

HONG KONG / JUDGMENT

HKSAR v. MUHAMMAD HAJI AND OTHERS

COURT

Court of Appeal

DECIDED

25 June 2007

CASE / FILE NUMBER

CACC125/2003

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bjbj CACC125/2003 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CRIMINAL APPEAL NO. 125 OF 2003 (ON APPEAL FROM HCCC 160
OF 2002)

BETWEEN HKSAR Respondent and MuHAMMAD HAJI (D1) 1st Applicant MUHAMMAD RIAZ
KHAN (D2) 2nd Applicant MUHAMMAD SALEEM MAIN KHAN (D3) 3rd Applicant

Before : Hon Stuart Moore VP, Stock JA and McMahon J in Court Date of Hearing : 22 May2007
Date of Judgment : 22 May 2007 Date of Reasons for Judgment : 25 June 2007

REASONS FOR JUDGMENT

McMahon J (giving the judgment of the Court) : AUTONUMOUT The applicants were each
unanimously convicted after a trial in March 2003 before Deputy High Court Judge Line and a
jury of an offence of conspiracy to traffic in dangerous drugs contrary to section 4(1)(a) and

(3) of the Dangerous Drugs Ordinance, Cap. 134 (the Ordinance) and sections 159A and 159C of
the Crimes Ordinance, Cap.

200. The drugs involved comprised 1.9 kilograms of heroin. Each applicant was sentenced to 24
years imprisonment. AUTONUMOUT The 1st and 3rd applicants (who we shall refer to as
and) sought leave to appeal both their convictions and their sentences. The 2nd applicant
(who we shall refer to as) sought leave to appeal his conviction only. Each was
unrepresented before us, but represented at trial. AUTONUMOUT On 22 May 2007 we
granted leave to D1 and D3 to appeal their convictions, treated the hearing as their appeals,

allowed their appeals and ordered that both be retried. We dismissed the application of D2. We said we would give our reasons for those orders in due course and now do so. The prosecution case AUTONUMOUT The prosecution alleged a joint enterprise wherein D1, D2 and D3 had dealings with a person () they believed represented the eventual buyer of a consignment of heroin but who was in fact an undercover agent of the Drug Enforcement Agency of the United States Government. A meeting between D1, D2 and PW1 in PW1 s room at the Regal Airport Hotel was recorded and provided strong evidence of the intentions of D1 and D2 to supply drugs at a certain price to PW1. AUTONUMOUT On the day following that meeting, various Hong Kong customs officers, who subsequently gave evidence at trial, observed D1, D2 and D3 going together by bus to Hong Kong International Airport, taking with them a grey suitcase which was in the physical possession at various times of D1 and D3. AUTONUMOUT Once at the airport D2 and D3 went to the lobby of the Regal Airport Hotel and one or the other of them asked for PW1 and later for a person Morocone, who they thought PW1 represented, at the reception desk. Whoever of D2 or D3 made these enquiries was told that those persons were not registered as guests and both D2 and D3 then returned to the departure hall where D1 had remained with the suitcase. There they were all three arrested by customs officers. Subsequently the suitcase was searched and the drugs particularised in the indictment were found hidden inside its interior lining. All three in their cases at trial denied knowledge of the drugs in the suitcase. Only D2, however, gave evidence. He said he thought the dealings with PW1 involved the sale of gemstones by his boss D1. The position of D1 and D3 AUTONUMOUT At trial the judge directed the jury that in respect of both D1 and D3 the provisions of section 47 of the Ordinance applied so as to place a persuasive burden upon each to rebut the presumptions arising under the provisions of that section. No criticism attaches to the trial judge in doing so, for the direction he gave complied with the then current understanding of the operation and effect of the provisions of section

