

HONG KONG / JUDGMENT

HKSAR v. NAWAZ Imran

COURT

Court of Appeal

DECIDED

8 February 2007

CASE / FILE NUMBER

CACC18/2005

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bjbj CACC 18/2005 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 18 OF 2005 (ON APPEAL FROM HCCC NO. 116 OF 2004)

BETWEEN HKSAR Respondent and NAWAZ Imran Applicant

Before : Hon Woo VP, Burrell J and Lunn J in Court Date of Hearing : 9 November 2005 and 31 January 2007 Date of Judgment: 31 January 2007 Date of Reasons for Judgment : 8 February 2007

REASONS FOR JUDGMENT

Hon Woo VP (giving the reasons for judgment of the Court):

Introduction

AUTONUMOUT The applicant was convicted on 22 December 2004 after trial before Deputy Judge Barnes (now Barnes J) and a jury in the Court of First Instance on a single count of trafficking in a dangerous drug. The judge passed a sentence of imprisonment for 7 years 6 months on him.

AUTONUMOUT The applicant applied for leave to appeal against both conviction and sentence.

AUTONUMOUT At the initial hearing before this Court on 9 November 2005, in respect of sentence the applicant was represented by Mr Robert Andrews, assigned by the Legal Aid Department, but was unrepresented in respect of conviction. In view of the judge's direction on the presumption of knowledge of the nature of the drug referred to below, a matter that was the subject of the judgment given on 23 June 2005 by another division of this Court in *Hung Chan Wa & Anor v HKSAR* [2005] 3 HKLRD 291 that was to proceed further to the Court of Final Appeal (), we adjourned the hearing and granted the applicant an appeal aid certificate regarding his appeal against conviction. As a result, Mr Andrews represented him both on sentence and conviction at

the resumed hearing on 31 January 2007. AUTONUMOUT At the conclusion of the resumed hearing, we allowed the appeal, quashed the conviction and ordered a retrial. We also granted bail to the applicant pending the retrial. Our reasons appear below.

Background

AUTONUMOUT The particulars of offence on the indictment against the applicant stated that on 13 January 2004, at Room 3, 12th Floor, Lee Shing Mansion, No. 43, Jordan Road, Yaumatei, Kowloon (the flat), the applicant unlawfully trafficked in a dangerous drug, namely, 26.92 grammes of a crystalline solid containing 26.66 grammes of methamphetamine hydrochloride, commonly known as . AUTONUMOUT The prosecution s evidence was that on 13 January 2004, police officers kept surveillance at the flat, which was the subject of a search warrant. The applicant, together with a woman, was seen entering the flat at about 10 pm. He was observed to come out of the flat alone at 10.14 pm. The police intercepted him in the street and DPC 51157 (PW1) conducted a body search on him, which revealed nothing illegal. He was then taken back to the flat at 10.21 pm. Police officers used two keys found on him to open the main door to the flat and the door to a bedroom inside. While a woman police officer was conducting a body search in the bedroom on the woman, PW1 conducted another body search on the applicant inside the sitting room. During this second search, PW1 touched the outside of the applicant s private parts and found a tissue packet containing the dangerous drug described in the indictment tucked under the blue underpants that the applicant was wearing. Factual grounds of appeal against conviction AUTONUMOUT Prior to Mr Andrews taking up the appeal on conviction on his behalf, the applicant had raised a number of grounds referring to the facts and evidence of the case as the basis for challenging the conviction. AUTONUMOUT Although, as will be seen later, we allow the appeal against conviction based on a point of law, it is still necessary for us to deal with some of the applicant s own contentions on the facts and evidence briefly, to show that his appeal against conviction would otherwise fail and to put the discussion of the law in a proper factual context. AUTONUMOUT The applicant relies heavily on the inability on the part of PW1 to find anything illegal on his person during the body search in the street, in contrast with PW1 s evidence that he found the drug tucked inside the applicant s underpants when they were inside the flat, to contend that the evidence was incredible. AUTONUMOUT The assessment and weighing of the evidence, and indeed of all evidence, was entirely a matter for the jury. The judge had drawn the jury s attention to this aspect of the evidence. She said: What were the circumstances of the search in the street? You heard it was not a patting down, not a frisking. It was a thorough search by the officer. He said it was a thorough search but not as thorough as the one conducted inside the room in the unit. PW1 explained to you why he did not search the private area of the accused. Do you find his evidence credible or reliable? It is a matter for you. You heard the packet was tucked inside the underpants, at the lower abdomen, but close to the penis of the accused. You have also heard that, from the time PW1 intercepted the accused to the time he received instructions to take the accused back to the flat, only two minutes had elapsed. So is it possible for PW1 to have missed the packet during the search? (p 11G-N of the summing-up) AUTONUMOUT The applicant also complains that the woman who had been seen to be with

