

HONG KONG / JUDGMENT

HKSAR v. SHAKEEL AHMED

[2019] HKCA 1013

COURT

Court of Appeal

DECIDED

6 September 2019

CASE / FILE NUMBER

CACC61/2017

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CACC 61/2017

[2019] HKCA 1013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO 61 OF 2017

(ON APPEAL FROM HCCC 27 OF 2016)

BETWEEN

HKSAR

Respondent

and

SHAKEEL AHMED

Applicant

Before: Hon McWalters JA in Court

Date of Hearing: 13 August 2019

Date of Judgment: 6 September 2019

J U D G M E N T

A.

Introduction

The applicant was charged with one count of trafficking in a number of different dangerous drugs, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134. The charge particularised the dangerous drugs as “2,158 grammes of a solid containing 967 grammes of cocaine, 118 grammes of a crystalline solid containing 116 grammes of methamphetamine hydrochloride (“Ice”) and 43.7 grammes of cannabis in herbal form.”

The applicant pleaded not guilty to the charge and stood trial before D’Almada Remedios J (“the judge”) and a jury in the Court of First Instance. On 1 March 2017, the applicant was unanimously convicted of the sole count and was sentenced to 23 years and 9 months’ imprisonment. On 16 March 2017, the applicant applied for leave to appeal his conviction.

On 7 September 2018 the applicant applied out of time for leave to appeal his sentence. In support of his application he filed an affirmation explaining that his lateness in appealing was primarily due to the fact that his then counsel only reminded him to file a notice to appeal in respect of his conviction within the prescribed time but not his sentence.

At the hearing of the application I reserved my judgment which I said I would hand down at a later date. This is my judgment.

B.

The prosecution case

At about 02:40 hours on 27 June 2015, the applicant and one Mehmood Khalid (“Mehmood”) were put under surveillance by PC 7011 (“PW1”) at the junction of Nathan Road and Man Ming Lane, Yau Ma Tei. PW1 observed Mehmood give keys to the applicant who then put them into his left front trousers pocket. The two then parted and left in different directions.

The police suspected that dangerous drugs were being kept in Flat D on the 5th floor of Hong Lok House, 477 Nathan Road (“Flat D”). PW1 intercepted the applicant at about 03:05 hours. The applicant was then searched and police found on his person HK\$17,676.70 cash (P44), two mobile phones (P48, P50), two loose keys (P46, P47) and a bunch of six keys in his left front trousers pocket (P45).

The applicant was then taken to Flat D for a search of these premises and there the police officers used the two loose keys, P46 and P47, to open the two locks on the door to Flat D. They also tested the keys on the key chain, P45, and found that two of them also opened the door to Flat D.

Inside that flat they found the drugs the subject of the charge. They also found:

a tenancy agreement for Flat D signed by one “Nguyen Thiluong” as tenant (P28);

one grey underwear (P29) and one blue underwear (P30) for men;

two toothbrushes (P31, P32), both of which were later found to have on them the applicant’s DNA;

inside a bedside drawer a copy of a Form 8 (P33) and a gym membership card (P34), both in the name of the applicant; and

cash totalling HK\$87,850 (P14-P27).

The admitted retail value of the 967 grammes of cocaine was HK\$2,259,426; of the 116 grammes of Ice was HK\$46,020; and of the 43.7 grammes of herbal cannabis was HK\$5,812.

The applicant’s fingerprint was found on the sticky side of a piece of adhesive tape that was removed from a Jack Daniel’s carton (P6), containing 40 pellets of cocaine. The rest of the cocaine, in the form of 100 pellets, was concealed in two Hennessy cartons and the Ice in a Jin Xin carton. The cannabis was in a plastic bag inside a Lenovo case together with an electronic scale, a number of smaller plastic bags and the HK\$87,850.

In a subsequent video record of interview conducted between 21:40 and 23:15 hours on 27 June 2015, the applicant stated that Flat D was not his house, the HK\$87,850 found in it was not his, and he had no knowledge of the dangerous drugs in the flat. He said that of the HK\$17,676.70 found on him, HK\$17,000 had been given to him to look after by a friend called “Usman” who would be seeking its return in due course.