47. That the direction was wrong in placing a persuasive burden of proof upon each of D1 and D3 subsequently became plain from the decision in HKSAR v. Hung Chan Wa [2006] 3 HKLRD
841. In view of that judgment Mr Leung for the respondent conceded that the conviction of D3 could not stand, but argued that the proviso to section 83 of the Criminal Procedure Ordinance, Cap. 221, allowed the conviction of D1 to be maintained because of the strength of the evidence against him. That evidence included the evidence of what was said at the meeting in PW1 s hotel room at which D1 was present. AUTONUMOUT In our view both convictions had to be set aside. The imposition of a reverse onus of proof, in respect of an element of an offence, upon a defendant at trial, when none should have been imposed, is a most serious matter and it is only in the clearest case, that is, where a jury properly directed would have inevitably come to the same conclusion, or would no doubt have nevertheless convicted, that the proviso can be applied. In the present case we were unable to say that the jury s decision would inevitably have been the same had the jury been properly directed and we declined to apply the proviso in respect of D1. AUTONUMOUT In the result we made the

orders concerning D1 and D3 we have set out above. The position of D2 AUTONUMOUT The trial judge quite specifically instructed the jury that the direction he gave them as to the presumptions arising under section 47 of the Ordinance applied only to D1 and D3, but not to D2. That no doubt was because there was no substantial evidence that D2 had ever been in physical possession of the suitcase. The judge directed the jury also that the cases of each had to be considered separately. We were satisfied in those circumstances that the misdirections as to the reverse onus of proof applying to D1 and D3 would not have overflowed into and adversely affected the case of D2. AUTONUMOUT We turned then to consider his grounds of appeal as advanced before us. Those grounds were homemade but can be best summarized as follows :

- (1) that the judge factually misdirected the jury as to an aspect of the surveillance evidence called at the trial;
- (2) that the judge failed to deal properly with evidence given by the customs surveillance officers which was inconsistent with the officers witness statements, and that D2 s counsel was incompetent in not cross-examining those witnesses on the inconsistencies;
- (3) that the judge factually misdirected the jury that a note with the hotel room number of PW1 was found on D2;
- (4) that the recording of D1 and D2 s conversation with PW1 in the hotel room breached D2 s right to privacy guaranteed by Article 14 of the Bill of Rights;
- (5) that D2 was not informed promptly of the nature of the charge against him; and
- (6) that counsel representing all three of D1, D2 and D3 at trial was subject to a conflict of interest in doing so, and D2 should have been provided with separate representation.

Grounds 1 and 3 AUTONUMOUT These two grounds can be conveniently dealt with together as they concern the judge s alleged misdirections as to the evidence at trial. AUTONUMOUT The first misdirection complained of is that the judge in summing up the evidence of PW2, a customs officer who had conducted surveillance of D2, wrongly told the jury that on the morning of 30 November 2001, before D1, D2 and D3, together with the suitcase containing drugs, went by bus to the Regal Airport Hotel, PW2 had seen D2 (rather than, correctly, D1) go up to the 3rd floor of the Imperial Hotel in Nathan Road in Kowloon where D3 was staying, and then leave shortly before D3 came downstairs with the grey suitcase and joined D1 and D2 at a bus stop opposite the hotel. AUTONUMOUT It was accepted by Mr Leung for the respondent that this direction was factually wrong. But he argued that it was an immaterial error against the background of the evidence in the case as a whole, as it was common ground that D2 and D3 had arrived in Hong Kong on the same aeroplane and were due to return to Pakistan on the same flights on 2 December 2001; that all three of D1, D2 and D3 were together at the bus stop; that all three caught the same bus to the airport and that, once there, D2 and D3 had gone to the reception lobby of the Regal Airport Hotel before rejoining D1 who had remained elsewhere with the grey suitcase. AUTONUMOUT D2 argued that this misdirection wrongly suggested to the jury that he had gone to D3 s room to

