

HONG KONG / JUDGMENT

HKSAR v. MOHAMMAD AZAM

COURT

Court of Appeal

DECIDED

18 May 2007

CASE / FILE NUMBER

CACC55/2006

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bjbj CACC55/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 55 OF 2006 (ON APPEAL FROM DCCC 903 OF 2005)

BETWEEN HKSAR Respondent and (D1) MOHAMMAD AZAM Applicant

Before : Hon Stock JA, Burrell and McMahon JJ in Court Date of Hearing : 20 April 2007 Date of Judgment : 20 April 2007 Date of Reasons for Judgment : 18 May 2007

REASONS FOR JUDGMENT

Hon McMahon J (giving the judgment of the Court) AUTONUMOUT The unrepresented applicant sought to renew his applications for leave to appeal against both his convictions and sentence after those applications had been refused by Woo VP on the 1 August 2006. Having heard his applications we dismissed them and we now give our reasons. AUTONUMOUT The applicant was convicted after trial before Deputy Judge Johnny Chan in the District Court of three offences, namely, robbery, blackmail and claiming to be a member of a triad society. He was sentenced to 2 years imprisonment for the robbery offence; to 18 months imprisonment for the blackmail offence and to 12 months imprisonment for the offence of claiming to be a member of a triad society. The judge ordered that the sentences for the blackmail and triad offences be served concurrently with each other, but that six months of those sentences be served consecutively to the 2 years imprisonment imposed in respect of the robbery offence. That resulted in a total sentence of 3 years imprisonment. AUTONUMOUT The prosecution case at trial was that on 30 September 2004 at about 8:45 p.m. the victim of these offences, who became PW1 at trial, was in the vicinity of the Tung Chung ferry pier on his way home when he was intercepted by the applicant and three other men. The applicant introduced himself to PW1 as being Azam from the

area of Yat Tung Tsuen and said he was one of the big persons in the area and was of the 14K . This constituted the offence of claiming to be a member of a triad society. AUTONUMOUT The applicant, presumably to make his point, then grabbed PW1 by the collar, punched him on the neck and slapped him on the face. He then took the wallet of PW1 and removed \$1,100 from it before returning the wallet to PW1. These facts constituted the offence of robbery.

AUTONUMOUT The applicant then reminded PW1 that he was one of the big persons in the area and said that as PW1 walked along that roadway every day he would have to pay the applicant \$1,500 every month or else the applicant would kill him. This grounded the blackmail offence.

AUTONUMOUT PW1 was understandably frightened by all this and agreed to the applicant s demand. The applicant and those with him then left by motor vehicle. PW1 memorised that vehicle s registration number and reported the whole matter to the police. The applicant was subsequently arrested and identified by PW1 at an identification parade. AUTONUMOUT The applicant was represented by a solicitor at trial. He did not give evidence and the defence case relied upon various attacks on the credibility of PW1. The applicant s solicitor concentrated on inconsistencies between the police witness statement of PW1 and his evidence in court and inconsistencies within the evidence of PW1 during the trial. Conviction AUTONUMOUT The grounds of appeal against conviction put forward by the applicant, who appears before this court in person, can be summarised as follows :-

- (1) the judge should have found at the end of the prosecution evidence that the applicant had no case to answer;
 - (2) PW1 s evidence was insufficiently reliable to found a conviction; and
 - (3) the acquittal of the 2nd defendant at trial (D2) was inconsistent with the conviction of the applicant. AUTONUMOUT As an initial matter the applicant sought to adduce before us fresh evidence from two alibi witnesses, Mr Salim Hussain and Mr Mohammad Imran. There had been no attempt made by the applicant to call these witnesses at his trial though a notice of alibi had apparently been served. He said that his solicitor at trial decided not to call these witnesses and consequently no witness statements were taken from them and none were relied upon before us. He did not allege any negligence or incompetence on the part of his solicitor. The witnesses according to the applicant were available to be called at his trial if they had been required. AUTONUMOUT This fell a long way short of triggering this court s discretion to order the calling of evidence pursuant to section 83V(1) of the Criminal Procedure Ordinance, Cap.
221. No sufficient explanation was provided to this court for the failure to adduce that evidence at the applicant s trial and we rejected the application. AUTONUMOUT We return to his grounds of appeal. Ground 1 and Ground AUTONUMOUT These two grounds can be conveniently dealt with together as both revolve around the credibility of PW1. The substance of the no case submission made on behalf of the applicant by his solicitor was that the prosecution case against the applicant entirely depended upon the credibility of PW1 and that as PW1 s evidence contained significant contradictions and inconsistencies it was insufficiently reliable to allow the trial to continue. AUTONUMOUT In this regard the

ultimate issue at trial also was the reliability of PW1 as a witness. There was no other evidence apart from that of PW1 adduced against the applicant on any of the three charges he faced. As the judge said in his reasons for verdict ... The decision of the defendants not to give evidence and not to call witnesses only leaves the prosecution case enjoying the advantage of not being undermined, contradicted or explained by any testimony from the defendants. ... The prosecution case stands or falls on the evidence of PW1. Thus, the credibility and reliability of PW1's evidence are of crucial importance. ... AUTONUMOUT

The primary challenges to PW1's evidence were firstly that he, in his witness statement made to the police, had said that he had been assaulted by the applicant before he had been spoken to. In his evidence chief he said he had initially been spoken to by the applicant and then had been assaulted. In cross examination he explained this inconsistency by saying the assault was more or less contemporaneous with the words spoken to him by the applicant, and that the applicant had been speaking to him both before and after the assault.