him was not arrested by the police and was not called by the prosecution to testify in the case. The jury was reminded of this matter by the judge in her summing-up: You heard that the woman was searched but there was no evidence of anything illegal found on her. She was brought back to the police station, you heard, but she was never charged. There was no evidence that a witness statement was taken from her by the police, and you heard from PW3, the inspector, that the woman has since left Hong Kong. According to the police evidence, the search of the accused was not done in the presence of the woman. PW1 searched the accused outside the room while the WPC, the woman police constable, was inside the room with the woman, with the door closed. PW2 had earlier given instructions to the woman police constable to search the woman. While there is no evidence before you as to the whereabouts of the woman when the accused suddenly banged his head on the wooden partition, you might have reasonably inferred that the woman would have heard it, if not actually witnessed such an event. It is a fact that the woman was not called to give evidence to support the police version. You only have the police evidence on what had taken place. (pp 14M-15B of the summing-up) AUTONUMOUT The applicant further complains that the police took no photograph of the alleged drug being found tucked inside his underpants. This has to be viewed in the context of the defence case put forward on behalf of the applicant at the trial that the applicant did not wear any underpants when he was searched by the police. AUTONUMOUT In fact, photographs of the applicant had been taken after the successful search. A photograph of the drug wrapped in a tissue packet tucked inside his underpants, by way of reconstruction, was produced at the trial. In respect of this aspect of the evidence, the judge told the jury: Photograph 15 of P20 shows the tissue packet tucked inside the underpants. That is a reconstruction, you heard. PW1 testified that that was not the actual position, in fact. It was much further down, lower and further down. This search and the find as a result of the search, was also witnessed by PW2, the sergeant, PW3 the inspector, and the exhibits officer who gave evidence, PW5, DPC34145. (p 8D-G of the summing-up) According to PW1, the accused was not co-operative in that the accused failed to watch the search but deliberately opened and closed his eyes, leaned to his left side, and the accused also spit and played what, in effect, is raspberries with his saliva, like a child. (p 8Q-S of the summing-up) AUTONUMOUT Indeed, photographs 12, 13, 14 and 15 of Exhibit P20 showed that the applicant was wearing a pair of blue underpants. He was in a seated position. In photographs 12 and 13, he appeared to have his eyes closed. Photograph 15 showed a white packet tucked inside the blue underpants on him. AUTONUMOUT The applicant's contentions on the facts and evidence had been drawn to the jury's attention by the judge in her summing-up. The jury decided on the facts and found the applicant guilty. There is nothing in the summing-up that has shown that any of the judge's directions to the jury on the facts and evidence was incorrect or wrong or unfair in any way. These and other contentions of the applicant are of no substance and do not affect the safety of the conviction. The judge's directions on law AUTONUMOUT The applicant has not personally challenged the judge's summing-up to the jury by way of any allegation that the summing-up was in any way wrong in law. AUTONUMOUT However, at the hearing on 9 November 2005 we made known that there was one direction given by the judge that had caused us concern, and we granted an appeal aid certificate for the applicant to be represented by counsel. Mr Andrews was subsequently assigned to act for him regarding conviction as well, and has now raised this supplementary ground that

