

HONG KONG / JUDGMENT

HKSAR v. MAK CHI HO

COURT

Court of Appeal

DECIDED

3 July 2008

CASE / FILE NUMBER

CACC290/2007

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bjbj efore: Hon Stuart-Moore VP and Beeson J in Court Date of Hearing: 3 July 2008 Date of Judgment: 3 July 2008

J U D G M E N T

Beeson J (giving the Judgment of the Court): The Applicant pleaded guilty to one count of robbery and one count of attempted robbery. The offences, which targeted convenience stores, were committed one after the other on the same day. The applicant was sentenced by Recorder J. Leong SC, from a starting point of 10 years, to 6 years imprisonment on each count. The Recorder ordered that 3 years of the sentence on Count 2 be served consecutively to the sentence on Count 1 making a total sentence of 10 years imprisonment. The applicant now seeks leave to appeal against sentence. It was argued that the sentences for both offences should have been made entirely concurrent (Ground 1); that the starting point was too high (Ground 2) and that insufficient weight was given to his remorse (Ground 3). These offences were committed by the applicant acting alone in the early hours of the morning. He carried a convincing imitation firearm and in each instance used it to point at counter staff when declaring robbery and demanding money. At the time of the robberies there were 2 female staff on duty in each store. In the first robbery the female staff member at the counter appears to have been so scared that she was unable to comply with the applicant's demand for cash and the applicant left empty-handed. In the second robbery the staff member at the counter responded to the applicant's demand by taking out all the money from the cash register, putting it in a paper bag and giving it to the applicant who then left. The staff in each shop raised the alarm and the applicant was caught in the vicinity soon afterwards. A search revealed an imitation Glock pistol in his bag. In a subsequent video interview the applicant claimed he was committing the robberies to pay his rent. He had purchased the pistol 3-4 years earlier. Ballistics evidence showed that the gun could fire plastic balls only and was not a firearm as defined in the Firearms and Ammunition Ordinance, Cap. 238. When sentencing the Recorder took into account a number of factors;

- (1) the offences were committed very close together;
 - (2) an imitation firearm was used which caused fear;
 - (3) in each case the weapon was not just carried but was pointed at staff;
 - (4) there should be no distinction between the 2 offences for sentencing purposes;
 - (5) the applicant had admitted the offences almost immediately; had pleaded guilty and had indicated remorse;
 - (6) the applicant had a criminal record dating from 1987 and the similar offences thereon had been committed in 1987 and 1988. The Recorder commented that the court had to look not only at the sentences applicable to each of the counts but also at totality and the effect of that overall. She noted the cases of *R v. Yiu Tai-wing* [1995] 2 HKCLR 119; *Li Man-biu & others* CAAR 4/2000; *Chow Tat Hi Peter* CACC 60/2005 and *Huang Jian-feng* CACC 145/2006 and assessed the appropriate starting point as 10 years for each count. On Ground 1 the Recorder considered counsel's submission on behalf of the applicant that the two offences should be treated as a single enterprise but rejected it, taking the view that each was a separate and distinct offence, each deliberately committed. However she refrained from making the sentences wholly consecutive, recognising that that would make the overall totality too high. Accordingly she ordered 3 years of the second sentence to run consecutively to the sentence on the first count. We are satisfied that the Recorder imposed proper sentences for each offence. Here the robberies were separate ventures, albeit closely linked by time and venue. They did not come into the one transaction category. The Recorder took all relevant matters into consideration and the resulting sentences cannot be faulted. As for Ground 2, there is no substance in the submission advanced on behalf of the applicant that the Recorder misunderstood the relevant sentencing principles, or that she misapplied *R v. Yu Tai-wing* (supra). This ground must fail. Ground 3 suggests that the Recorder somehow failed to note adequately the applicant's remorse. This ignores the Recorder's specific reference in her Reasons for Sentence to that remorse and to other matters personal to the applicant. The only significant mitigation however was the applicant's plea which reflected his remorse and was properly recognised in the sentence. The applicant has not shown that the Recorder erred in imposing these sentences which overall are neither wrong in principle nor manifestly excessive. This application is dismissed. (M. Stuart-Moore) (C-M Beeson) Vice-President Judge of the Court of First Instance High Court Mr Wong Hay Yiu, instructed by Legal Aid Department, assigned by DLA, for the Applicant Mr Robert S K Lee, SC, DDPP (Ag) and Ms Olivia Tsang, SGC (Ag), of Department of Justice, for the Respondent
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