusions and inferences from that evidence without the benefit of any testimony from him to undermine, contradict or explain that evidence. I can see no conceivable ground of appeal against conviction in this matter. As for sentence, the judge did not enhance the starting point because of the applicant's status in Hong Kong. There was no warrant for any reduction of sentence in this case, given that the applicant had pleaded not guilty and been found guilty after trial. The sentence passed cannot be said to be manifestly excessive and I can see no reasonably arguable ground of appeal against sentence. The applications for leave to appeal against conviction and sentence are accordingly refused. In view of the overwhelming nature of the evidence in this case, and the fact that the sentence of 2 years imprisonment is the appropriate sentence for non-domestic burglary under long-established guidelines, I should give the applicant this specific warning so that he may carefully weigh his options. He has the right to renew his application for leave to appeal against conviction and/or sentence to the Court of Appeal. However, he should be warned very clearly of the consequences of so doing, which consequences may include a direction for any loss of time spent in custody pending his appeal, if the Court of Appeal were to come to the view that there was no justification for the renewal of his application. (Andrew Macrae) Justice of Appeal Ms Denise Chan ADPP (Ag), of the Department of Justice, for the Respondent The Applicant appeared in person Appeal Bundle, p 21M. PAGE - A B C D E F G 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

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