the judge erred in giving the direction on the presumption of knowledge of the nature of the drug. AUTONUMOUT In her summing up, the judge gave directions to the jury on the basis if they accepted that the applicant did have the dangerous drug on his person during the search inside the flat. She said: Then if that is the case, you would have thought that the accused must have known that he had a packet of something inside his underpants. The law provides that any person who is proved to have a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug. I repeat. The law provides that any person who is proved to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of the drug. To rebut this presumption, the accused only needs to show that it is more probable than not that he did not know that the packet he had concealed on his person was a packet of dangerous drug. The accused did not have to make you sure that he did not know. Is there any evidence to show that the accused did not know that it was a packet of dangerous drug? I have already referred you to the evidence of the accused carrying this packet on his person and on his way out somewhere. You have seen the tissue that is P2 you have seen the transparent resealable packets P17 and the crystalline substance P3 which was later confirmed to be the methamphetamine hydrochloride. By all means look at them again during your deliberation. You have heard how that packet was concealed in a very private area of the accused. Would a person hide something side his underpants if there was nothing to hide? Why was there a need to hide that packet? Where was he going with it? It is a matter for you, members of the jury, to decide whether the presumption has been rebutted or not. (pp 18C-19A of the summing-up) (Emphasis added.) AUTONUMOUT The presumption that the judge mentioned corresponds with the presumption under section 47 of the Dangerous Drugs Ordinance, Cap 134 which provides: Any person who is proved to have had in his physical possession: anything containing or supporting a dangerous drug; the keys of the baggage, briefcase, box, case, cupboard, drawer, safe-deposit box, safe or other similar container containing a dangerous drug, shall until the contrary is proved, be presumed to have had such a drug in his possession. Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug. AUTONUMOUT The direction of the judge cited above clearly shows that it was the presumption in section 47(2) that she was referring to since the terms used in the direction were identical to the terminology of the subsection. AUTONUMOUT In a recent decision in Hung Chan Wa & Anor v HKSAR [2005] 3 HKLRD 291, given by another division of this Court on 23 June 2005, months after the judge in the present case summed up to the jury, it was held that the presumption in section 47(2), on its face, imposed a persuasive burden on the accused and as such did not satisfy the criterion of proportionality and so was incompatible with the presumption of innocence. The decision was affirmed by the CFA, [2006] 3 HKLRD 841, which declared that section 47(1) and (2) each should be read and given effect as imposing an evidential onus only, as opposed to a persuasive onus. AUTONUMOUT As to how the court should approach the evidential onus, Stock JA, giving the judgment of the Court of Appeal, had this to say at [2005] 3 HKLRD 291, pp 355D-356D:

144. The practical approach to this evidential burden is the same as when that burden arises in other contexts; for example, where the issue of provocation or self-defence is raised: see Archbold Hong Kong: Criminal Law, Pleading, Evidence and Practice 2005, pp. 293-294 para. 4-194 and Archbold: Criminal Pleading, Evidence and Practice 2005, p. 476 para. 4-382. We suggest that in cases where either presumption under s. 47(1) or (2) has been engaged, the following principles should be applied: It is for the judge to determine whether sufficient evidence has been adduced to constitute an issue fit to be left to the jury. The burden may be discharged regardless of the quarter from which the evidence derives. In other words, the evidence upon which the accused may rely in this regard may emanate from the prosecution or in the testimony adduced by the accused. An evidential burden is not discharged by the mere mouthing of words by an accused, whether to the police upon apprehension, or to the court in testimony, that he was unaware that the container housed a dangerous drug. It is, as Lord Steyn commented in *R v Lambert* [2002] 2 AC 545 at p. 572: important to bear in mind that it is not for the defence merely to allege the fact in question: the court decides whether there is a real issue on the matter and, whilst the exculpatory evidence may come from any quarter, we respectfully endorse the conclusion by Lord Hope in the same case at p. 588, that: an evidential burden is not to be thought of as a burden which is illusory. What the accused must do is put evidence before the court which, if believed, could be taken by a reasonable jury to support his defence. In jury trials, judges should avoid giving directions as to what does and what does not constitute an evidential burden and whether or not such a burden has been discharged. By the time of a summing-up, the issues will have crystallised and a judge will have determined, if necessary after hearing counsel, whether sufficient evidence as to lack of knowledge (whether as to the presence of the item, or as to the nature of the item, or both) has been adduced to raise an issue fit to be left to the jury. If the judge decides that the evidential burden has been discharged, he will then tell the jury with such adaptation as the circumstances may require that the accused says that he did not know that the item was in his possession, or that the item was a dangerous drug, as the case may be, and that it is for the prosecution to prove that he did so know, and not for the accused to prove that he did not; and that if what the accused asserts is or may be true, he is entitled to be acquitted. AUTONUMOUT The direction given by the judge in our case specifically referred to the need on the part of the applicant to rebut the presumption of knowledge of the nature of the drug possessed and to the standard of proof of that rebuttal, being on the balance of probabilities, which clearly demonstrates that the judge was referring to the presumption of persuasive burden and not the presumption of evidential burden adumbrated in *Hung Chan Wa*, and is accordingly a misdirection. AUTONUMOUT Mr Robert Lee, taking over the case in place of Mr Zervos on behalf of the respondent, has made clear his stance to this Court: It is submitted at the outset that the learned trial judge's direction on the presumption under section 47(2) is inconsistent with the CFA ruling; that the ruling applies to this case and the guilty verdict is thereby rendered unsafe and unsatisfactory; that the proviso is inapplicable; and that a retrial should be ordered. AUTONUMOUT Mr Andrews accepts the concessions by Mr Lee and argues that a retrial should not be ordered. AUTONUMOUT We will first examine

whether Mr Lee's concessions are properly made. AUTONUMOUT The judge's summing-up was given on 22 December 2004 and the guilty verdict was returned on the same day. The question that arises for consideration is whether or not we should apply the law as having been declared by the Court of Appeal on 23 June 2005 and subsequently by the CFA on 31 August 2006 in *Hung Chan Wa* (the CFA ruling) on the section 47(2) presumption retrospectively so that the judge's direction, based on and in accordance with the previous law, would be considered to be wrong. In this regard, it is only necessary to refer to the Chief Justice's judgment in *Hung Chan Wa*, to say that in the circumstances of this case, it would not be justified for this Court to exercise the power, even if we have it, of prospective overruling, ie, limiting the application of the CFA ruling to decisions made after its decision or the Court of Appeal's decision. The main reason is that the applicant had lodged the present application well before the *Hung Chan Wa* decision on 23 June 2005 and we had granted an adjournment at the initial hearing of this case on 9 November 2005 to await the Court of Final Appeal's decision and for the presumption point to be raised. It would generate a feeling of grievance in the applicant if we were now to rule that the CFA ruling has no retrospective effect on the judge's direction in this case. AUTONUMOUT There are a few other points we have to consider regarding the concessions, all of which arise out of the provisions of section 83(1) of the Criminal Procedure Ordinance, Cap 221 (), which provides:

- (1) Except as provided by this Ordinance, the Court of Appeal shall allow an appeal against conviction if it thinks that the conviction should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or that the judgment of the court of trial should be set aside on the ground of a wrong decision on any question of law; or that there was a material irregularity in the course of the trial, and in any other case shall dismiss the appeal: Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred. AUTONUMOUT First, despite the direction of the judge, now ruled incorrect and amounting to a misdirection in law, whether it necessarily follows that the applicant's conviction is unsafe and unsatisfactory under s 83(1)(a) or it should be set aside under s 83(1)(b). Secondly, whether in any event, this Court should apply the proviso to s 83(1) and dismiss the appeal on the basis that no miscarriage of justice has actually occurred. AUTONUMOUT Mr Lee submits that as the judge's misdirection went to an essential and crucial issue in the trial, it cannot be maintained that the guilty verdict is still safe and satisfactory. AUTONUMOUT He also refers to *Yuen Kwai Choi v HKSAR* (2003) 6 HKCFAR 113, paras 51-54, *Chan Chuen Ho v HKSAR* (1999) 2 HKCFAR 198 and *Lee Chun Tat v HKSAR*, FAMC 52 of 2006, unreported, at para 7, for the well-settled principle governing the application of the proviso to section 83(1) of the CPO, which is whether a hypothetical reasonable jury, properly directed, would inevitably have come to the same conclusion or would no doubt have convicted. He submits that the key issue in this regard would be the cogency of the prosecution evidence in respect of the element of knowledge of the nature of the drug. While the evidence might have been reasonably strong (even without resorting to the

