

HONG KONG / JUDGMENT

HKSAR v. SINGH SATINDER PAL AND ANOTHER

COURT

Court of Appeal

DECIDED

27 May 2015

CASE / FILE NUMBER

CACC428/2014

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bjbj CACC 428/2014 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CRIMINAL APPEAL NO 428 OF 2014 (ON APPEAL FROM DCCC 782,
858, 875, 878 & 995/2013)

BETWEEN HKSAR Respondent and SINGH SATINDER PAL 1st Applicant (D13) IJAZ MUHAMMAD
2nd Applicant (D17)

Before: Hon Lunn VP, Hon M Poon J and D Pang J in Court Date of Hearing: 8 May 2015 Date of
Judgment: 8 May 2015 Date of Reasons for Judgment: 27 May 2015

REASONS FOR JUDGMENT

Hon D Pang J (giving the reasons for judgment of the court): In the hearing before Judge G Lam, the 1st and 2nd applicants were referred to respectively as and in a District Court case involving multiple defendants and multiple charges. Acting in person, the 1st applicant, who was convicted after trial, sought leave to appeal against his conviction of one charge (Charge 6) of acting as a member of a triad society, contrary to section 20(2) of the Societies Ordinance, Cap 151, and with the assistance of counsel, sought leave to appeal against the 18 month sentence that was imposed on him as a result. Convicted on his own plea of a different charge of acting as a member of a triad society (Charge 8), the 2nd applicant, who acted in person, also sought leave to appeal against that conviction. THE 1ST APPLICANT The Prosecution Case Between April 2011 and January 2013, a covert operation was conducted whereby an undercover police officer () was tasked to infiltrate the 14K triad society. The circumstances giving rise to Charge 6 was one of the many incidents that PW1 recorded. The trial judge summed it up as follows

69. In the early hours on 20 August 2012, D1, PW1, D6, D9, D10, D11, D12 and a bald-headed male gathered at the main entrance of New Golden Cyber Cafe located in Shamshuipo.
70. D1 said to the group of people mentioned above Dong Lo suffered a beating from Ah Poon for no reason. Later on, we must locate the fuck face. You guys need to give him a beating. So many of us are standing here. It's so fucking conspicuous. Go down first. Having heard what D1 said, the group went back down to the cyber cafe. Later on, [the 1st applicant] arrived at the cyber cafe as well.
71. About 2:50 am, D1 told the group Hey, we can go now. PW1, D1, D6, D9, D10, D11, D12 and [the 1st applicant] left the cyber cafe together. Mak Dong Lo and the bald-headed male followed too.
72. The group walked along Yen Chow Street towards Yee Kuk Street. D1 ordered [the 1st applicant] to ask PW1 and D6 not to walk together in order not to be so conspicuous. Later on, D9 also asked D6, D12, Mak Dong Lo and D10 not to huddle together in order not to be so conspicuous. The group went to a suite situated at 13/F, Tak Cheong Building on Yee Kuk Street.
73. In the suite, a person who was believed to be Ah Poon was seen coming into the building on the CCTV system. Having seen the person on the screen, D1 said Ah Poon you fuck face did something to my follower. I will definitely do something to you. D1 asked PW1, D6, Mak Dong Lo and D12 to leave the suite together to look for Ah Poon. The group walked downstairs from the 13th Floor to the Ground Floor.
74. On the way down, D1 said Ah Poon might have weapons with him, so he told the group to get some weapons just in case. Mak Dong Lo and D12 each picked a mob stick from the staircase. PW1 and D6 picked up metal rods. They went to the Ground Floor lift lobby but could not find Ah Poon. They returned to the suite.
75. In the suite, PW1 heard D1 talking on phone Ah Poon, I have so many people here. Who can you chop? Do I have to call you Poon Gor when I walk by and see you? It's alright that you did something to me. What the fuck were you doing when you did something to my followers?
76. About 4:00 am, D1 said to the people in the suite Hey, you may leave separately. PW1 saw D9, D10 and the bald headed male leaving. PW1 then left together with D11 and D12. The Defence Case Neither D1 nor the 1st applicant availed themselves of the right to give evidence, nor did they call any witnesses. D9 did testify, but he said that he was drunk and was unaware of the nature of the night's gathering. D10 was absent for the best part of the trial and was not re-arrested until after the evidence had finished. D6, D11 and D12 had all pleaded to Charge 6 at the outset. There was, therefore, nothing to gainsay PW1's evidence. Reasons for Verdict Having referred to such matters as the incidence and burden of proof, the judge began his assessment of the evidence by saying

