

HONG KONG / JUDGMENT

HKSAR v. TSANG HON HANG AND ANOTHER

[2024] HKCA 70

COURT

Court of Appeal

DECIDED

19 January 2024

CASE / FILE NUMBER

CACC227/2022

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CACC 227/2022 [2024] HKCA 70

On appeal from [2022] HKCFI 3694

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO 227 OF 2022

(ON APPEAL FROM HCCC NO 139 OF 2020)

HKSAR

Respondent

v

Tsang Hon Hang (D4)

1st Applicant

Cheng Yiu Man (D5)

2nd Applicant

Before: Hon Zervos JA in Court

Date of Hearing: 17 January 2024

Date of Judgment: 19 January 2024

J U D G M E N T

The two leave applications before the court concern a robbery case involving nine defendants. Six of the defendants pleaded guilty to a joint charge of robbery, including the 1st applicant (whose original trial designation was D7 and later D4) and the 2nd applicant, (whose original trial designation was D8 and later D5), while the remaining three defendants pleaded not guilty to the charge (whose original trial designations were D1, D2 and D6). The defendants were committed to the High Court and appeared before Campbell-Moffat J (the judge). The case against the three defendants who pleaded not guilty proceeded to trial before a jury and were convicted of the alternative offence of common assault. The other six defendants confirmed their pleas of guilty and agreed a summary of facts before the judge. On 6 December 2022, the judge sentenced D4 to 8 years' imprisonment and D5 to 7 years and 4 months' imprisonment.

On 16 December 2022, D5 filed an application for leave to appeal against sentence. On 23 March 2023, D4 filed an application for leave to appeal against sentence out of time. D4's application was out of time by nearly three months, but I have nevertheless addressed it to ensure that I was not shutting out a substantial and plainly arguable ground of appeal.

The summary of facts

On the evening of 8 August 2018, two couriers of a licensed money service operator, situated in Middle Road, Tsim Sha Tsui, were loading into a private vehicle a suitcase containing \$10 million cash for transportation to Hung Hom. As they were loading the suitcase into the boot of the vehicle, the driver of the vehicle, who was assisting in the loading of the suitcase, was attacked and hit over the head with a bottle. The bottle smashed, causing the driver's head to bleed. He turned around and saw two to three males behind him, one of whom was D3. The three males assaulted the driver and the two couriers. The driver was punched and kicked, who struggled with the males. The driver saw another male, D2, retrieve two suitcases from the boot of the vehicle; one of the suitcases contained the \$10 million cash. D2 ran away with the suitcases, and the driver chased after him. D2 kicked the driver, causing him to fall. At the same time, D2 dropped one of the suitcases but managed to place the suitcase containing the \$10 million cash into a private vehicle that was parked nearby. The private vehicle drove off, and D2 ran away.

The police carried out an investigation and arrested D1, D2 and D3 on 15 August 2018, D4 on 27 August 2018, D5 on 13 September 2018, and D6 on 7 June 2019. The summary of facts agreed by the defendants upon their pleas of guilty contained an outline of the robbery and how a passerby had witnessed it. It also set out a summary of the caution statements that were made by the various defendants and how the robbery was planned and carried out. It was an elaborate operation, organised and planned by a person named "G". He recruited D1, who carried out surveillance of the money exchange shop, taking photographs of the staff. He acted as a lookout

when the robbery took place. D2 confirmed his role in the robbery and that he was offered a reward of \$30,000 to steal the suitcase containing the cash. D3 said he was recruited to beat up someone but had no idea it was a robbery.

D4 said he received a telephone call about robbing an underground bank and agreed to be the driver of the getaway car for \$200,000. He purchased the getaway vehicle through his fraternal brother and arranged for forged licence plates to be put on it. He drove D5 and D6 to the location of the robbery. D5 told him that there would be another group carrying out the assault. He saw D2 retrieve the two suitcases and drove the vehicle towards him. D2 put a suitcase into the vehicle, and he drove off. D5 and D6 were in the vehicle with him throughout the robbery. He discarded the forged licence plates and parked the vehicle in a private car park. D5 and D6 discarded the suitcase and put the money in a rucksack. He told his fraternal brother not to use the vehicle and to have it scrapped. On 9 August 2018, he received a \$200,000 reward. He also confirmed that he did not have a valid driving licence at the time.

D5 said he was responsible for finding a driver and someone to snatch the money. He received a telephone call on the day before the robbery from a person with the surname Chan to participate in it. He called D4, asking him to be the driver and promising him a reward of \$200,000. He asked D4 to recruit one more person to snatch the money. On the day of the robbery, D5 joined D2, D4 and D6 at Tsim Sha Tsui and waited in D4's vehicle for further instructions. D5 was in contact with Chan via WeChat. He saw the couriers take two suitcases to the private vehicle, and a South Asian male hitting one of the men on his head with a bottle. He saw D2 taking the two suitcases out of the boot of the vehicle. After one of the suitcases was loaded onto the vehicle by D2, D4 drove off without D2. He said the three took the cash out of the suitcase and put it into a rucksack. D4 discarded the forged licence plates and the empty suitcase on a hillside. He said D6 gave him \$300,000 cash and he passed on \$200,000 to D4 as his reward, keeping \$100,000 for himself. Chan contacted him later that evening and told him and D6 each to carry \$500,000 cash to the Mainland. They converted the cash into Renminbi at a money exchange shop. He handed over the Renminbi cash to D6. He said he subsequently spent his reward when he met with Chan and D6 in Macau.