Miss Nguyen Thi-luong testified for the prosecution and stated that she came to know the applicant in early 2013 on the internet. She denied having had any romantic relationship with him but said that out of compassion for the applicant, who could not rent a flat without a HKID card, she rented Flat D and signed the tenancy agreement (P28) for one year starting from September 2014. There was one key given to her by the estate agent, which she had in turn given to the applicant on the same day she signed P28. The applicant was the one who paid the rent. She had heard from him that he had changed the lock or locks to Flat D. She added that she visited the applicant at Flat D occasionally, and he would always open the door and let her in.

C.

The defence case

The applicant elected to give evidence and called one witness, Mr Grewal Inderjit Singh.

The defence case was that the applicant, a torture claimant of Pakistani origin, was not the occupier of Flat D and had never paid any rent for it. He had lived at 22 Kimberley Road since 2012 which was the address stated in his Form 8. He said he had gone to Flat D on previous occasions to visit Miss Nguyen, his then girlfriend and the occupier of this flat. He also said he would consume liquors such as “Jack Daniel’s” and “Hennessy” with Miss Nguyen and one “Abbas”, a tenant living in another flat on the 5th floor. He said the last visit he made was in April 2015.

He said the toothbrushes were Miss Nguyen’s and he had used them and this was why his DNA was found on them. He had never previously seen the cartons containing the dangerous drugs, or any adhesive tape, during his drinking sessions. He did not know how his fingerprint got onto the sticky side of the adhesive tape on P6.

In explaining how he came into possession of the keys to Flat D, he said he did not have them except on the night of 27 June 2015, he was given two keys by Mehmood on Miss Nguyen’s instructions so that he could wait for her in Flat D that evening. He put the two keys on his key chain so he would not lose them. He said at the time of the arrest he was only in possession of the two keys given by Mehmood which he had put on P45. He did not have P46 and P47 in his pocket as the police alleged, nor did he know Mehmood beforehand.

He maintained that he did not know about the dangerous drugs and had nothing to do with them. He accused Miss Nguyen of falsely implicating him as their romantic relationship had turned sour since April 2015.

Mr Grewal testified that he was an owner of a mobile phone business at Chung King Mansions and had known the applicant for four to five years. He recalled that on one occasion the applicant went to his shop with “Usman” as they wanted him to be the witness that about HK\$14,000 to HK\$15,000 was given to the applicant by “Usman”. However, Mr Grewal did not know what the money was given to the applicant for or on what terms it was given.

D.

The judge’s Reasons for Sentence

The judge acknowledged the applicant was a Form 8 holder at the time of the offence and that the sentence would have to be enhanced for this fact.

The judge noted that there were mainly two kinds of narcotics involved, namely cocaine and Ice. For 967 grammes of cocaine, she directed herself in accordance with HKSAR v Abdallah and adopted a starting point of 21 years and 9 months’ imprisonment. For 116 grammes of Ice, she directed herself in accordance with HKSAR v Tam Yi Chun and adopted a starting point of 11 years and 9 months’ imprisonment. The judge then took the “combined approach” and reached a starting point of 22 years and 9 months’ imprisonment.

Having taken into account the Form 8 holder status of the applicant, the judge further enhanced the starting point by one year. Hence, she imposed on him 23 years and 9 months' imprisonment.

The judge also ordered the forfeiture of all items found on the applicant.

E.

The application for leave to appeal against conviction

The applicant was unrepresented at the leave hearing. In his Form XI filed on 16 March 2017, he maintained his innocence and complained that it was unfair to him that Mehmood and Miss Nguyen were not charged for the present offence for their apparent connections to Flat D.

