

HONG KONG / JUDGMENT

HKSAR v. PINTO

[2024] HKCA 1164

COURT

Court of Appeal

DECIDED

11 December 2024

CASE / FILE NUMBER

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CACC 1/2024, [2024] HKCA 1164

On Appeal From [2023] HKDC 1826

in the high court of the

hong kong special administrative region

court of appeal

criminal appeal no 1 of 2024

(on appeal from dccc NO 131 of 2023)

BETWEEN

HKSAR

Respondent

and

Pinto

Appellant

Before: Hon Macrae VP and Zervos JA in Court

Date of Hearing: 11 December 2024

Date of Judgment: 11 December 2024

J U D G M E N T

Hon Macrae VP (giving the Judgment of the Court):

The appellant appeals, by leave of the Single Judge, against the sentence of 26 months' imprisonment imposed on him in the District Court by Deputy Judge K H Cheang following his plea to a charge of burglary, contrary to section 11(1)(b) and (4) of the Theft Ordinance, Cap 210.

The facts accepted by the appellant

PW1 was a co-owner of the penthouse and rooftop of Ng Po House, Nos 103-109 Sai Yeung Choi Street South, Mongkok, Kowloon. She lived in a hut on the rooftop. The building was under renovation with scaffolding erected around it at the time of the offence but it was still occupied. It consisted of 9 floors with 7 apartments on each floor. There was a metal gate from the 9th floor to the rooftop. Only PW1 had access to the rooftop, which was installed with a motion detection CCTV system, through a locked metal gate, although the main gate of the building was always open and a security guard was posted there between 8 am and 5 pm.

On 17 November 2022, PW1 returned to the hut, locked the metal gate and secured her front door. In the small hours of the following day, at about 3:30 am, the appellant trespassed onto the rooftop area. PW1 was alerted to his presence by the CCTV, after which she and the appellant looked at each other through a glass door of the hut. The appellant then fled and PW1 called the police.

Upon subsequent investigation, the appellant admitted under caution that the metal gate to the rooftop was locked. However, he had managed to crawl through an unlocked wooden door and climb up the scaffolding to the rooftop. He remained on the rooftop for about 20 minutes where he stole a workman's glove.

Reasons for sentence

The Deputy Judge noted that the appellant was a Form 8 recognizance holder and had a previous conviction involving a charge of Dealing with goods to which the Dutiable Commodities Ordinance applies and a further charge relating to an immigration offence, for which he was sentenced to a total of 13 months and 2 weeks' imprisonment in 2018.

The Deputy Judge did not accept the face value of the appellant's mitigation (for he elected not to testify in any Newton enquiry) that he went to the building thinking it was a friend's apartment.

The Deputy Judge sought to ascertain from the prosecution whether the rooftop was a common part of the building or part of PW1's premises. He was informed that the Land Registry recorded PW1 as one of two co-owners of the penthouse and rooftop. Accordingly, he regarded the offence as a domestic burglary and adopted 3 years' imprisonment as the starting point for the offence, which he then enhanced by 3 months for the appellant's status as a Form 8 recognizance holder. After giving the appellant a one-third discount for his plea of guilty, he passed a sentence of 26 months' imprisonment.

Grounds of appeal and the appellant's submissions

Mr Lee, who was assigned to act for the appellant pursuant to the appeal aid certificate granted by the Single Judge on 23 October 2024, has advanced three grounds of appeal. We thank him for his realistic submissions.

Ground 1 avers that the Deputy Judge failed to exercise his judicial discretion and adopt a starting point below the customary 3 years' imprisonment in all the circumstances of the case. Mr Lee argues that a lower starting point would be justified in the case of a burglary of the common parts of a residential building (citing HKSAR v Suen Chi Wai) or where the value of the stolen property was not significant (citing HKSAR v Chau Man Ying).

Ground 2 argues that the Deputy Judge erred in enhancing the starting point by 3 months' imprisonment on the basis of the appellant's Form 8 status. Mr Lee submits that the commission of a crime by a refugee or torture claimant does not necessarily attract an enhanced sentence if the crime has no significant effect on the reputation of Hong Kong, for which proposition he relied on the decisions in HKSAR v Sandagdorj Altankhuyag & Anor and HKSAR v Shah Syed Arif.

Ground 3 complains that, taking into account all the circumstances of the case, the ultimate sentence of 26 months' imprisonment was manifestly excessive.

The respondent's submissions

On behalf of the respondent, Mr Hui resists the appeal on the basis that the appellant's sentence was neither wrong in principle nor manifestly excessive. He submits that the Deputy Judge correctly rejected the assertion that the rooftop was a common part of the building: it was private property belonging to PW1. He also points out that, unlike the facts in Chau Man Ying, the building was not vacant and the trespass not opportunistic.