presumption) to support an inference of knowledge, he submits that it was not overwhelming. The guilty verdict was not unanimous but only returned by a majority of 5:2, and thus it cannot be said that a reasonably jury, properly directed, would have inevitably convicted. AUTONUMOUT Nevertheless, examining the evidence in the present case before us, it is plain that had the judge adopted the approach stated in para 144(1) of Stock JA's judgment in Hung Chan Wa and applied her mind to it, she would have come to the conclusion that no sufficient evidence as to the applicant's lack of knowledge of the drug had been adduced to raise an issue fit to be left to the jury. The prosecution's evidence was that the drug was in a tissue packet tucked inside the applicant's underpants that was revealed by a body search on him conducted by PW1. The revelation was witnessed by PW2, PW3 and PW5 (see the part of the summing-up cited under paragraph 13 above). The applicant did not give evidence to support his case put forward by trial counsel that the drug was not found on him and that he did not wear any underpants at the time. Photographs 12, 13, 14 and 15 of Exhibit P20 belied such allegations by showing that the applicant was wearing a pair of bright blue underpants. AUTONUMOUT When returning a verdict of guilty, the jury must have accepted that the prosecution's evidence that the applicant was wearing a pair of blue underpants and the dangerous drug was found tucked inside the underpants. As the judge said, the packet of drug was concealed in a very private area of the accused. It would be impossible for someone to have put the packet there without his knowing it: he must know that he possessed the packet. It would similarly be impossible for him not to have known what was contained in the packet was a dangerous drug. Thus any allegation of the applicant's lack of knowledge of the drug would not be open for argument, and there was nothing that could constitute sufficient evidence as to the alleged lack of knowledge as an issue fit to be left to the jury. The second step in para 144(4) of Stock JA's judgment in Hung Chan Wa that is necessary to take only when a judge decides that the evidential burden has been discharged would not have been applicable in the present case. Thus, it can be argued that despite the judge's misdirection, the conviction was not unsafe or unsatisfactory, and that no miscarriage of justice had occurred. The five members of the jury who found the applicant guilty must have accepted that the prosecution's evidence that the dangerous drug was found in the packet tucked inside the underpants that the applicant was wearing. In the circumstances of this case where no issue was raised as to his knowledge of the ice and no explanation was given as to why he did not know the packet contained ice, the five members of jury would inevitably have been sure that the applicant knew his possession of the ice and convicted him. AUTONUMOUT Mr Andrews accepts that throughout the trial, the factual issue between the parties was whether or not a packet containing ice had been found by a police officer on the applicant's person, and that it had never been suggested by way of defence, either that the packet had not contained ice, or whilst he was aware of the packet was unaware of its content. Mr Andrews accepts that there was no issue that could have given rise to any forensic necessity for the judge to direct the jury on the presumptions under section 47. However, Mr Andrews stresses that since the judge had taken upon herself to direct the jury on the presumptions, she confused the jury with legal jargon on an otherwise completely straightforward issue of facts, to the extent that they must at least have been

