

HONG KONG / JUDGMENT

HKSAR v. NGAI LOK YU

COURT

Court of Appeal

DECIDED

18 March 2003

CASE / FILE NUMBER

CACC168/2002

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bjbj CACC 168/2002 in the high court of the hong kong special administrative region court of appeal CRIMINAL appeal no. 168 of 2002 (on appeal from DCCC NO. 1167 of 2001)

BETWEEN HKSAR Respondent NGAI LOK-YU Applicant

Before: Hon Yeung JA, Beeson J & Suffiad J in Court Date of Hearing: 18 March 2003 Date of Judgment: 18 March 2003

J U D G M E N T

Hon Yeung JA (giving judgment of the Court):

Background

The applicant Ngai Lok Yu appeared with Cheung Kwok-wai (D1) before HH Judge Day on an indictment consisting of 3 charges. The applicant faced the 1st charge of blackmail jointly with D1. He also faced the 3rd charge of blackmail on his own. The 2nd charge of theft was only directed at D1. The applicant was convicted after trial on both the 1st and 3rd charges of blackmail. He was sentenced to a total term of 4 years imprisonment. D1 was acquitted of the 2nd charge. Initially the applicant applied for leave to appeal against both conviction and sentence. The application for leave to appeal against sentence was abandoned on 16 October 2002 and hence we are only concerned with his application for leave to appeal against conviction. Prosecution Case The victims, Liu Lam-wo (PW2) and Liu Man-tak (PW1) are brothers (the Liu brothers). PW2 operated Tin Ha Restaurant with branches in Kowloon City, Shaukeiwan and Diamond Hill. PW1 worked as a technician and was based mainly at the Kowloon City branch. D1, also known as Ricoh, was a supplier to the Shaukeiwan branch. In mid-June 2001, the Kowloon City branch was deliberately damaged when a truck was driven into the roller shutters.

There was also glue at the locks and faeces at the doors. A few days later, about 40 men occupied the restaurant in an intimidating manner and the police were informed. The 40 men were then invited back to the police station for inquiry. There was a subsequent threat to injure PW1 and a meeting was arranged in July 2001 by D1 through a middleman, Wong Keung, to settle the matter. The parties met in a room at the Gala Club in Wanchai. Yuen Kwok-wah (PW3), the manager of the Shaukeiwan branch represented the Liu brothers at the meeting. The applicant and D1 appeared with others including Wong Keung. Wong Keung introduced the applicant to PW3 as No. 14 So Ha . There was then a discussion amongst the applicant s group. Subsequently Wong Keung approached PW3 to tell him that the matter had been settled and a total of \$99,000, including two months deposit of protection fees and other expenses had to be paid. PW3 then consulted his boss who agreed to the payment. On or about 12 July 2001, PW3 withdrew \$100,000 that was proceeds of the restaurant from his account. The money was then paid to D1, as the applicant s group would not come to collect it, according to PW3. D1 also said So Ha would come to collect tor dei of \$5,000. On or about 3 September 2001, a man arrived at the Kowloon City branch to collect tor dei i.e. protection money. He was paid \$5,000. On or about 2 October 2001, the same man returned again to collect \$5,000. PW1 refused to pay him. The same man returned the next day and PW1 still refused to pay. Shortly afterward, the applicant came to the restaurant with a group of people and demanded the money. PW1 said he had to consult his brother first and the applicant then left. The meeting at the Gala Club formed the subject matter of the 1st charge and the incident on 3 October 2001 formed the subject matter of the 3rd charge. The Evidence PW3 gave detailed evidence on the meeting at the Gala Club and the events leading to such meeting. He said after the incidents in mid-June 2001 and the report to the police, PW1 appeared to be scared and refused personally to attend the meeting at the Gala Club. He said he himself was scared as he was told that they were going to see the big brother . PW3 said when he first met the applicant at the Gala Club, the applicant was introduced as No. 14 So Ha . To such introduction, the applicant s reaction was nothing special . PW3 also said the applicant was present throughout the meeting. It was not disputed that on 14 October 2001, PW3 attended an identification parade and positively identified the applicant. PW3 denied that the meeting at the Gala Club was a social meeting for playing mahjong. He disagreed with the suggestion that the applicant was only introduced as Ah Lok and not as No. 14 So Ha . PW1 also detailed the incidents in mid-June 2001 and the subsequent indication that he would be the next target of attack. He said when he made the payment to D1 in July 2001, he was told that someone could come to collect tor dei in future. D1 also told him that through his connection, he had tried to stop the restaurant from being tampered with. PW1 confirmed the payment of \$5,000 tor dei in September 2001 which payment was recorded as entertainment expenses in the account books of the restaurant. When the man came again in October 2001, he refused to pay him. When PW1 still refused to pay the next day, the applicant, together with 5 others arrived at the restaurant to demand payment. The applicant said in a fierce manner, ve promised to pay and now you refuse to pay. What do you want to do? PW1 positively identified the applicant at the identification parade. In cross-examination by counsel for D1, PW1 mentioned a tenancy for the premises in No. 5-9 Fuk Lo Tsuen Road which was next to the Kowloon City branch. It was a 7 years tenancy with rent for the 1st three years fixed and the rent for the subsequent 4 years negotiable. PW1

