

HONG KONG / JUDGMENT

HKSAR v. NG WING CHUNG

COURT

Court of Appeal

DECIDED

8 December 2005

CASE / FILE NUMBER

CACC176/2005

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Before : Hon Stock JA and Suffiad J in Court Date of Hearing : 30 November 2005 Date of Handing Down Judgment : 8 December 2005

J U D G M E N T

Hon Suffiad J (giving the judgment of the Court) : AUTONUMOUT On 7 April 2005, the applicant pleaded guilty to and was convicted on his own plea by Deputy Judge Pang in the High Court of three counts of robberies and one count of attempted robbery. AUTONUMOUT On the same day, he was sentenced by the judge to :

- (a) four years and eight months on each of the first two counts of robbery to run consecutively making a total of nine years and four months;
- (b) four years and eight months on each of the 3rd and 4th counts, eight months each of those two counts to run consecutively to each other and to the first two counts thereby making a grand total of 10 years and 8 months. AUTONUMOUT In passing sentence on the applicant, the judge used a starting point of seven years for all the four counts but discounted each by the usual one third to take account of his guilty plea thereby arriving at four years and eight months on each count. The basis for the further order that the first two counts be served consecutively and the 3rd and 4th counts be served partly consecutively to each other and the first two counts was to take cognizance of the totality principle. Facts of the case AUTONUMOUT On 31 August 2004, around 9.35 a.m., the applicant wearing a baseball cap and a surgical mask entered the Asia Commercial Bank at Des Voeux Road West (4th count of attempted robbery). He produced a note with the threatening words Robbery, have gasoline, give \$500, \$1000 quick to one of the bank tellers inside the bank. That teller alerted her colleagues. The applicant having waited for a while at the counter without getting any

money, then left the bank. Bank staff alerted the police and after a brief chase, the applicant was intercepted and arrested by police officers inside a toilet of a restaurant in the vicinity of the bank. AUTONUMOUT In cautioned video recorded interviews the applicant following his arrest, the applicant admitted the offence relating to the 4th count, as well as confessing to three other offences of robbery (the 1st, 2nd and 3rd counts) as follows :

- (a) On 25 July 2003 at around 12.15 p.m. the applicant entered the Shanghai Commercial Bank in Sau Mau Ping. He wore a baseball cap, a pair of sunglasses and a surgical mask and produced a note with threatening words Robbery act quickly to one of the bank staff. He got away with cash \$1,840 (1st count).
- (b) On 25 July 2003 at around 12.25 p.m. the applicant entered the DBS Bank at Kwun Tong wearing a baseball cap, a pair of sunglasses and a surgical mask. He produced a note with Chinese characters saying Robbery to one of the bank staff. He also made the remark of Robbery. He got away with cash \$9,380 (2nd count).
- (c) On 28 October 2003 at around 11.10 a.m. the applicant entered the Wing Hang Bank in Kwun Tong wearing a surgical mask. He produced a note with the words in Chinese Have gasoline, give money to one of the bank staff. He got away with cash \$14,480 (3rd count).
AUTONUMOUT At the time of his arrest, the applicant was 28 years old, single, and had a clear record. AUTONUMOUT The applicant now seek leave to appeal against the total sentence of 10 years 8 months imprisonment imposed by the judge in respect of these four counts of robbery and attempted robbery. AUTONUMOUT Three grounds of appeal have been put forward. The first and third grounds effectively are the same namely, that the total sentence of 10 years and 8 months in all the circumstances of this case was manifestly excessive. The second ground of appeal is that the judge failed to give sufficient credit to the applicant for fully co-operating with the police and making a full confession to counts 1, 2 and 3 which, but for his confession, the prosecution would have difficulty in proving his guilt relating to those counts. AUTONUMOUT The applicant relies on two cases in his submission that the total sentence of 10 years and 8 months in the present case was manifestly excessive. AUTONUMOUT In HKSAR v. Wong Keung, CACC25/2003, the Court of Appeal upheld a total sentence of 10 years passed by the judge on the appellant, dismissing the appellant s appeal against sentence. The commission of the offences in that case (two counts of robbery and one count of attempted robbery) were very similar to the present case in that banks were the targets of the robberies and that the appellant there produced notes with threatening words in the commission of the offences. AUTONUMOUT Where that case differed from the facts of the present case was that the appellant in Wong Wai Keung s case was armed with hoax bombs and actually poured thinner onto the counters in the banks to bolster his threats of violence in committing those robberies. AUTONUMOUT In the present case, there was the threat of gasoline by the applicant as contained in the words on the threatening notes presented to the bank staff in the 3rd and 4th counts; serious in itself, but there was no suggestion that he actually possessed gasoline. AUTONUMOUT In the case of HKSAR v. Chan Sum, CACC341/1997, the appellant s appeal against the total sentence of