In an undated letter recently filed with the court, the applicant raised 11 complaints which can be summarised as follows:

(1)

the judge erred by telling the jury that the applicant had met Miss Nguyen after searching the internet for a sexual partner;

(2)

the judge failed to adequately direct the jury as to the mixture of DNA that was found on the blue underwear;

(3)

(i)

the judge erred in highlighting to the jury that the applicant was a member of a gym club as this may have caused the jury to think that the applicant was enjoying a standard of living beyond that of an ordinary Form 8 holder and which was, therefore, afforded through illegal money;

(ii)

the judge erred in inviting the jury to consider that the applicant was the occupier of Flat D by highlighting to them that the lost gym membership card was found in Flat D;

(4)

the judge erred by excessively emphasising to the jury that the applicant lived at 22 Kimberley Road "at least from 2012" as he had lived at that address since October 2010; furthermore, the jury might have wrongly reasoned that he was renting two flats and could only afford to do so with illegal money;

(5)

the judge's summing up was prejudicial and unbalanced as shown by her not repeating the evidence of the officer who lifted the fingerprints at the scene;

(6)

(i)

the judge's summing up was prejudicial and unbalanced in directing the jury on the applicant's statements in his record of interview when the applicant was not asked about the presence of an electronic scale and a bundle of plastic bags in the flat in the video record of interview;

(ii)

no CCTV footage was produced by the police in respect of the alleged interception of the applicant outside McDonald's on Nathan Road which cast doubt on PW1's credibility;

(7)

(i)

the judge misdirected the jury on the evidence of the keys, in particular, the number of keys found on the applicant at the time of the arrest as there was an admitted fact covering this matter;

(ii)

the amendment in PW1's post-record notebook entries in respect of the number of keys found on the applicant cast doubt on PW1's credibility;

(iii)

there were doubts as to why Mehmood would still go to Flat D with only one key on him, and if he had just given the keys to Flat D to the applicant. Nevertheless, these facts were not emphasised to the jury. Furthermore, if six keys were seized then from whom did the other keys come and what detailed explanation was there in respect of them.

(8)

(i)

Miss Nguyen's evidence was incredible and should not be believed;

(ii)

the defence counsel failed to cross-examine the landlord on the basis that he would not have any problem in renting the flat to a Form 8 holder;

(9)

the judge failed in her summing-up to fairly direct the jury on the applicant's defence that Miss Nguyen had set up the applicant with all the dangerous drugs found in Flat D;

(10)

during his cross-examination of the applicant the prosecutor suggested to him that he said in his video record of interview that Mehmood was his friend. This was not supported by the evidence, and this line of questioning was unfair and prejudicial to the applicant;

(11)

the trial judge should not have permitted the evidence concerning the information leading to the arrest of the applicant to be placed before the jury as it was unfair and prejudicial to the applicant.

F.

Discussion: Conviction

I have considered all of the complaints and only find that one of them could form the basis of a reasonably arguable ground of appeal. I shall briefly explain why I have reached the conclusion I have in respect of each complaint.

F.1

The judge's misstatement that the applicant was seeking a sexual partner

It is true that the applicant in his examination-in-chief only said he was looking for "partners" as opposed to "sexual partners" on a dating website and so this was a mistake by the judge.

However, I am of the view that this mistake, on its own, was insignificant and would not have prejudiced the applicant. It was in fact the applicant's case that it was through a dating website that he met Miss Nguyễn, that from the second meeting they had become sexual partners, and thereafter had sex in all subsequent meetings. It would have been clearly understood by the jury that the applicant, on his own case, was not looking for a platonic relationship and the mistake by the judge would not have prejudiced him in any way. I find no reasonably arguable ground of appeal in this complaint.

F.2

The DNA on the underwear

The second admitted facts set out in clear terms the nature of the human DNA found on the blue underwear (P30) and that it was a mixture from at least two DNA sources, with at least one male source, and the applicant "could not be confirmed or excluded as a possible source of the DNA mixture because a random match probability cannot be provided due the mixture of sources". Whilst the judge in summing-up did not specifically direct on this piece of evidence, she had directed the jury to treat the matters set out in the admitted facts as conclusively proved. The judge's summing-up on this matter was perfectly adequate and I find no reasonably arguable ground of appeal in respect of his complaint.

F.3

References to the applicant's gym membership

At trial it was agreed that the unchallenged witness statement of the gym manageress could be admitted into evidence by way of section 65B of the Criminal Procedure Ordinance, Cap 221. The references made by the judge in her summing-up in respect of the applicant's gym membership were not prejudicial as she reminded the jury of the defence case that the membership card had been reported lost. The significance of the gym membership lay in the fact that the membership card was found in a bedside drawer of Flat D. Its presence in the flat and its location within the flat supported an inference of occupancy of the flat. I find no reasonably arguable ground of appeal in respect of this complaint.