confused in their minds as to who had to prove what, and if by the applicant, what did he have to prove and whether by evidence. Mr Andrews relies on the non-unanimity of the verdict as an indication of possible confusion. AUTONUMOUT We cannot rule out that the jury or one or more of its members could or might have been confused by the judge's direction on the presumption of knowledge of the drug. They must have been impressed with the judge's repetition of the presumption, but as to what use, if at all, they had actually made of the presumption, we cannot speculate. While the knowledge of the nature of the drug, once the jury accepted it to have been found tucked in the applicant's underpants, would hardly be open to question, we cannot be sure that the misdirection had no effect on the verdict. The jury were told that they must follow the directions on law given by the judge, and we do not know how they would react had they known that the judge's direction was quite irrelevant to any issue to be decided by them. The position of a hypothetical reasonable jury, as opposed to the jury in the present case who had convicted the applicant can, on the other hand, be more easily assessed: it cannot be said, if properly directed, they would inevitably have convicted the applicant. This is because they may or may not view the evidence in the same manner as the jury in this case did. It follows that we cannot be sure that the conviction is safe or satisfactory, nor can we be sure that no miscarriage of justice has occurred. Conclusion on conviction AUTONUMOUT Accordingly, for the misdirection mentioned above, we are duty bound to allow the appeal and quash the conviction. Retrial AUTONUMOUT Mr Lee and Mr Andrews are diametrically opposed on the question whether we should order a retrial. AUTONUMOUT Section 83E(1) of the CPO provides: Where the Court of Appeal allows an appeal against conviction and it appears to the Court of Appeal that the interests of justice so require, it may order the appellant to be retried. AUTONUMOUT The Appeal Committee of the CFA in *Lee Shing Hung v HKSAR*, FAMC 29 of 2006 stated:

4. In our view, the fact of having served the sentence does not of itself make an order for retrial wrong in principle. Whether a retrial should be ordered involves an exercise of discretion by the intermediate appellate court taking into account all relevant considerations, including the public interest and the legitimate interests of the defendant. AUTONUMOUT The applicant was arrested on 13 January 2004 and has since remained in custody. The period that he has spent in custody will be counted towards part of the sentence that he has served after his conviction on 22 December 2004. Both Mr Lee and Mr Andrews have addressed us on the sentence that the applicant is likely to get if a retrial is ordered and the matters relating to his application for leave to appeal against sentence. Mr Andrews submits that on the issue of a retrial the likelihood of success in the appeal against sentence is material in that any reduction in sentence by this Court would proportionally represent the greater amount of time the applicant has already spent in serving his sentence, and thus should be taken as a significant factor against a retrial. AUTONUMOUT On the other hand, Mr Lee addresses on the various scenarios that may ensue regarding the length of the sentence and the applicant's time in custody. He submits that according to the Correctional Services Department, since the applicant has been kept in custody from 13 January 2004, his

estimated date of release after serving a sentence of 7 years (90 months) would fall on 11 January 2009 (representing the normal about one-third remission). He submits, as his predecessor Mr Zervos did, that for the assistance rendered by the applicant to the authorities (the only ground of appeal against sentence, see below), at most a discount of 12% (about 11 months) would be awarded. That would bring forward his release date to around February 2008. On this basis, several scenarios require examination: If no retrial is ordered, the applicant would be released at once and obtain the benefit of about 12 months reduction in sentence (ie from February 2007 to February 2008); If a retrial is ordered, which may take place as early as May 2007, and (a) he pleads not guilty but is convicted, he would serve the remainder of the sentence until February 2008, or (b) he is acquitted, he would have been kept in custody for about an extra four months, assuming in (a) and (b) no bail is granted pending the retrial; If a retrial is ordered and he pleads guilty, he would be entitled to about a 25% discount (about 22 months) from the proper sentence for his plea and a further 12% reduction (about 11 months) for his assistance to the authorities, resulting in a sentence of about 57 months (ie, 90 months less 33 months). Assuming a 33% remission (say, 19 months), he would need to serve about 38 months from 13 January 2004, making the expected date of release around March 2007. Even if he is being kept in custody pending the retrial, he would still have to serve a further 2 or 3 months by May 2007.