Mr Hui also stresses that, since the appellant trespassed into the rooftop in the small hours of the morning, thereby causing fear and alarm to PW1, his actions seriously abused the hospitality extended to him by the people of Hong Kong and affected the community at large.

Discussion

There are essentially three questions or issues raised by this otherwise rather straightforward appeal. Firstly, is there a difference in terms of the appropriate starting point between an invasion of the private living areas of domestic premises and a trespass to the private roof area (akin to a garden or terrace) without any attempt to enter the living areas of a property? Secondly, does the fact that what is stolen is not of high value affect the seriousness of the crime of burglary, whether domestic or non-domestic? Thirdly, is the status of a defendant as a Form 8 recognizance holder an aggravating feature in respect of a burglary of either type?

The answer to the first question must surely be that it depends on the facts and circumstances. After all, even an opportunist burglar is looking for an opportunity. Therefore, whether his intention is to enter into someone's home from the roof area or the garden or terrace may well depend on what he finds, such as an open door or an accessible window and how he assesses the ease of entry or egress. Equally, the roof area or garden or terrace is part of the domestic premises and offers an opportunity in itself to steal items of value. Whatever the position, one must always remember, as the Court in *HKSAR v Ng Wai Hing* has emphasised:

“Burglary is a serious offence and burglary of domestic premises is even more serious as there is always the possibility of confrontation with the occupant who will be subject to extreme fright when a total stranger invades his privacy. The gravamen in burglary of domestic premises is the fear felt by victims that a thief should have invaded their own house. That is why it may be regarded as an aggravating factor in burglary of premises which are expected to be occupied.”

In the present case, the appellant did come face to face with PW1 through a glass door, as a result of which he fled. However, PW1 was not to know how the appellant might or might not react in the circumstances, particularly when she was a lone female, and she would have been understandably alarmed and fearful at seeing an intruder outside her hut at 3:30 am. As to what the appellant's true intention was, he chose not to give evidence in a Newton enquiry.

We agree with Mr Hui that the circumstances in *Chau Man Ying* were rather different. Although domestic premises, the six-storey building in that case had been closed for redevelopment. The applicant cannot have been expecting to come face to face with any of the occupants because the building had been abandoned and was awaiting demolition. The nine-storey building in the case before us was privately occupied, as was the rooftop and hut, which was privately co-owned by PW1. Moreover, the circumstances in *Suen Chi Wai* were quite different and involved, as the Court appears to have accepted, an intrusion and stealing from “the common areas only and not from inside individual homes”.

As for the second issue, it is true that the appellant only stole a workman's glove, which was of minimal value. However, that was all the property of value he could find before he was discovered. Doubtless there were more valuable items in a private, occupied building than in an abandoned one: it was a mere matter of chance what the appellant managed to steal and how far he was able to go before being detected. Furthermore, the appellant was plainly interrupted when he came face to face with PW1, as a result of which he immediately fled.

We see nothing wrong with the starting point of 3 years' imprisonment for this burglary which involved trespassing onto private property, albeit outside and not inside the living areas of the premises, at a time when the premises were occupied as he was to discover when he came face to face through a glass door with the occupant.

In respect of the third issue, we consider, as we have said, that burglary is a serious offence, for which the maximum sentence on indictment under the Theft Ordinance, is 14 years' imprisonment, a higher maximum than, for example, the offence of theft itself. Although the circumstances of different burglaries will differ markedly, the time may have come when the Court will need to re-evaluate the sentencing parameters for domestic and non-domestic burglaries, which may be considered to be on the low side.

In our view, it is a matter of grave concern that defendants who are permitted to remain in Hong Kong as non-refoulement claimants should commit a burglary of any premises. Not only is the community affected but also the city's reputation for safety and security is damaged, as other jurisdictions have found where the situation of undetected burglaries seems to have got out of hand. As the Court observed in *HKSAR v Godhaniya Haja Samat*, albeit in the context of an arson offence:

"Such an offence also has the obvious effect of tarnishing this city's reputation for order and security: the occupants of a residential building in Hong Kong are entitled to expect that their place of residence is safe and secure".

We see nothing wrong with the Deputy Judge's enhancement by 3 months' imprisonment of the starting point, given the status of the appellant as a Form 8 recognizance holder when committing the crime of burglary.

Accordingly, the sentence of the Deputy Judge was appropriate and the appeal is dismissed.

(Andrew Macrae)

Vice President

(Kevin Zervos)

Justice of Appeal

Mr Matthew Hui PP, of the Department of Justice, for the Respondent

Mr Dick Lee, instructed by Vitus Lawyers, assigned by the Director of Legal Aid, for the Appellant

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