tell him to come down to the bus stop with the grey suitcase. He said that mis-statement of the evidence by the judge prejudiced his case which was to the effect that he did not really know D3 and had himself gone out to the airport simply to confirm his return flight to Pakistan. AUTONUMOUT In our view the misdirection was not material. There was ample evidence which was not contested at trial showing association between D2 and D3, and we agree with Mr Leung that against the backdrop of that other evidence of association the judge's error pales into insignificance. AUTONUMOUT The other complaint made by D2 was that the judge was in error in telling the jury that a note, Ex. 40, with the number 5154 written on it was seized from him when he was arrested. PW1, the undercover agent, had said he had written this note at the end of the meeting with D1 and D2 in Room 5154 at the Regal Airport Hotel. AUTONUMOUT's fundamental complaint was that there was no evidence this note was in fact seized from him at the time of his arrest. In support of this assertion, he pointed to the lack of reference to Ex. 40 in his listed prisoner's property. However, as Mr Leung submitted to us, if the exhibit was seized from D2 at or shortly after the time of his arrest as the prosecution alleged, then it would quite simply not appear in the list of D2's prisoner's property. AUTONUMOUT In our view D2 misconceived the meaning of the list of prisoner's property he relied upon in support of his argument. But whatever the provenance of Ex. 40 it cannot have, in any material way, prejudiced the case of D2 by being attributed to him. That is because it simply showed a connection between D2 and the room in which PW1 was staying in the Regal Airport Hotel. AUTONUMOUT That connection was in any event common ground. It was D2's case that he and D1 were involved with PW1 in negotiations which he claimed related to gemstones rather than drugs but which, whatever the subject matter, had involved him and D1 meeting with PW1 in Room 5154 at the hotel. Those negotiations were ongoing at the time of D2's arrest. AUTONUMOUT The fact that D3 had also written upon his palm the same number 5154 as upon Ex. 40 connected D3 to D2 to no greater extent than that to which the unchallenged evidence of D2's presence in Room 5154 on the occasion of the meeting with PW1 already connected them. AUTONUMOUT The judge's misdirection in this regard, if such it was, was not material. AUTONUMOUT There was no merit in grounds 1 and 3. Ground 2 AUTONUMOUT PW3 was a customs surveillance officer who gave evidence that he had seen D2, while on the trip to the airport, leave his seat on the lower deck of the bus and go to the upper deck. AUTONUMOUT's complaint in this regard was that the witness statement of PW3 did not make any reference to his going to the upper deck of the bus. He similarly complains that PW4, another customs surveillance witness, seated on the upper deck of the bus, who in his witness statement had said he saw D2 arrive at the upper deck and speak to D1, but in that statement made no mention of D2 speaking to D3, had in his evidence said he saw D2 speak to both D1 and D3. AUTONUMOUT These inconsistencies or omissions must be put in perspective. There was, as we have said, unchallenged evidence that D1, D2 and D3 were on the same bus as it travelled to the airport; that D1 and D3 were sitting together in the upstairs section of the bus and that D2 was sitting downstairs next to the luggage rack where the grey suitcase had been placed by D3. AUTONUMOUT It was quite plain that PW4 had said in his statement that he had seen D2 arrive on the upper deck of the bus and speak to D1. D1 and D3 were sitting together. Both,

like D2, were Pakistani nationals. The evidential effect of D2 speaking to both D1 and D3 rather than simply to D1 was negligible, particularly in the context of the other evidence we have referred to linking D2 to D3. AUTONUMOUT The omission of a reference in PW4's statement to D2 speaking to D3 as well as D1 in the context of the case as a whole was trivial. Equally the omission in PW3's statement to a reference to D2 leaving his seat and going upstairs shortly before the bus arrived at the airport and immediately before D1, D2 and D3 got off the bus was immaterial. AUTONUMOUT Importantly in this regard when D2 gave evidence he said he had left his seat and had gone at least partially upstairs to talk to D1 before D1 had commenced to come down to the lower deck of the bus preparatory to alighting. So there was never any issue that D2 had left his seat on the lower deck and proceeded up the internal staircase of the bus as PW3 had said. D2's trial counsel was experienced and it was plainly a proper decision, reasonably open to him in the circumstances of the case, not to cross-examine PW3 and PW4 on the omissions in their witness statements. There is no question of incompetence in this matter. AUTONUMOUT D2 also complains that his counsel did not cross-examine another customs surveillance officer, PW5, who gave evidence she had seen D1, D2 and D3 chatting together at the departure area of the airport immediately before their arrest, but whose witness statement made no mention of this. Again there was little point in any such cross-examination. It was never seriously challenged that D1, D2 and D3 had been arrested as they stood together at the airport departure hall. There was no merit in this ground. Ground 4 AUTONUMOUT The meeting in Room 5154 of the Regal Airport Hotel on 29 November 2001, which is the subject of this ground, was one between an undercover agent and two persons suspected of contacting him for the purpose of arranging the sale of dangerous drugs. The meeting was secretly recorded by Hong Kong customs officers. AUTONUMOUT The complaint of D2 was that the recording of this meeting breached his constitutional right to privacy, in that no legal basis for the recording of private conversations existed at that time in Hong Kong law. We assume, for the purposes of this ground, that there existed a reasonable expectation of privacy in the circumstances of a conversation conducted in a private hotel room, and that at the time of the recording of the conversation, contrary to what was perhaps common understanding, there was no sufficient legal framework in place so as to allow surveillance of this sort to take place lawfully. AUTONUMOUT Prima facie, therefore, there was a breach of D2's right to privacy contrary to Article 14 of the Hong Kong Bill of Rights and Article 30 of the Basic Law (incorporating Article 17 of the International Covenant on Civil and Political Rights). But that is not the end of the matter. AUTONUMOUT In *HKSAR v. Li Man Tak* [2006] HKC 293, Yeung JA said in dealing with evidence obtained in breach of those same rights: However it is important to bear in mind that evidence obtained in breach of the right of privacy is not inadmissible per se. The court has to carry out a balancing exercise in which the fact that there has been a breach of the accused's guaranteed right is a very important but not necessarily determinative factor. (Per Blanchard J in *R v Shaheed* [2002] 2 NZLR 377 at p. 419) In the earlier decision of *HKSAR v. Chan Kau Tai* [2006] 1 HKLRD 400, Ma CJHC said: First, account must of course be taken by the court of any breaches of rights contained in the Basic Law or the ICCPR. Second, any breach as aforesaid will not, however,