Sentence AUTONUMOUT Since the proper sentence for the applicant may have a bearing on the consideration whether a retrial should be ordered, we proceed to address the questions raised on the application for leave to appeal against sentence. AUTONUMOUT The judge adopted a starting point of 7 years imprisonment for the 26.66 grammes of ice found tucked inside the underpants of the applicant. AUTONUMOUT According to AG v Ching Kwok Hung [1991] 2 HKLR 125, for the trafficking of between 10 to 70 grammes of ice, the appropriate sentencing tariff after trial is one of 7 to 10 years imprisonment. AUTONUMOUT The judge's adoption of 7 years imprisonment as the starting point, which was imposed on the applicant, can in no way be said to be excessive. Mr Andrews, for the applicant, has not challenged the propriety of the starting point either. AUTONUMOUT The only ground that is raised for the applicant for a reduction of sentence was the assistance that he gave to the authorities after he had been convicted. The facts in support of this ground are shown by way of fresh evidence adduced by the applicant. All of the events described took place after the date of the conviction and could not have been available at the time the judge sentenced him. The respondent, very fairly, does not oppose the admission of the new evidence in connection with our consideration of sentence, and we admit the new evidence for the purpose.

AUTONUMOUT The matter based on which a reduction of sentence is sought does not relate or connect to the offence with which the applicant was found guilty in the present case. It arose out of a different case in which 4 persons were tried and found guilty before the District Court of a charge of assault with intent to rob. Briefly, the facts were that on a day in March 2003, the 4 culprits stopped the victim in the street around midnight, assaulted him, and demanded money from him. The victim gave evidence before the District Court of the assault and demand for money, and an independent witness also gave evidence at the trial that he saw the 4 culprits surround the victim. Based on the evidence of the victim and the

independent witness, the 4 culprits were convicted. The defence evidence that the victim owed money to one of the culprits had been considered by the court but rejected. The 4 culprits made applications for leave to appeal against conviction and sentence, although the first of the culprits who demanded money from the victim abandoned his applications in the course of the hearing before another division of this Court. Those proceedings were titled CACV 375 of 2005. AUTONUMOUT At the hearing of the applications by the 3 remaining culprits before this Court, they sought to adduce evidence that the victim, who had later gone to jail for a totally unrelated matter, had confessed to other inmates that he had perjured at the trial of the 4 culprits to implicate them. Three inmates were called by the 3 culprits to give evidence before the Court to prove the confession of perjury by the victim. AUTONUMOUT How the applicant in the present case featured in CACV 375 of 2005 was that he had voluntarily informed the police that he had been approached by some inmates in jail to give false evidence in court against the victim in return for \$15,000 but he had refused. The false evidence he was asked to give was to the effect that a letter to be sent out by him from jail was to be falsely represented as one being sent by the victim. This false evidence would have supported the three inmates evidence of the victim's confession of perjury. The applicant was called by the prosecution to give evidence before this Court of what he had told the police, in order to help rebut the three inmates testimony regarding the alleged confessed perjury. When giving evidence before this Court, the applicant not only testified to what he had informed the police, but he also told the Court that after the three inmates had given evidence in this Court, he overheard them talking about getting money from one of the three culprits as a reward for having testified. The prosecution also called another fellow inmate of the applicant as a witness, who testified that he had been present and heard the applicant being offered money in order to give false evidence. The Court rejected the testimony of the three inmates and accepted that of the applicant and his fellow inmate as evidence of the truth. As a result, the applications of the 3 culprits for leave to appeal against conviction were dismissed. AUTONUMOUT We note from R v Davies and Gorman (1979) 68 Cr 319, HKSAR v Ng Shek Yu, CACC 178/2000 (1 March 2001, unreported) and HKSAR v Yu Tak-kwong, CACC 169/2002 (cited in Sentencing in Hong Kong, 4th Ed, p 40) that an accused who had provided assistance to the authorities and given evidence to that end would be awarded a discount of about 40-50% of his sentence. It has to be noted that when the discounts of 40 to 50% were mentioned, the accused had pleaded guilty, which would by itself normally attract a one-third discount, and the increased discount would therefore apply to him. An accused convicted after trial would not be entitled to the usual one-third discount and that 33% should be deducted from the appropriate discount allowed for the assistance given by him to the authorities. AUTONUMOUT Having considered all the circumstances relating to the obviously useful assistance given by the applicant to the authorities in an entirely voluntary manner, his giving evidence in court to verify the information provided by him with the added information of the conversation of the three inmates about seeking the reward, without succumbing to the temptation of the money offered, and his not being satisfied with just sitting tight and keeping quiet, we take the view that the appropriate reduction from the 7 years 6 months term that he is serving should be