F.4

The references to the Kimberley Road residence

There was no error by the judge in directing the jury that the applicant had lived at 22 Kimberley Road "at least from 2012" as it was supported by the applicant's Form 8 (D1) and there was not excessive reference by her to this fact. Nor was there any reference by her to the applicant having the financial means to rent two premises. The issue was not whether he could afford to rent two flats but rather was whether he was in occupation of Flat D. I find no reasonably arguable ground of appeal in respect of this complaint.

F.5

The fingerprint evidence

There was nothing in this complaint. As to the fingerprint evidence the judge had, in an earlier part of the summing-up, recited in detail the evidence of SPC 14421 on how fingerprints were lifted. There was no need for her to repeat the same evidence and I find no reasonably arguable ground of appeal in respect of this complaint.

F.6

The applicant's VRI and the absence of CCTV of the applicant's interception

It was an admitted fact that an electronic scale (P12) and a bundle of plastic bags (P13) were found together with dangerous drugs in the "Lenovo" bag (P10). There is no prejudice to the applicant in anything the judge said in respect of this admitted fact.

The absence of CCTV footage in respect of the interception of the applicant does not cast doubt on the credibility of PW1.

Neither of these complaints can found a reasonably arguable ground of appeal.

F.7

The issue of the keys seized from the applicant

In respect of the judge's alleged errors in stating the number of keys found on the applicant at that time, I find no merit in this complaint. The judge's directions have to be read in the context of the evidence. It was an admitted fact that a bunch of six keys (P45) was found on the applicant at the time of the arrest. In addition to this bunch of keys there was evidence from PW1 that he found two loose keys on the applicant's person. Thus, it was the prosecution case that a total of six keys were found on the applicant.

It was the two loose keys that were used to open the door of Flat 8D. An inference available to the jury was that these were the keys given to the applicant by Mehmood. However, there was also evidence that two of the keys of the bunch of four keys on the key chain also opened the door to Flat 8D. This was very significant as it provided supporting evidence to the prosecution case that the applicant was the resident of Flat 8D and that what Mehmood was doing was returning to the applicant a spare set of keys to the flat; something that Mehmood would do only because the applicant was the occupant of the flat. It is unclear if the full significance of the applicant being found in possession of two sets of keys to Flat 8D was appreciated at trial.

The applicant's complaint on appeal relates to a mistake made by PW1 when post-recording the applicant's response to caution. This post-record refers to PW1 finding in the applicant's left trouser pocket "two keys that could open Flat 8D, 5th Floor, Hong Lok House", but "two" is deleted and replaced with "four". That the original entry was of only two keys being found on the applicant was relied upon by him as support for his evidence to this effect and of his assertion that the two keys were not loose in his pocket but were attached to the key chain.

The judge's reference to "2 keys or 4 keys" was actually made by her when she was reminding the jury that there was a dispute between the prosecution and the defence as to the number of keys found on the applicant that could unlock the door to Flat 8D. There was no error by the judge. The evidence was accurately described by her. What the jury would make of the evidence and what impact it would have on their assessment of the witnesses and their evidence were all matters for them.

I cannot find any reasonably arguable ground of appeal in respect of any of these complaints.

Whilst on the subject of the keys I should mention that Mr Cheung very fairly brought to my attention that the issue in respect of the keys is complicated by the parties agreeing to an admitted fact that in respect of the police photographs "the descriptions in the album of each photograph are accurate." The police photo album, exhibit P98, consists of 51 photographs affixed to a piece of paper and underneath each photo there is a description of what each photo depicts. The last photo in the album, photograph 51 is of a door with two locks and a latch affixed to it. A loose key is inserted in each lock. The loose keys allegedly seized from the applicant were exhibits P46 and P47. The English description under photograph 51, is:

"

The main door of Rm 8D with a key (The key belongs to M/MEHMOOD Khalid)” (Emphasis added.)

