

HONG KONG / JUDGMENT

HKSAR v. SAE JAO MONCHAI

COURT

Court of First Instance

DECIDED

21 July 2017

CASE / FILE NUMBER

HCMA183/2017

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bjbj HCMA 183/2017 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO 183 OF 2017 (ON APPEAL FROM KCCC NO 2949 OF 2016)

BETWEEN HKSAR Respondent and SAE JAO MONCHAI Appellant

Before: Hon Zervos J in Court Date of Hearing: 21 July 2017 Date of Judgment: 21 July 2017 J U D G M E N T On 27 March 2017, the appellant was convicted after trial before Mr Michael L Y Leung, a Deputy Magistrate, of two charges of trafficking in a dangerous drug and sentenced to a total of 20 months imprisonment. The appellant appeals against his conviction and sentence. At the outset of the appeal hearing, the appellant abandoned his appeal against sentence and proceeded only with his appeal against conviction. He is represented by Mr David Boyton and Mr Raymond Chui. In August 2016, police officers mounted an undercover operation at the lounge where the appellant worked. On 19 August 2016, a male employee of the lounge, who identified himself as Ah Moon , greeted two female police officers posing as customers, officers Lam and Cheng. He chatted with them for a while and later offered to sell cocaine to officer Lam. Officer Lam gave him \$500 and he returned with a packet of cocaine which he gave to her. On 20 August 2016, officer Cheng together with a male police officer posing as a customer, attended the lounge. Ah Moon greeted the undercover police officers and introduced himself as the manager of the lounge. They chatted together and later Ah Moon offered to sell cocaine to officer Cheng. The two went into a staff room where officer Cheng gave him \$500 and in return he gave officer Cheng a packet of cocaine. Ah Moon spoke fluent Cantonese. On 28 August 2016, the operation turned overt and the appellant was arrested. On the next day, 29 August 2016, the appellant attended an identification parade at which both officers Lam and Cheng positively identified the appellant as Ah Moon. The only issue at trial concerned the identification of the appellant as the male who sold the drugs to officers Lam and Cheng. The defence case was that the two police officers were mistaken. There was a voir dire hearing to determine the preliminary issue as to the admissibility of the identification parade evidence and whether dock identifications should be allowed. The

magistrate admitted into evidence the identification parade evidence on the basis that it had been fairly conducted. He also allowed the two police officers to conduct dock identifications of the appellant. On the special and general issues, the appellant did not testify or call evidence. The magistrate set out in his statement of findings his analysis of the identification issue. He noted that the legal representative for the appellant had initially objected to the actors that had been selected to participate in the identification parade on the basis that they were different in appearance and body shape to the appellant. Two of the actors were Filipinos whereas the appellant was a Thai national. The magistrate noted that the nationality of the actors was not important and the real issue was whether the actors used in the line-up were similar in appearance to the appellant. He found that the actors reasonably resembled the appellant. He further found that the identification parade was fairly conducted and was therefore admissible. I have considered the evidence and the defence submissions on this issue and I agree with the magistrate's analysis and conclusion. The magistrate also found that dock identification should be allowed on the ground of recognition. As he explained, the officers spent some time with the person that they identified as Ah Moon and had ample opportunity to observe his features and appearance and therefore be in a position to recognise him. The magistrate explained that he accepted the evidence of officers Lam and Cheng who both identified the appellant as Ah Moon in an identification parade some 9 to 10 days later. He concluded that all the Turnbull requirements had been fulfilled and allowed the dock identification. The appellant advances two grounds of appeal. The first is that the magistrate gave inadequate reasons concerning his ruling on the identification issue. The second is that the magistrate did not examine adequately the specific defects of the identification parade. Identification evidence is one of those evidential subjects that requires special attention because of the risk of mistake. The Court of Appeal in *R v Turnbull* [1977] QB 224 laid down guidelines which are applicable when the prosecution's case is wholly or substantially based upon disputed identification evidence. The basic principle is the special need for caution when the issue turns on evidence of visual identification. This is particularly so in cases where the identification evidence is based on a fleeting glance or a longer observation made in difficult conditions. How a tribunal of fact should address identification evidence will depend upon the quality of it, which needs to be carefully considered before it is accepted and relied upon. When the identity of a defendant becomes an issue the guidelines set out in *Turnbull* should be followed. Mr Boyton complains that the magistrate did not approach the evidence of identification properly and failed to direct himself as to how he should approach such evidence. There is no question that the central issue in the proceedings before the magistrate was the identification of the appellant by the two police officers. The magistrate in his statement of findings stated that the issues in the case were (i) whether the identification parade is admissible evidence; (ii) whether dock identification should be allowed; and (iii) whether Ah Moon was the appellant. He then discussed in detail the evidence on the special issue as to the identification of the appellant. He specifically referred to the *Turnbull* guidelines and clearly addressed the evidence with them in mind. He accepted the evidence of the two police officers and found that they had both identified the appellant as Ah Moon and that they had both denied that they had mistakenly identified him. He accepted their evidence completely and concluded that he was in no doubt that the appellant is Ah Moon. Mr Boyton submits that the magistrate did

not adequately address or reason the issue of identification in his statement of findings, in particular he complains that the magistrate did not address whether the two police officers could have been mistaken when identifying the appellant. The magistrate clearly turned his mind to the issue surrounding the identification of the appellant by the two police officers. He found that the police officers were honest and credible and accepted their account of events. Both police officers on separate occasions identified the appellant in an identification parade. Both denied that they were mistaken about identifying the appellant. The magistrate attached full weight to their evidence. I am satisfied that the magistrate has properly considered the issue of identification and that is evident from his statement of findings and the record of the proceedings. He clearly accepted the evidence of the two police officers and found their identification evidence reliable. As he stated, he attached full weight to the police officers evidence. Mr Boyton also complains that the magistrate should not have admitted into evidence the identification parade evidence when it was more prejudicial than probative. However, he acknowledged in oral submissions that the identification evidence of the two police officers was not of poor quality. In any event, he lists a number of matters that he submits rendered the identification parade evidence unreliable. First, he argues that the identifications were made of a stranger. That may be so, but both police officers were greeted by Ah Moon and spent a considerable period of time with him in the lounge. He chatted with them and entertained them while they were there. This was not a fleeting encounter. Secondly, he complains that the two police officers were extremely precise in their height estimates of the appellant. One officer said he was 175-176 cm tall. The other officer said he was 1.73 metres tall. He argues that appellant was the tallest, by about half a head, of the eight people used in the identification parade and so therefore he stood out. The participants in the identification parade were of varying heights, and whilst the appellant was the tallest, the range of heights were not of a nature or degree that would render the identification parade unfair. Thirdly, he complains that two of the actors were Filipinos and not Thai nationals like the appellant. Whilst it is true that two of the actors were Filipinos, their general appearance and characteristics was similar to the other participants in the identification parade. It should be noted that the other participants were Thai nationals. But in any event what was important, as correctly noted by the magistrate, was whether the actors reasonably resembled the appellant. He was satisfied that the identification parade was fairly conducted and I agree. There is no substance to this ground of appeal. I have considered the evidence presented at trial and the issues before the magistrate, and I find no basis to interfere with the magistrate's verdict. As this is a rehearing on the papers, I am satisfied to the requisite burden and standard of proof that the appellant is guilty of the offences as charged. The appeal against conviction is therefore dismissed. (Kevin Zervos) Judge of the Court of First Instance High Court Mr Felix Tam, SPP of Department of Justice, for HKSAR Mr David Boyton and Mr Raymond Chui, instructed by Littlewoods, for the appellant

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