15 months, representing slightly less than 17% of the entire term of his sentence, but without giving any of the one-third discount that would have been awarded to him had he made a guilty plea. Thus, if the applicant failed in his appeal against conviction his expected date of release, having been in custody from 13 January 2004, for a sentence of 75 months (90 months less 15 months), taking into account the normal one-third remission to reduce the term to 50 months, would be about March 2008. AUTONUMOUT For the purpose of calculating the likely sentence if the applicant pleads guilty at a retrial, we accept that he would get about 25% discount instead of the normal 33% because such a plea would not be considered as a timely one: see *R v Ng Wing Kwong*, CACC 62 of 1995, *HKSAR v Chui Chi Wai & Anor* (No. 2) [2000] 1 HKLRD 704 and *HKSAR v Kwok Wai Hung* [2004] 3 HKC 82.

AUTONUMOUT Taking into account our views expressed above, the first two scenarios for examination posed by Mr Lee (see para 41 above) will be more or less the same. However, the third scenario would be different, as follows: If a retrial is ordered and he pleads guilty, he would be entitled to about a 25% discount (about 22 months) for his plea from the proper sentence of 90 months and a further 15 months (see para 59 above) for his assistance to the authorities, resulting in a sentence of about 53 months (ie, 90 months less 37 months).

Assuming a one-third remission (say, 18 months), the actual period of custody would be about 35 months, which would have been fully served before the resumed hearing before us.

AUTONUMOUT Thus, it can be seen from scenario (2)(b) that the applicant would be prejudiced by having to spend more time in custody if a retrial is ordered and he is acquitted, unless bail is granted pending the retrial. On the other hand, if he pleads guilty at the retrial (scenario (3)), the time he has spent in custody would allow him to be released forthwith, generating some pressure on him to plead guilty. AUTONUMOUT Mr Andrews is opposed to a retrial. He refers to the inability to call as a witness the woman who was with the applicant in the flat when the search on him was conducted. But this inability already existed at the time of the trial before the judge. Mr Andrews says that the first trial had given an opportunity to the prosecution witnesses to rehearse their evidence, but this happens in every retrial and has not been shown to so prejudice the applicant as to warrant our desisting from ordering a retrial. In sum, Mr Andrews has not been able to show us anything that a retrial, other than the consequential and normal risk of a conviction, would prejudice the applicant or result in unfairness to him. He has not been able to persuade us that a retrial should not be ordered. AUTONUMOUT The offence is a serious one, involving a sizable quantity of ice. The evidence is strong, albeit not overwhelming. Any prejudice that the applicant may suffer regarding the time he has to spend in custody on a retrial being ordered can be minimized by granting him bail, which will also remove or reduce any unnecessary pressure on him to plead guilty. Having taken into account all the circumstances, we consider that the interests of justice require us to order a retrial.

Conclusion

AUTONUMOUT For the above reasons, we allowed the appeal and quashed the conviction. We also ordered a retrial, and granted bail to the applicant pending the retrial. (K H Woo) Vice-President, Court of Appeal (M P Burrell) Judge of the Court of First Instance (Michael Lunn) Judge of the Court of First Instance Hearing on 9 November 2005 Mr Kevin P Zervos SC, SADPP of the Department of Justice, for the Respondent Applicant, NAWAZ Imran, in person (regarding conviction) Mr Robert Andrews, instructed by Messrs Burke, Fung & Li, for the Applicant (regarding sentence) Hearing on 31 January 2007 Mr Robert S K Lee, SADPP of the Department of Justice, for the Respondent Mr Robert Andrews, instructed by Messrs Burke, Fung & Li, for the Applicant (regarding both conviction and sentence) 1udk 1udk &`#\$ PHbn J85 q \M68 k1B[p B!B` wo+eBA (~g| B!B` (~g k1B[wo+e Lphr], ^ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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