automatically result in the exclusion of the evidence obtained in consequence of the breach: the court still retains discretion to admit or exclude the evidence. Third, the discretion in the court to admit or exclude evidence involves a balancing exercise in which the breach of constitutional rights is an important factor whose weight will depend on mainly two matters: the nature of the right involved and the extent of the breach. In the present context, there are two main competing interests, both facets of what can broadly be called the public interest: on the one hand the interest in protecting and enforcing constitutionally guaranteed rights; on the other, the interest in the detection of crime and bringing criminals to justice. Where the gravity of a breach or derogation is small but the crime involved is a serious one, the public interest will lean more favourably towards the latter factor with the consequence that any evidence obtained as a result of the breach or derogation will be admitted AUTONUMOUT In the present case as in HKSAR v. Wong Kwok Hung (unreported), CACC40/2006, the right to privacy of D2 was not breached in bad faith. Nor in the circumstances of the present case could the breach of that right outweigh the public interest in detecting crimes involving the importation or exportation and sale of very large quantities of dangerous drugs. AUTONUMOUT Further, the evidence of the conversation in the hotel room meeting could as well have been given by PW1, the undercover agent, in the absence of the recording. The production of the recording simply ensured that evidence of that conversation was given in the most reliable and accurate form. Not to have admitted it in evidence would, as said in Wong Kwok Hung, have required the best evidence to be ignored. That in itself would have derogated from the fairness of the trial. AUTONUMOUT This ground could not succeed. Ground 5 AUTONUMOUT The complaint of D2 under this ground was that at the time of his arrest he was not informed that the conversation between himself and PW1 in Room 5154 of the Regal Airport Hotel had been recorded. This ground was wholly misconceived. There is no obligation whatsoever for an arresting officer to inform a suspect at the time of his arrest of the evidence against him. AUTONUMOUT D2 complained also that his right to silence was prejudiced by the fact that, unknown to him at the time, he was meeting with PW1, an undercover agent of the Drug Enforcement Agency. His complaint as we understood it is that PW1 should have reminded him of his right of silence at some time during the recorded hotel room conversation when suspicion fell upon him. There was no substance to this complaint. Putting aside the fact that PW1 had no official capacity in Hong Kong and that no Hong Kong customs or police officer was present at the meeting, the investigation in which PW1 was involved was obviously on-going. The accusatory stage was far from being reached, and there can have been no requirement to caution D2 : see Secretary for Justice v. Lam Tat Ming [2000] 2 HKC 693. AUTONUMOUT This ground necessarily failed. Ground 6 AUTONUMOUT By his final ground of appeal D2 asserted that in representing all three defendants at trial, i.e. himself, D1 and D3, his counsel (and presumably his solicitors) ignored a conflict of interest which arose between his and the other two defence cases. In his written and oral submissions to us D2 did not point to any specific issue or matter which arose at trial which generated any such conflict of interest. His primary submission on this point was a general complaint that it was a headache and Herculean task for single counsel who was representing three defendants