AUTONUMOUT In that regard the judge's findings were as follows. He said ... I do not consider the discrepancy between PW1's evidence in court and what he told the police in his statement as to whether he was spoken to first before he was assaulted by Azam or that he was assaulted by Azam first before the latter spoke to him as material. The evidence of PW1 is very clear. D1 had been talking throughout the incident. He spoke to PW1 first. He then assaulted PW1 and then there was further talking by D1 after the assault. ... AUTONUMOUT

The judge was entitled to come to this conclusion. The events described by PW1 were no doubt frightening and disorientating. Common sense and experience dictate that the precise order of events in circumstances such as these may very frequently be the subject of understandable confusion in an honest witness's mind and no criticism can be made of the judge rejecting the assertion that this inconsistency undermined the credibility of PW1.

AUTONUMOUT Secondly, PW1 in his police witness statement had said when the applicant and his associates left the scene, the applicant had driven the vehicle. In his evidence he firstly said D2 drove the vehicle, and then when this inconsistency was pointed out to him, he said he had forgotten who had driven the vehicle from the scene. The incident had taken place over a year before PW1 gave his evidence. The judge accepted that he had in fact at the time of giving his evidence simply forgotten whether it was the applicant or D2 who had driven the vehicle when they left and no criticism can be made of that finding.

AUTONUMOUT A further inconsistency within PW1's evidence relied upon by the applicant concerned PW1 initially denying he had ever been in trouble with the police, but subsequently admitting he had been jailed some years previously for assaulting his girlfriend. AUTONUMOUT

That evidence went in this way Q. Well, let me approach this a different way. You've had dealing with the police before, haven't you? A. Like what? Q. Well, have you ever been in trouble with the police? A. No. Q. Now, that's not true, is it? A. I don't understand. What is trouble? Q. Yes, you understand, you've just denied it. Have you ever had trouble with the police before? COURT: You mean a conviction? MR PICKAVANT: Yes. I'm trying to phrase it like a gentleman but he's not having it. COURT: Put it straight whether he had a criminal conviction because it may not involve the police for these matters. MR PICKAVANT: Very well, as you wish. Q. You've got a conviction, haven't you? A. Only once I

had a quarrel with my girlfriend, common assault case, two years ago. Q. Yes, but you went to prison, didn't you? A. No, under remand custody. Q. You received 14 days in prison for an assault, didn't you? A. Yes; yes. I fought with my... Q. So you're quite -- do you have a temper? Are you a violent man? A. No. AUTONUMOUT The judge, while taking into account PW1's evidence that he had been convicted of an offence of violence, nevertheless concluded that the contradiction, if that is what it was, contained in the above passage of PW1's evidence did not undermine his credibility. He was entitled to do so. AUTONUMOUT The final salient feature of PW1's evidence relied upon by the applicant concerned whether or not PW1 had been in the area near Tung Chung Pier where the offences occurred for some time prior to these events, or in fact had been on his way home from work as he alleged. Considerable effort in cross examination was spent trying to determine whether PW1 being in that area at the time of the offence, i.e. 8:45 p.m., was consistent with him leaving his workplace near the location of the big Buddha on Lantau Island at 6:00 p.m. AUTONUMOUT The judge addressed the matter as follows PW1 also gave an account of what he did after he had finished work at 6 pm on the day in question, the work in Tung Chung where the big Buddha is. After work, he had to walk to the bus stop which took him 15 minutes, and he had to wait for the bus which took him 15 to 20 minutes. The bus journey from Tung Chung to the ferry pier took one and a half hours. It appears to me that PW1 was only giving us an estimate of the time spent in travelling based on his daily pattern and experience. I accept his evidence that he was not lingering in the area for an excessive period of time. ... AUTONUMOUT The judge's findings in this regard are consistent with the evidence before him and there was no substance to this final complaint concerning the first two grounds. Ground AUTONUMOUT The applicant suggested his convictions were inconsistent with the acquittal of D2. There is no merit whatsoever in this assertion. D2 was acquitted because even though PW1 had picked him out at an identification parade, the descriptions PW1 had given to the police, on the day of the offences, of the persons who were with the applicant did not match the appearance of D2. It was that simple fact which caused the judge to have a reasonable doubt about the guilt of D2. This issue concerning D2 in no way impinged upon the prosecution's case against the applicant. AUTONUMOUT This final ground also had no merit and for these reasons we dismissed the application for leave to appeal against conviction. Sentence AUTONUMOUT The applicant simply complained that his sentence was too severe. AUTONUMOUT He received a totality of 3 years imprisonment for a brazen robbery in the company of others which involved violence and assertions of him being a triad together with a blackmail demand. AUTONUMOUT The sentences imposed in respect of the individual offences could not on any footing be described as excessive, nor could the totality of sentence, and the application for leave to appeal against sentence was dismissed for that reason. (Frank Stock) Justice of Appeal (M.P. Burrell) Judge of the Court of First Instance (M.A. McMahon) Judge of the Court of First Instance Mr Simon Tam, SGC of the Department of Justice

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