116. Both the prosecution and defence accept that the crux of this case is the credibility and reliability of PW1's evidence. I have borne in mind that the evidence against each defendant for each charge is a one-against-one situation. I understand that the allegations made by PW1 against each defendant are easy to fabricate but difficult to rebut. The judge took into account (and dealt with) all the criticisms that were made in respect of PW1's evidence. For example, it was stressed or otherwise alleged by the defence that (a) PW1 had only his memory to rely on when making his daily entry in the Occurrence Book at night (not an impossible task nevertheless); (b) PW1 deliberately failed to create audio and/or visual records of what he witnessed to make it impossible to rebut (personal safety and preserving the trust of others were his main concerns); (c) the reported words or actions of the defendants were sometimes unreasonable and improbable (not so, plus human behaviour is sometimes difficult to predict or explain); (d) PW1 was incurring a lot of expenses as well as earning an extra income from his undercover job, so he fabricated evidence to keep the operation alive for his own financial gain (there were more pressing concerns for PW1 and, in any event, everything was documented); and (e) the entries in the Occurrence Book were almost word perfect and suggestive of copying (there are all sorts of innocent reasons why a record would be well written). The judge found PW1 to be an honest and reliable witness and fully accepted his evidence. Conversely, he concluded that although [the 1st applicant] was the last person in D1's group to arrive at the cyber cafe and he did not take part in the search for Ah Poon at Tak Cheong Building, at the street, D1 told him to tell the group to split up and not to be so conspicuous, and he did. In my view, these words would not have come out from someone innocent. As a juror, I am satisfied that D1 organized a group to seek revenge against Ah Poon in a triad way and to show force. [The 1st applicant] knew the purpose of that group and was ready, able and willing to assist. The Appeal against Conviction In his Notice of Application for leave to appeal (Form XI) dated 18 December 2014, the 1st applicant wrote that since he arrived at the cyber cafe late and walked in the street only at the beckoning of others, he could not be guilty of knowingly taking part in a triad attack. He attributed his conviction to discrimination against his Indian heritage. Discussion We find no merit in these grounds. The judge was entitled to draw the inference that he did in the last quoted passage of his Reasons for Verdict (see paragraph 6 above). By the latest, the 1st applicant would have become aware of the purpose of their meeting up when the group started to monitor the CCTV in Tak Cheong Building. His action on the street suggests it to be earlier. But he never withdrew his presence from the group. Reasons for Sentence Dealing first with his background and mitigation, the judge had this to say of the 1st applicant
63. He is 39 and married with 2 children. He has 7 conviction records, which include 1 offence of Claiming to be a member of a triad society (dated May 1998). Mr. IU informed me that D13 was a member of Sun Yee On when he was 18, but he is no longer a member of that triad society. Mr. IU submitted that the cause of D13's getting into trouble in the past was his drug addiction. In Charge 6, he was ready to give assistance to his group, but nothing more than that. He did not do anything to encourage others nor was he the organizer. At most, he was

someone associated with a triad member. Stating that he regarded it as correct, the judge adopted the approach of Judge J Chan who, in a separate proceeding, sentenced D6 and D11 in respect of Charge 6 and sentenced the 1st applicant to 18 months imprisonment for the same incident . The following is what Judge Chan said when dealing with D11