There are two problems with the italicised words. The first is that it is expressed in the singular whereas the photo depicts two keys in two locks. The second problem is the statement that the key belongs to Mehmood. Although, as an admitted fact, it is conclusive evidence that a key belongs to Mehmood it is unclear what this precisely means. Both keys were possessed by Mehmood prior to him passing both of them to the applicant. Is the phrase “belongs to” intended to convey ownership in addition to possession?

There is ambiguity in the description and this ambiguity can only be clarified by reference to the evidence. The evidence makes it clear that what is being asserted is that these are the keys that the police observed were in Mehmood’s possession and which they saw him pass to the applicant as a result of which the applicant came to be in possession of two sets of keys to the door of Flat 8D. There is nothing to suggest that the prosecution were alleging that Mehmood owned the keys he passed to the applicant and it was never a part of the prosecution case that Mehmood was an occupant of Flat 8D.

Before leaving this point, however, I must comment that there is an obvious danger in making a blanket adoption of all descriptions of photos without carefully checking that those descriptions are accurate and do not by any ambiguity or looseness of language convey a wrong or misleading meaning.

F.8

The evidence of Miss Nguyen and of the landlord

Miss 8Nguyen’s testimony was summarised by the judge in detail in the summing-up. She had consistently denied the applicant’s allegations and her testimony was not shaken under cross-examination. The judge, in concluding her speech, reminded the jury of the doubts raised by the defence in respect of Miss 8Nguyen’s credibility. The credibility of Miss 8Nguyen was an issue placed squarely before the jury. The applicant’s complaint has no merit.

The defence counsel did cross-examine the landlord and he agreed that he would not discriminate against torture claimants and had rented rooms to such persons.

There is nothing in either of these complaints that would found a reasonably arguable ground of appeal.

F.9

The judge’s direction on the applicant’s set-up defence

In the summing-up, the judge reminded the jury on a number of occasions that the gist of the defence case was that the applicant had been set up by Miss 8Nguyen. There is no merit in this complaint.

F.10

The cross-examination of the applicant by the prosecutor

As the applicant states in his letter, this line of questioning was not pursued by the prosecutor after objection was raised by the defence counsel. Nor was any reference made by the prosecutor in his closing speech to the applicant being acquainted with Mehmood. I can find no reasonably arguable ground of appeal in respect of this complaint.

F.11

The judge's directions on the "target" evidence

Most of the "acting on information received" and "target person" evidence came out from the cross-examination of PW1 by the applicant's counsel as a forensic tactic so that she could obtain support for the defence case that the applicant had been set up by Miss Nguyen. I also note that when directing the jury that the information the police acted upon was "only information, and not evidence, as to why the police officers had a search warrant for the premises and why they were there in the vicinity that evening", the judge reminded the jury that they might "consider whether this lends support to the defendant's account that he was set up by Miss Nguyen."

The relevant legal principles were anticipated by the Court of Appeal in *HKSAR v Chung Tang Ping*. That judgment makes it clear that it does not matter which party is responsible for bringing out the references to "target person". What is important is that the judge ensures that the jury is not improperly influenced by this evidence. The way in which the jury could be improperly influenced was described as follows:

"

Terms such as 'information' and 'target person' are likely to arouse in one's mind the notion that information received by the police concerning illegal activities is related to the defendant. Such kinds of information have a substantial influence on the jury, who are lay people. It would also easily tend to predispose them to be biased against the defendant and form the pre-conceived notion that he/she must be related to the illegal activities (See *R v Li Chun Choi* [1990] 1 HKLR 665)."

What action is required of the judge to prevent any improper influence occurring was set out at paragraph 37 of the judgment:

"

37.

Although it was the defence that proactively brought up the issue that the police acted upon information to proceed to Lok Ma Chau Control Point to arrest the applicant, who was the target person of the police, with the express purpose to reinforce the defence's stance, the Trial Judge should proactively explain to the jury when he was directing them the reason for disclosing to

them the applicant's identity as the police's target person, in order to avoid causing the jury to be biased against the applicant on the ground that the applicant was the police's target person. He should also make it plain to them that they should not on that ground form the notion that the applicant therefore must be related to the police's anti-dangerous drugs activities, and that the applicant had taken part with knowledge in the said offence."

