

HONG KONG / JUDGMENT

HKSAR v. SUBRAMANIAM NAVARAJAN

COURT

Court of Appeal

DECIDED

1 August 2007

CASE / FILE NUMBER

CACC480/2006

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bjbj CACC 480/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL criminal APPEAL NO. 480 OF 2006 (ON APPEAL FROM DCCC NO. 545 of 2006)

BETWEEN HKSAR Respondent and subramaniam navarajan macrobutton nomacro Applicant

Before: Hon Stuart-Moore VP, Stock JA and Burrell J in Court Date of Hearing: 1 August 2007 Date of Judgment: 1 August 2007 J U D G M E N T Burrell J (giving the judgment of the Court): The applicant (referred to at trial and on appeal as Rajan) was convicted by Deputy District Judge Ada Yim of a single offence of wounding contrary to section 17 of Cap. 212, the Offences Against the Person Ordinance. He had been jointly charged with a man referred to as Zihan . However Zihan had absconded and the applicant was tried alone. Zihan had been charged with 2 woundings. Prosecution case We shall refer to all the participants in this incident by their abbreviated names. A summary of the events as found by the judge is as follows. On the evening of April 14th 2006 a man named Hameed hosted a party at his home in Tuen Mun. In the early hours of the following morning a fight occurred at that address. The fight had started because a man named Gamage had accused the applicant of stealing his bag. In the fight it was alleged that Zihan had hit Hameed over the head with a bottle. This formed the first charge of wounding against Zihan alone. After the fight Zihan, Rajan and a third man named Sana left the party. A little later Gamage and Hameed decided to pursue them and went by taxi to Zihan s home in Tsuen Wan. There, they met and confronted Zihan, Rajan and Sana on a staircase. Rajan was armed with a knife. Gamage and Hameed turned to run away but were chased by the other three. Rajan caught up with Hameed and stabbed him in his arm. At trial Gamage and Sana were not called as witnesses. Only Hameed, the victim, gave evidence for the Prosecution as to what had occurred. At 10:35pm on April 15th Hameed gave a witness statement to the Police in which he described his assailants and gave the names of Rajan, Zihan and Sana. He had known Rajan for over a year. About 3 hours later, at 2:05am on April 16th the same police officer took a witness statement from Gamage. He confirmed that Rajan had stabbed Hameed s left arm. Rajan was arrested 2 months

later. Defence case Rajan gave evidence. He said he had not attended the party and had not been at the scene of the fight in Tsuen Wan either. Thus it was his case that Gamage and Hameed had collaborated and falsely accused him of the wounding in Tsuen Wan. His alibi was that he was at the home of a friend named Lee Hau at the material time. Lee Hau was not called as a witness because he was an overstayer. Rajan believed that Gamage and Hameed had falsely accused him because Rajan had earlier informed the Police about another overstayer who had been staying at Hameed's home and also because Hameed was currently in debt to a friend of Rajan's. Grounds of appeal The perfected grounds amount to two complaints. First, that the judge should not have relied on Hameed as a credible witness. He was the only witness as to what had happened. Secondly, there were striking similarities in the two witness statements taken by the same police officer (PW1) from Hameed and Gamage. The similarities suggested that Hameed and Gamage had colluded to fabricate a story against the applicant. PW1's evidence in chief was that the statements had come from the witnesses and that he had not coached or briefed them. There is no doubt that in many instances exactly the same words and phrases appear in both statements. Mr John Dunn, counsel for the applicant, lists 12 examples from the two statements which are less than 2 pages in length. We quote merely 3 of them. Both witness statements contain these words: (i) At that time I did not see any of them carrying (my) handbag but I saw WP1 holding a 26cm fruit knife in his right hand . (ii) At that time I noted that my (VTM

- s) left arm was bleeding. Despite of it we continued to give chase . (iii) Meanwhile, I saw AP, who ran in the front was stopped by the Police whilst WP1 dropped down the knife handle onto the ground and fled in the opposite direction to the Police . The other nine examples illustrate the same degree of similarity. Both witnesses also gave exactly the same descriptions of the two men, Zihan and Rajan. Details such as 1.72m tall and short hair cut with a little lost in the front appeared, word for word, in both statements. To suggest that the 2 witness statements came, independently, from the mouths of the witnesses is fanciful. However PW1, in cross examination, seemed to say that that is how the statements were taken. When being asked about Gamage's witness statement he was asked did the contents of this statement come from Ruwan (Gamage) himself, they're his answers? A: Right right. Q: You didn't coach him in any way? You didn't tell him what to say? A: Correct. Q: All those details came from Ruwan (Gamage)? A: That's right. Q: And can I assume that you recorded them as accurately as you could, trying to use his words as translated to you? A: That's right. Q: You didn't alter them in any way. You just recorded what he said? A: That's right. When asked the same questions in relation to Hameed's witness statement he gave the same answers. As the two witness statements are to all intents and purposes identical, common sense dictates that PW1 composed them himself from the information provided to him from the interpreter. It is regrettable that the interpreter was not available to give evidence. Common sense also dictates that many pieces of evidence could not have come from both witnesses; for example, 1.72 metres tall holding a 26cm fruit knife hair cut with a little lost in the front white/brown shorts . Such expressions must have come from one or the other. If they came from one, they did not come from the other. Each statements must be the sum of what both had said. There must, therefore, be parts of each which were not uttered by that

particular witness. Which parts and which witness cannot be known. The judge was aware of this issue. In her reasons for verdict she dealt with it as follows: The defence referred PW2 to his and Gamage's witness statement (Exhibit P1 and P6), drew his attention to the similarity in the content, and the same estimation regarding to the length of the knife involved and the height of WP2, put to the witness that these shown that he concocted the story together with Gamage. The witness disagreed. I noted the same officer, PW1 with the assistance of an interpreter interviewed both of them, the officer prepared a list of similar questions for them, and organized their answers put them down in writing and paragraphed them. Both of them were describing the same incident; I do not consider similarity in their witness statements affect the creditability of PW2. She correctly identified the issue as being the effect the similarities have on the credibility of PW2 but what it does not deal with is PW1's evidence as to how the witness statements came to be so alike in the first place. What cannot be ignored is that PW1's evidence is simply unbelievable. We have come to the conclusion that a conviction based on such tainted evidence cannot be allowed to stand. Given our concern about the two witness statements and bearing in mind that the applicant's defence from the outset was that Hameed had given false evidence against him, other deficiencies in the prosecution case take on a greater significance. First, at the scene Hameed only said that his attackers were Zihan and a friend of his. He didn't name Rajan until his statement was taken 20 hours later even though he had known Rajan for over a year. Secondly, there was the absence of evidence from a key prosecution witness (Gamage) and key defence witness (Zihan) and a key neutral witness (the interpreter). In all these circumstances the conviction is unsatisfactory. Accordingly we grant leave to appeal against conviction and treating the hearing of the application as the appeal, the appeal is allowed and the conviction is quashed. (M. Stuart-Moore) macrobutton nomacro Vice-President (Frank Stock) Justice of Appeal (M.P. Burrell) Judge of the Court of First Instance Mr Hayson K S Tse, SGC, of the Department of Justice, for the Respondent. Mr John Dunn instructed by Messrs Joseph Li & Co., assigned by Director of Legal Aid, for the macrobutton nomacro Applicant PAGE - PAGE 1udk 1udk 1udk 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 "0 "0 "0 i\$&`G Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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