25. In mitigation for D11, Mr Chow submits that the role of D11 was similar to that played by D6 who had been sentenced by this court. This court took a starting point of 18 months and sentenced D6 to a term of 12 months imprisonment. Mr Chow submits that D11, like D6, was only a foot soldier and not an officer, a similar starting point should be adopted.
39. When I sentenced D6 for Charge 6, my attention was drawn to the authority HKSAR v Choy Ka Fai and 4 others CACC195/2009. As I indicated on the last occasion, the facts of the present case were quite different from the facts of Choy
- s. The present case was not just a case of blowing whistle or gathering power to show force. The defendants involved were embarking on a revenge attack against a hostile triad member. They went to the residence of the target person, and in the course of their search for the target person, they had armed themselves with weapons. The Appeal against Sentence Counsel acting on behalf of the 1st applicant in relation to sentence had advanced two grounds: By adopting the starting point of 18 months imprisonment, the judge had wrongly departed from the guidelines in HKSAR v Choy Ka Fai & Others [2011] 1 HKLRD 150. The 18-month term was manifestly excessive and/or wrong in principle in the light of the minor role that the 1st applicant played in the incident. Discussion Not unlike the present case, the case of Choy Ka Fai & Others arose from an undercover operation resulting in the arrest and prosecution of a number of defendants. It occasioned a brief but succinct review of the past sentencing approach to three types of triad offences one of which was blowing the whistle . However, this review did not set down any guidelines for sentence. Giving the judgment of the Court, Tang VP (as Tang PJ was then) cited with approval the judgment of this Court in HKSAR v Wong Sing Chi CACC 245/1999 (31 August 1999, unreported) and affirmed that for this particular genre of acting as a member of a triad society , the normal starting points of sentence for an officer and a soldier were 15 and 9 months imprisonment respectively. These starting points had their genesis in the factual context of Wong where rival groups of 20 and 40-plus people were assembled for a settlement talk in a restaurant . It did not develop into something even less pleasant. In Choy, the same starting points were applied and upheld in circumstances [that were] not as serious . These results correlate with the long-standing definition of blowing the whistle , to which Tang VP alluded . It is a summons from one member to other members of same triad society to gather together to show force which, experience has shown, may or may not lead to violence. That being the case, and notwithstanding the fact that the congregation of a triad group to stand against the presence of a rival gang is in itself a serious menace to tranquility , we do think the circumstances that gave rise to Charge 6 are distinguishable and are more serious than a bare show of force. As pointed out by the court below, this case was an attempted attack on a rival triad. The group congregated particularly for that purpose. They outnumbered the

other side by ten to one. There is nothing to suggest that the attack was contingent upon the failure of a possible settlement. Tak Cheong Building was where the intended victim lived. Looking at the matter in the round, we are satisfied that a starting point of 18 months was appropriate for D1 and the subgroup that went down the stairs and who armed themselves with makeshift weapons as they did so. The judge erred, however, when he failed to take into account that (a) the 1st applicant was not part of the actual assault party and (b) there was no evidence that he was aware that the intended attack would involve weapons. For the 1st applicant, a starting point for sentence of 15 months imprisonment would have been appropriate. THE 2ND APPLICANT The Facts The facts constituting Charge 8 were as follows