agreed that he vacated the premises after only 3 years and 3 months as the landlord wanted to double the rent and they were unable to reach agreement. He agreed with the suggestion that what he did upon vacating the premises led to complaint by the landlord that he had damaged certain fittings and fixtures. He said he suspected the incidents in mid-June 2001 were incidents of retaliation. It also transpired that CCTVs were used at the Kowloon City branch at the material time. It was agreed that none of the video recordings depicted the applicant. PW1 agreed with the suggestion that when the applicant came to demand payment in October 2001, a young man entered the restaurant first. He then went out and the applicant appeared with others at the doorway. PW1 then went out to the doorway to talk to the applicant. PW1 denied the suggestion that he in fact did not see the applicant on that occasion. PW5 Ko Po-yee worked as a waitress at the Kowloon City branch. She witnessed the applicant having a conversation at the doorway on 3 October 2001. PW5 also identified the applicant as the man talking to PW1 on 3 October 2001. It was an admitted fact that No 14 So Ha referred to the notorious triad society 14K. The applicant did not give nor call any evidence. Findings By The Judge The judge concluded PW1, PW3 and PW5 were all truthful and reliable witnesses and he accepted their evidence. The judge found that the applicant was present at the meeting in Gala Club in July 2001. It was a meeting to settle a certain vendetta when the applicant was introduced as So Ha of the number 14-K triad society. The judge found that the applicant's group demanded \$99,000 inclusive of compensation, expenses and two months protection money to settle the matter with a monthly protection fee of \$5,000 thereafter. The judge concluded that they made the demand for money, the demands were unlawful and the menaces plain. The judge also found that the applicant went to the Kowloon City branch on 3 October 2001 to demand the monthly protection fee of \$5,000. When PW1 refused to pay, the applicant said, you promised to pay and now you refuse to pay. What do you want to do? The judge concluded that the applicant did make an unlawful demand for \$5,000 in circumstances in which the menaces were clear and were meant to be so. In so far as the failure of the CCTVs to capture the applicant, the judge concluded that they in fact did not cover the whole restaurant. The cameras did not cover the areas that PW1 was sitting at nor the spot at the doorway where he talked to the applicant. Grounds of Appeal Mr. McGowan, on behalf of the applicant suggests that in view of the dispute about the tenancy of the premises at No. 5-9 Fuk Lo Tsuen Road, the judge should have considered the defence under s. 23 (1) of the Theft Ordinance. He also suggests that the applicant's presence at the Gala Club meeting was insufficient to lead to the inference that the applicant was party to the demands for payment. Mr. McGowan attacks the quality of the identification evidence when PW1 had previously seen the applicant's image on videotapes. He also says the evidence of PW1 and PW5 of the presence of the applicant at the restaurant on 3 October 2001 was doubtful when the CCTVs did not capture the applicant. Finally it is suggested that the judge had misdirected himself when he used the word unlawful instead of unwarranted in deciding the guilt of the applicant. With respect we fail to see the relevance of s. 23(1) of the Theft Ordinance at all. The dispute about the tenancy was brought up by counsel for D1 in cross-examination of PW1 to demonstrate that damages to the restaurant could be the result of retaliation. There was no suggestion, let alone evidence to support any suggestion, that the demands for money made by the applicant's group was connected to the dispute about the tenancy or in anyway lawful or warranted demands. There was never any suggestion that the