cases from different angles at same time . He points also to the fact that he, unlike D1 and D3, was never in physical possession of the suitcase containing the drugs. AUTONUMOUT We do not think, looking at the issues which arose at trial, that there was any obvious conflict of interest between the case of D2 and the cases of D1 and D3. AUTONUMOUT The conduct of the trial on behalf of D1 and D3 as a whole seemed simply to be that, while D1 and D3 had possession of the suitcase, they disputed they knew there were drugs in that suitcase and simply attempted to rebut the presumptions which were, at trial, accepted to have arisen, on the basis of other evidence in the prosecution case. In other words the defence cases of D1 and D3 were simply to put the prosecution to proof, and to attempt on the evidence as a whole to demonstrate they did not know of the contents of the suitcase. AUTONUMOUT s case was not in conflict with the positions taken by D1 and D3. Indeed in terms of the important aspects of his case such as the version he gave as to the meaning of the conversation he and D1 had with PW1 in the room at the Regal Airport Hotel, to the effect that both he and D1 understood they were negotiating the sale of gemstones, his case was on all fours with what appears to have been the cases of D1 and D3. AUTONUMOUT It is fundamentally a matter for the good judgment of counsel as to whether there is or may be a conflict of interest in the cases of co-defendants. AUTONUMOUT In the present case D2 did not demonstrate to us any particular matter or issue which plainly pointed to a conflict of interest and this complaint was without substance. AUTONUMOUT A further and more fundamental complaint was made by D2 in the course of his argument under this ground regarding the competence of his counsel and of his solicitors. AUTONUMOUT It is that he had provided instructions to his solicitor which had not been provided to his counsel, and that the instructions his counsel had apparently acted upon had not been provided by him. AUTONUMOUT This was a sufficiently serious allegation so as to require Mr Paul Kwong, the solicitor for D1, D2 and D3 at trial, to give evidence before us of these matters. AUTONUMOUT It was his evidence that he had indeed, with the help of an interpreter, taken instructions from D2 prior to the commencement of the trial and had provided those instructions in typed form to counsel. AUTONUMOUT We accepted his evidence in that regard. When shown a document which D2 produced to us as the instructions he had drafted and provided, Mr Kwong said he had not seen that document before and that D2 had in fact not provided it to him. Mr Kwong s recollection of these events appeared reliable to us and he was able to state with a degree of certainty that he and trial counsel had acted upon instructions provided by D2. AUTONUMOUT An inherent improbability in D2 s assertions in this regard is that he claimed that for some unknown reason the instructions provided to counsel were fabricated by some person or persons equally unknown. That seemed to us an extremely unlikely scenario and we had no hesitation in dismissing it and accepting Mr Kwong s evidence. AUTONUMOUT We accepted his evidence also as to a subsidiary complaint made by D2 concerning facts admitted at trial pursuant to section 65C of the Criminal Procedure Ordinance. D2 said that while the document containing the agreed facts was signed on his behalf by counsel, he was not informed of its contents. AUTONUMOUT Kwong on that point told us that D2 had indeed given his verbal agreement to the contents of that document before it was signed by counsel. He said this was done in the presence of

both himself and counsel and with the assistance of a translator. D2 told us that he could not remember what happened in this regard but simply said he had not agreed the facts contained in the signed documents. AUTONUMOUT Kwong s evidence was clear and precise. D2 s recollection was very much less so. We accepted the evidence of Mr Kwong. AUTONUMOUT This ground also failed and for these reasons we dismissed D2 s application for leave to appeal his conviction. (M. Stuart-Moore) (Frank Stock) (M.A. McMahon) Vice President Justice of Appeal Judge of the Court of First Instance David Leung, SGC of the Department of Justice, for HKSAR The 1st, 2nd and 3rd Applicants in person PAGE - PAGE A B C D E F G H I J K 1udk 1udk &`#\$ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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