

HONG KONG / JUDGMENT

HKSAR v. MUI TAK MING

COURT

Court of First Instance

DECIDED

17 April 2007

CASE / FILE NUMBER

HCMA1093/2006

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Before: Hon Beeson J in Court Date of Hearing: 21 March 2007 Date of Judgment: 17 April 2007J U D G M E N T

The Appellant was convicted after trial in the Magistracy, on a single count of Claiming to be a Member of a Triad Society, contrary to section 20(2) of the Societies Ordinance, Cap 151. On 1 November 2006, he was sentenced to a term of 5 months imprisonment. It is against conviction only that the Appellant appeals. Factual Background The background to the offence was a long-term police undercover investigation into what was believed to be a protection racket on public light bus routes which ran between Tsz Wan Shan and Tsuen Wan. To join the route, a prospective driver was introduced to the person in charge. A Stand Fee or Protection Fee of \$1,850 was paid which authorised the driver to drive that route. Such fee was to be paid monthly. Failure to pay meant that the driver could not drive on that route. Payment entitled the driver to a plastic plate which distinguished him from other types of driver. The route was divided into 2 shifts day and night. The route was organised by the same group of people, two-thirds of whom organised the day shift and one-third the night shift. PW1, a police undercover agent, joined the day shift and received a plastic route plate for that shift. As part of his duties, which stretched over a period of some two years, PW1 attended on 13 December 2003 a number of meetings with fellow drivers, at which some route plates were to be sold. PW1 and other drivers met first at the Hong Kong Bank at the junction of Cheung Fat and Un Chau Street in Sham Shui Po. They went to a caf called Lo Yau Kee for a meeting there. After the meeting, the participants moved to the public light bus association headquarters in Un Chau Street two to three minutes walk away, where a further meeting took place. After various formalities, everybody left the association premises and went to the Caf de Coral in Un Chau Street. Sometime during that meeting, a man referred to as Mui Tsz Kor (allegedly the Defendant), replied in answer to a question from a driver as to who would look

after the stand; We, Lo Sun will continue to look after the stand. It s not for Yau Chi On to have a say. I have had a quarrel with Yau Chi On before. I said if you are so great you open another route for me to earn money. Now Yau Chi On just sit there and have money but he still have so much to say. The words quoted were the basis for the charge of claiming to be member of a triad society. Grounds of Appeal The main issue at the trial was identification and the basic ground of the appeal against conviction is that the Magistrate failed to deal properly with that issue. The Perfected Grounds of Appeal against conviction were:

- (1) the Magistrate erred in
 - (i) holding that the identification was not a question of Turnbull [B32K]; (ii) failed to warn herself of the special need for caution and the risks of mistaken identification, according to the principles set out in R v Turnbull [1977] QB 224; (iii) failed to give sufficient weight to the inherent weaknesses in PW1 s identification evidence; and
- (2) given the poor quality of PW1 s identification evidence and the lack of any other evidence to support that identification, there was a lurking doubt as to the accuracy and reliability of the identification evidence which rendered the conviction unsafe and unsatisfactory. The only occasion on which PW1 claimed to have seen the Appellant was on 13 December 2003 at the three meetings. On 15 November 2005, almost two years later, PW1 identified the Appellant as Mui Tsz Kor in a one-to-one confrontation at the police station. The confrontation was conducted at the request of the Appellant and the circumstances were set out in paragraph 2 of the Admitted Facts [B25]. The Appellant surrendered to police on 10 November 2005 and was arrested. On 15 November, a one-way viewer Identification Parade was held at Tsuen Wan Police Station; the Appellant attended with his lawyer. In the presence of his lawyer, the Appellant requested a one-to-one confrontation, rather than a formal identification parade. During the confrontation, PW1 positively identified the Appellant and it was recorded that the Appellant and his lawyer had no comment about the identification . PW1, who was the only prosecution witness, gave evidence that he had not seen Mui Tsz Kor again after the meeting on 13 December 2003, or before the identification. The Appellant did not dispute that PW1 would have had more than one view of Mui Tsz Kor during the time that he was in the presence of PW1 at the three meetings. The group stayed 5 to 10 minutes at each of the three locations, PW1 saw the face of Mui Tsz Kor at close proximity and in each of the venues, the lighting conditions were adequate. The Magistrate gave brief oral reasons for verdict at the end of the trial. On identification, she said: As to the identification, after going through the evidence of PW1, I am satisfied that on the day in question, there is sufficient evidence to show that this witness can have sufficient evidence to show that he had, a period of time a view on the face of the person who said those words. And there was also evidence of the period of time, the distance between them, the lighting condition. So this is not a question of Turnbull (emphasis supplied). The only question is that this witness picked out, identified this Defendant 2 years after the incident. I have to be careful to see if there is any fading of memory in PW1 s mind. The identification taken 2 years later was a one-to-one confrontation. From the Admitted Facts, this kind of identification was taken at the request