applicant had reasonable grounds for making any demand for money. In any event, the background of the matter was inconsistent with such suggestion. We must not ignore that the demand for \$99,000 in July was meant to cover compensation and two months protection fees and the further demands in September and October 2001 were demands for payments of tor dei . How such matters could have given rise to a reasonable ground for making demands for money is incomprehensible. The judge was perfectly right in paying no regard to this issue. There was no evidential basis for him to do so. It simply is a non-starter. The applicant might not have done nor said a lot at the Gala Club meeting. There was no such need and it would certainly not be advisable for him to do so. But he was introduced as a member of a notorious triad society. He took part in a discussion at the end of which demand for payment was made. There was talk about payments of protection money and the matter was followed up by the monthly demands for payments of tor dei . There was clear evidence of a concerted effort to make unwarranted demand of money at the Gala Club meeting and as the judge observed, the menaces plain. There was ample evidence to lead to the irresistible inference that the applicant was a party to such concerted effort. The applicant chose not to give nor call any evidence to explain, contradict or undermine the prosecution case against him. If the meeting was purely social and the applicant had no knowledge of the unwarranted demand, only the applicant could have provided the explanation. The applicant chose not to provide one. The applicant of course had no obligation to prove his innocence. But in the absence of any evidence from the applicant, it is easier to draw an inference of guilt on the prosecution case and such inference would be strengthened by his failure to explain. (see the judgment of Lord Hoffman NPJ in *Li Defan & Another v HKSAR* [2002] HKLRD 527 at p. 540) On the evidence, the judge was perfectly entitled to draw the inference of guilt as he did against the applicant on the 1st charge. The demand for \$5,000 on 3 October 2001 was clearly an unwarranted demand with menaces. The only issue raised by the applicant, through his counsel was that he was not there. There was no evidence to support such assertion. In relation to the two related incidents, three witnesses positively identified the applicant. The judge was clearly aware of the issues and the relevant facts pertaining thereto. It was not established during cross-examination the exact spot that PW1 was sitting at when the applicant approached him at the restaurant. It was also not demonstrated that the spot where he talked to the applicant was within the purview of the camera. In fact, generally the evidence on the video recording is not entirely satisfactory. But contrary to Mr. McGowan s submission, the matter was clarified when PW1 said under re-examination that there were places in the restaurant not covered by the cameras and he actually went out via the exit not covered by a CCTV. He also confirmed that the spot where he and the applicant stood at the doorway was not covered. The judge concluded that the witnesses were truthful and reliable. The judge had also carefully analysed the evidence relating to the CCTV. He concluded that the image of the applicant was not captured on 3 October 2001 because the cameras did not cover the spots in question. The judge was entitled to reach such conclusion on the evidence. There is nothing on the points about identification. It is perhaps unfortunate that the judge used the word unlawful instead of unwarranted . Mr. McGowan does not demonstrate the significance of it and we fail to see any. On the prosecution evidence which the judge accepted, the demands for money as tor dei were clearly unwarranted demands. The judge was fully aware of the nature of the offences and the

issues involved. The judge clearly had used the words unlawful and unwarranted interchangeably. There is no resulting unfairness or injustice.

Conclusion

We have considered all the matters raised by Mr. McGowan. None of those matters gives us any concern. In our view, the applicant was rightly convicted of the two charges of blackmail and there is nothing unsafe or unsatisfactory about the conviction. The application for leave to appeal against conviction is refused. (W Yeung) Justice of Appeal (C-M Beeson) Judge of the Court of First Instance (A.R. Suffiad) Judge of the Court of First Instance Mr Vincent Wong of Department of Justice for Respondent Mr James H.M. McGowan instructed by Messrs Quan & Co for the Applicant PAGE - 2QX[2QX[2QX[& 6" CACV Judiciary Connie-final.dot setup Microsoft Word 9.0 CACV Title Microsoft Word Document MSWordDoc Word.Document.8

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