I am satisfied that it is reasonably arguable that:

(i)

the evidence in this case was capable of improperly influencing the jury; and

(ii)

whilst the direction of the judge went part of the way in counteracting the risk that the jury might be improperly influenced by this evidence, the directions did not go far enough in that they did not include the direction set out in the last sentence of paragraph 37 of *Chung Tang Ping*.

I grant leave to appeal on this ground of appeal.

G.

The application for leave to appeal against sentence out of time

It was not until 7 September 2018 that the applicant first applied out of time for leave to appeal his sentence. This is more than 1 year and 6 months out of time. In his supporting affirmation he blamed his lateness on his trial counsel's failure to remind him to file a Form XI in respect of his sentence.

In an undated letter recently filed with the court, the applicant raised essentially one ground of appeal. He referred to *HKSAR v Mushtaq Zeeshan* in arguing that his sentence was manifestly excessive. He also intended to challenge the forfeiture order made by the court in respect of the money found on him at the time of the arrest, ie HK\$17,676.70 cash (P44).

H.

Discussion: Sentence (out of time)

I do not accept the applicant's explanation for the delay in filing the Notice of Application for Leave to Appeal to appeal against his sentence. It defies logic that his then counsel, a very experienced criminal counsel, would have reminded him only of the time limit for appealing his conviction and neglected to inform him that there was also the same time limit for appealing his sentence. In any event, he still failed to explain why it took him more than one and a half years to file his application.

Nevertheless, I have also considered the merits of his grounds in order to satisfy myself that by refusing his application I was not shutting out a substantial and plainly arguable ground of appeal. For the following reasons I am not satisfied any of the applicant's complaints constitute a reasonably arguable ground of appeal.

This court has stated on countless occasions that drawing comparisons with other cases will not persuade the Court of Appeal that the sentence of an applicant for leave to appeal is manifestly excessive. Each case depends on its own facts and these comparisons do not assist the court.

In the present case, the judge rightly directed herself in accordance with HKSAR v Abdallah in respect of trafficking in 967 grammes of cocaine, and HKSAR v Tam Yi Chun in respect of trafficking 116 grammes of Ice, and sentenced the applicant on the combined approach. I am satisfied that the starting point of 22 years and 9 months adopted by her was appropriate in the circumstances. The judge extended leniency to the applicant by not sentencing him for his trafficking in the cannabis.

The judge correctly enhanced the starting point by one year, taking into account the aggravating factor that the applicant was a Form 8 holder. This court in HKSAR v Singh Gursevak stated that there is no reason why such an enhancement cannot be greater than 18 months, subject to the facts of each case. The dangerous drugs found in this case were of a substantial amount and it can be seen from the photos that they were packed in a way to facilitate dissemination, which, if successful, would certainly pose considerable harm to the general community in Hong Kong.

In respect of the forfeiture order, the applicant did not advance any ground in support of his application. In his mitigation, his counsel was trying to persuade the judge that the applicant, a Form 8 holder, was in a dire financial situation at the time of the arrest. This proposition however was dismissed by the judge. She obviously did not accept that an ordinary Form 8 holder would have so much money in his possession and was willing to pay HK\$500 a month for a gym membership when he claimed in evidence that he needed to sell the HK\$1,200 worth of coupons given by ISS to make ends meet. In the absence of any plausible explanation, the judge was entitled to forfeit the money found on the applicant as she did.

In any event, I have already expressed my reservation in HKSAR v Valencia that, notwithstanding past Court of Appeal practice to the contrary, there is a large question mark over whether the right of appeal against sentence can be used as an appellate remedy to appeal a forfeiture order.

I.

Disposition

For these reasons I grant the applicant leave to appeal his conviction but only in respect of ground 11 and I refuse him leave to appeal his sentence out of time. I remind the applicant of his right to renew his application for leave to appeal his sentence out of time before the Court of Appeal and also remind him that should he do so, and should the Court of Appeal find no merit in his renewed application, the Court of Appeal has the power to order loss of time under section 83W(1) of the Criminal Procedure Ordinance, Cap 221.

I grant an appeal aid certificate to the applicant to argue his appeal against conviction.

(Ian McWalters)

Justice of Appeal

Mr Ivan Cheung SPP, of the Department of Justice, for the respondent

The applicant appeared in person

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