seven years imprisonment was dismissed by the Court of Appeal in respect of one count of attempted robbery and three counts of robbery. AUTONUMOUT The facts of that case again bear similarities to the present case in that banks were the targets of the robberies and attempted robbery and that a threatening note was used by the appellant in that case. The note in relation to one of the counts made reference to a gun and in relation to two other counts made reference to a bomb. However, no gun or bomb was actually carried or used. AUTONUMOUT It was submitted that the facts of the present case brought it much more in line with what had happened in Chan s case and was decidedly less serious than what had happened in Wong Wai Keung s case where thinner was actually poured on the counter in the bank. AUTONUMOUT It should also be noted that the judge in Chan s case took a very different route in arriving at the total sentence of seven years in that case. Although the Court of Appeal did not think that sentence to be manifestly excessive, it does not follow that it thereby endorsed that sentence as being a tariff to be adopted in cases where the facts matched those of that case. Decision AUTONUMOUT Dealing first with the second ground of appeal, after the applicant was arrested for the offence, the subject of the 4th count, he was cautioned and confessed to the 4th count. He was then further cautioned by the police for the 2nd count for which the police wanted to make enquiries from the applicant. Under caution by the police, the applicant admitted involvement in the 2nd count and at the same time also admitted to having committed the 1st count since the 1st and 2nd counts occurred within 10 minutes of each other on the same day. Subsequently, the applicant was further cautioned by the police for the 3rd count. Under caution the applicant admitted to the 3rd count. AUTONUMOUT It was conceded by the prosecutor at the time of sentence before the judge that although the CCTV of the various banks had caught the culprit in the process of committing the offences the subject of the 1st, 2nd and 3rd charges, but because he was wearing a surgical mask, the prosecution would not have sufficient evidence to link those offences to the applicant had it not been for his confessions made under the cautioned video interviews after his arrest. AUTONUMOUT Whilst that difficulty in identifying the applicant from the CCTV images came about because the applicant, of his own doing, chose to wear a surgical mask in perpetrating those offences, we take the view that some credit must still be given to him for his confessions made to the police after his arrest, but for which these offences would not have been brought home to him. AUTONUMOUT This the judge had failed to do when sentencing the applicant for these offences. AUTONUMOUT In our view a reduction of the sentence by six months would have been proper here. AUTONUMOUT Turning now to deal with whether the total sentence passed was manifestly excessive, the starting point of seven years adopted by the judge cannot be said to be excessive as a starting point given the facts of the present case subject to what we have to say below as to counts 3 and 4. AUTONUMOUT The reduction by one third of that starting point in respect of all the counts to take account of the guilty plea is also in accordance with normal practice. AUTONUMOUT However, we are of the view that the judge erred in dealing with the principal of totality in the way that he did. AUTONUMOUT Looked at globally, the present case warranted a sentence which would have been below the total sentence of 10 years passed on the appellant in Wong Wai Keung s case. Instead the judge below ended up with a

total sentence of 10 years 8 months which in our view is manifestly excessive.

AUTONUMOUT We are further of the view that the judge ought to have differentiated between the starting points in respect of counts 1 and 2 where there was no mention of gasoline in the threatening note and counts 3 and 4 where mention was made of gasoline.

AUTONUMOUT In relation to counts 3 and 4, it would have been more appropriate to take a starting point in the region of eight years imprisonment, although we would not be inclined to disturb the individual starting points taken in relation to counts 1 and 2, namely, seven years imprisonment. Given the pleas of guilty, the resulting sentences would be terms of four years and eight months imprisonment in relation to each of counts 1 and 2; and five years and four months imprisonment in relation to each of counts 3 and 4. AUTONUMOUT

This brings us to the question of totality. We consider that, subject to the six months deduction to which we have referred, an appropriate totality would have been eight years imprisonment and, therefore, a term of 7 years imprisonment after that deduction.

AUTONUMOUT Accordingly, we grant the applicant leave to appeal against sentence and treat the hearing of the application as the appeal. The sentences of four years and eight months imprisonment in relation to counts 1 and 2 are left undisturbed. In exercise of our powers under section 83I of the Criminal Procedures Ordinance, Cap.221, we substitute for the terms of four years and eight months imprisonment in relation to counts 3 and 4, terms of five years and four months imprisonment each. To give effect to the totality of 7 years imprisonment, we order that 10 months of that term in respect of count 2 shall run consecutively to that in respect of count 1, the remainder to run concurrently; making a total thus far of five years and six months imprisonment; that one year of the term imposed in relation to count 3 shall run consecutively to the terms imposed on counts 1 and 2, the remainder to run concurrently; a total thus far of six years and six months imprisonment; and that one year of the term imposed in relation to count 4 shall run consecutively; making a total of seven years and six months imprisonment. To that extent, the appeal is allowed. (F. Stock) (A.R. Suffiad) Justice of Appeal Judge of the Court of First Instance Miss Mary Sin, SADPP, for the Respondent Mr Peter Ip, instructed by Messrs Lau Pa 1udk 1udk r p# (#p# &`#\$ u)4q& u)4q & 6" CACV Jeannie MY MokSo ABC.dot setup Microsoft Word 9.0 Judiciary CACV Title Microsoft Word Document MSWordDoc Word.Document.8

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