85. About 10:00 pm on 15 November 2012, PW1 phoned D3. D3 told him to go to Garden Restaurant on Nathan Road to report to D1. Upon arrival, PW1 did not go inside but phoned D1. PW1 asked D1 if they were going to have a meal. D1 said Not having a meal, but blowing whistle to have a fight. At that time, PW1 saw a male named Siu Keung. PW1 told D1 that he saw Siu Keung. D1 asked PW1 and Siu Keung to wait for him.
86. Later, PW1 joined D8 at a convenience store near Garden Restaurant. D1, Sei Ngan Mui, [the 2 D1, D8, [the 2nd applicant], D21 and PW1 all went up to a flat situated at 8/F, Hung Sing Building. In the flat, there were 3 unknown females, 2 unknown males. Ah Kay was there. Har Gor was also present. Har Gor said to D1 Dai Seh, we are all number. You don't have to bring so many fucking people here. D1 and Har Gor then went into a room for a chat.
88. About 10:35 pm, D1 came out of the room. He handed his mobile phone to PW1 and asked PW1 to answer his phone calls. Later, D1 told PW1 The matter had already been settled. The group then left the flat. PW1 saw D1, D21 and Sei Ngan Mui getting on a taxi together and left. The Appeal against Conviction It was tersely stated in his Notice of Application for leave to Appeal (Form XI) dated 29 December 2014 that the 2nd applicant wished to have his case re-opened. He included no submissions in support. Before us, the 2nd applicant explained that at the time of his plea, he was upset by his mother's ill health and other family problems. Discussion The 2nd applicant was at the material time represented by counsel, and had the service of an interpreter. Both his plea and his formal admission to the facts were done orally in open court. There is nothing to suggest that his mind and action were not ad idem. There is no merit in this application. DISPOSAL OF THE CASE For the reasons given above, the 1st and the 2nd applicants' applications for leave to appeal against conviction were dismissed. The 1st applicant's application for leave to appeal against sentence was granted and treating the hearing of the application as the hearing of the appeal, we allowed the appeal. His sentence of 18 months imprisonment was set aside and substituted by one of 15 months. (Michael Lunn) (M Poon) (D Pang) Vice President Judge of the Court of First Instance Judge of the Court of First Instance Mr Franco Kuan, SPP of the Department of Justice, for the respondent Mr Norton Pang, instructed by Herbert Tsoi & Partners, assigned by Legal Aid Department, for the 1st applicant (on sentence) The 1st applicant appeared in person (on conviction) The 2nd applicant appeared in person (on conviction) Reasons for Verdict, paragraphs 69-76. PW1's protector in the triad society:

Reasons for Verdict, paragraphs 25 - 30. Reasons for Verdict, paragraph 116. Reasons for Verdict, paragraphs 119 - 129. Reasons for Verdict, paragraph 130. Reasons for Verdict, paragraph 138(vi). Reasons for Sentence, paragraph 63. Reasons for Sentence, paragraph 49 - 50. Reasons for Sentence, paragraph 81. Judge Chan s Reasons for Sentence in DCCC782, 858, 875, 878 and 995/2013. Paragraph 20 of the Choy judgment. Paragraph 25 of the Choy judgment. Paragraph 18 of the Choy judgment. As per Liu JA in HKSAR v Yeung Chi Keung CACC 96/1988 (4 August 1988, unreported). Reasons for Sentence, Paragraph 49. Reasons for Verdict, paragraph 85 88. PW1 understood "number" to mean the 14K triad society. Appeal Bundle, Pages 122T 123J. PAGE gd# gdA@ gdA@ gdA@ gdA@ gdA@ gdA@ gdJ* gds[gds[gds[gds[gdA@ gdA@ gd# gdKU gdJ* B* ph h:yQ B* ph gdKU gdJ* he\$4 gd4t gdA@ gdJ* {tktbk hU5A hU5A he\$4 gd4t gd4t yt4t gd4Q_ gd4Q_ gd4Q_ gde\$4 yt4t gd4Q_ hTP\ h:yQ hw<g gdA@ &`#\$ PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V gd4Q_ :pA@ yt4t yt4t (#p# [Content_Types].xml Iw}, \$yi} _rels/_rels theme/ theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v`I`n 3Vq%`#q x}r : \TZaG I u3 L+M2 e(O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)` # R>QD =(K& =al- 4vfa 0%M0 theme/ theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/_relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/ themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> \$U " A:0- (*Rm(z A:0- \$*ru HCA2137/2004 hc_trans_05 JUDGE.DOT Catherine KW IEUNG Microsoft Office Word judiciary HCA2137/2004 Title <b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/ bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/ bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{6A35D3BF-D105-4BF9-B64F-FE61A9F13EB2}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/ customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/ officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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