of the Defendant. After the identification, the Defendant and his lawyer had no comments about the identification. I have also considered the evidence about how the one-to-one confrontation was conducted. After all, the sole question I have to determine on the identification is whether the identification was an accurate identification. I have careful consideration of the evidence and I am satisfied and I am sure that PW1's identification was an accurate identification, there is no mistake. [B32H-R] In her subsequent Statement of Findings, [B12/B13], the Magistrate looked at the identification in terms of the time of the meeting, the venue of the meeting; the length of time the meeting lasted; the position of PW1 vis-a-vis Mui Tsz Kor; the lighting and what part(s) of the body and/or face of Mui Tsz Kor was observed. She did this for each of the three meetings. In doing so she was following the requirements of a Turnbull examination of the incident. The Magistrate did not repeat, in the Statement of Findings her comment this it is not a question of Turnbull. I venture to suggest that in stating, as she did, this is not a question of Turnbull. the Magistrate was saying that this was not a fleeting glance situation. I say that because it was clear from her written findings, she had in mind the requirements of Turnbull. Having said that and accepting that de facto the Magistrate did follow Turnbull, I note that the inherent weaknesses of the identification evidence were not otherwise commented on. The period between the meeting with Mui Tsz Kor and the eventual identification 2 years later were dealt with by the Magistrate's finding that the Appellant was quite a distinguishable person in the trade; that she thought the Appellant would be memorable to PW1 because of his claim to be a member of Lo Sun and that because the Appellant was so impressive to PW1, his memory of the face of Mui Tsz Kor would not fade. In addition to the caution necessitated by the length of time between sighting and formal identification, thought should have been given to PW1's undercover role over the 2 years, in that he was obliged to observe not just Mui Tsz Kor, but a number of other people allegedly involved in the public light bus racket about some of whom he gave evidence at other trials. He did not give, or record any description of Mui's physical characteristics. At the three meetings, the attention of PW1 was not confined to Mui Tsz Kor and over the two intervening years he, no doubt, had come into contact with a number of other suspected participants. Given these facts it would have been helpful if the Magistrate had examined in greater detail, why it was that PW1 would have a recollection of Mui Tse Kor as memorable or distinctive. However, after considering the matters the Magistrate noted I cannot agree with the submission by Appellant's counsel that Turnbull considerations were ignored. Confrontation Evidence Where the submissions made by Appellant's counsel do resonate is in the complaint that the Magistrate did not deal properly with the confrontation at which PW1 purported to make a formal identification of the Appellant. The identification on 15 November 2005 was the result of a one-to-one confrontation. In her Statement of Findings [B20] the Magistrate prefaced her considerations of the confrontation procedure with a quote from Bruce and McCoy. Normally, it should only be used where either the accused has exercised his right to refuse to participate in an identification parade or for some other reason such a parade is impossible or impractical. She remarked it can be seen from the Admitted Facts that on the day it was supposed to be an identification parade. However, upon the request of the

Defendant in the presence of his lawyer, Mr Oliver Davies, who was also a trial Counsel, a one-to-one confrontation was held. Bruce and McCoy comment: where the accused refuses to participate in an identification parade and the police adopt an alternative method of identification such as a confrontation, the accused cannot later complain that the procedure was unfair because he has brought the process on himself. The Magistrate concluded: in the present case it was the Defendant who has brought the process on himself, so he could not now complain that the procedure was unfair. The Magistrate made no other assessment of the confrontation. It is noteworthy that having reminded herself of the principles, she failed thereafter to consider the proper weight it should have, given the time that had elapsed. The confrontation was carried out when the Appellant was alone in an office in the police station. PW1 was shown a man sitting in an office and was asked to confirm whether he was Mui Tsz Kor. At B60, the cross-examination is as follows. Q: Then he went to say the purpose of this identification parade is to confirm whether the suspect is involved in the incident. A. Yes. Q: And you looked in a room, I take it, and saw one person sitting there by himself. A: Yes. Q: You said, I confirm it. A Yes. Why the police acceded to the request for a confrontation, but failed to arrange a confrontation that would provide PW1 with some element of challenge in confirming his identification is not explained. There was no evidence that the Appellant had refused an Identification Parade, nor any explanation why it could not have been carried out on another day. Any confrontation should have been arranged in a manner that properly tested PW1's power of recognition. The Magistrate seemed to think it was only necessary for the police to provide a confrontation situation. She did not go on to consider whether there were inherent weaknesses in the procedure. Confrontation is a weaker formal identification procedure. PW1 was merely asked to confirm whether the person singled out for his viewing was involved in the incident being investigated. The better course for a confrontation would have been for the suspect to be presented in the company of as many other people as possible. There appears to be no real justification for use of the confrontation procedure in this case. There was no evidence, or indication that the Appellant had refused to take part in a formal identification parade. It seems that because of a prolonged wait at the police station, the Appellant's defence counsel requested the confrontation procedure and the police agreed, without fully considering the disadvantages in so doing. Ideally the request for a confrontation should have been refused given the nature of the identification required of PW1. Accepting however that such a decision was within the discretion of the investigating officer, it fell to the Magistrate to examine carefully the weaknesses and strengths of the identification thus obtained. It is not sufficient for the Magistrate simply to say that it was the Appellant's choice and thus he could not complain about it. It was for her to investigate any inherent weaknesses in the procedure and here the confrontation procedure, was of negligible value in assessing the reliability of PW1's identification. There is a strong possibility that PW1 was identifying, not the man he saw on 13 December 2003, but the man in the office whose identify he was asked to confirm. In the circumstances, I find that the identification evidence, as counsel for the Appellant submitted, is too tenuous to be relied on safely. Accordingly, this appeal against conviction is allowed and the conviction and sentence are quashed. (C-M Beeson) Judge of

the Court of First Instance Mr Joseph Wong, SGC of Department of Justice, for the
Respondent Mr Michael Delaney, instructed by Christopher K Y Wong, for the Appellant
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