D6 was identified after D4 and D5 mentioned his involvement in the robbery. D6 said he was contacted by D5 on the morning of the robbery, telling him there was a job for him. He met D4 and later D5, who told him they had to wait until the time was right. D2 was also waiting in the vehicle. He observed the robbery while in the getaway vehicle with D4 and D5. After that the suitcase containing the cash was put in the vehicle, D4 drove off. He said D4 and D5 changed the licence plates of the vehicle and D5 put the stolen cash into a rucksack. He said D5 invited him to visit Macau, where D5 gave him \$90,000 cash to spend.

The \$10 million cash was never recovered. The driver sustained multiple injuries, including a laceration to the right side of his head and abrasions to his knees and right elbow.

In passing sentence on D4, the judge adopted a starting point of 10 years after considering his role, which she enhanced by 12 months for his criminal record and recent release from prison, 6 months for his unrecovered benefit of \$200,000 from the robbery, and a further 6 months for his recruitment of D2. She reduced the notional starting point of 12 years' imprisonment by one third for his guilty plea, and sentenced him to 8 years' imprisonment. She made the following sentencing remarks in respect of D4:

“25.

As for D4, Tsang Hon-hang, I have heard what Mr Yu has said on his behalf and read his letter. He is one of two mature defendants, who knew full well what he was entering into when he agreed to provide the vehicle for this robbery. He had only just been released from prison but the reward was significant. D4's role was substantial and key to the carrying out of this offence and so I am surprised that it is suggested that he was recruited only on the day. He organised the vehicle, arranged for false plates, picked up D5 and D6, provided an observation point for others to supervise the robbery and recruited D2. He also disposed of incriminating evidence and helped some of the defendants to flee the scene. He received a significant reward of HK\$200,000.

26.

In sentencing D4, I also adopt a starting point of 10 years after trial. I will enhance that sentence by 12 months for the fact that he is a mature man with an extensive criminal record and had only just been released from a term of imprisonment. I will also enhance it by a further 6 months as he received some HK\$200,000 which he benefitted from and which has not been recovered. He also recruited D2 for which he will receive a further 6 months' imprisonment. That makes a total sentence of 12 years. He will receive a full one third discount for his plea at the earliest opportunity and will go to prison for 8 years.”

In passing sentence on D5, the judge adopted a starting point of 10 years, which she enhanced by 6 months for his involvement in the recruitment of D4 and D2 and a further 6 months for his unrecovered benefit of \$100,000 from the robbery. She reduced the notional starting point of 11 years' imprisonment by one third for his guilty plea, and sentenced him to 7 years and 4 months' imprisonment. She made the following sentencing remarks in respect of D5:

“27.

As for D5, Cheng Yiu-man, I have listened to what Mr Chiu has said on his behalf. There is a conflict between the mixed statements made by D5 and D6. Mr Chiu has explained that during a period of just three months immediately before this offending, D5 became involved with someone called Chan and it was he who recruited him to carry out a number of crimes including this one. Mr Chiu submits that he was young and under the instructions and influence of Chan throughout. Nevertheless, he admitted recruiting D4 and asking D4 to recruit D2 and he was liaising with Chan throughout the robbery whilst remaining a safe distance away. He was doing this in the presence of D6. He admitted to the recruitment of D4 but not to that of D6, which I believe he would have admitted if that had been the case. It may be that Chan recruited D6

separately. I do not know because D6 is pointing the finger at D5 and not at Chan. D5 suggests that he received only HK\$100,000 from this crime. I do not believe that version of events as he paid D4, the driver, HK\$200,000 and he was clearly higher up the hierarchy than D4 and closer to Chan. He was also responsible for laundering some of the funds. D5 has, in turn, sought to point the finger at D6 as being in charge of events that day. I do not fully believe either of them and, in any event, this is a joint enterprise for which both D5 and D6 are fully responsible for the acts of the whole gang and should receive a similar sentence.

28.

I intend to adopt a starting point after trial of 10 years. D5 recruited D4 and instructed him to recruit D2 for which I intend to enhance his sentence by 6 months, making 10 years 6 months. On his own account he received HK\$100,000, which has not been recovered for which I intend to enhance his sentence by a further 6 months which makes a total of 11 years. He will receive a full one third discount for his plea at the earliest opportunity. D5, Cheng Yiu-man will go to prison for 7 years 4 months.”

D4’s leave application

D4 is represented by Mr Victor Lee, who filed Perfected Grounds of Appeal on 12 July 2023. He advances the following three grounds, which I will deal with in turn.

Ground 1 complains that the enhancement of 12 months to his sentence for D4’s previous record and commission of the offence after release from prison was manifestly excessive and wrong in principle.

D4’s criminal record included offences in 2010 and 2011 of acting and being a member of a triad society, conspiracy to common assault, blackmail and criminal damage for which he received prison sentences. In April 2016, he was sentenced to 3 years and 6 months’ imprisonment for unlawful sexual intercourse with a girl under the age of 13, and soon after serving the sentence he committed the present offence. The triad and related offences of assault, blackmail and criminal damage were similar to the present offence of robbery and the judge was entitled to enhance his sentence as a repeat offender. Relevantly, the offences of common assault and blackmail are statutory alternatives to the offence of robbery. In light of the seriousness of the previous convictions and relevance to the present conviction, the judge was correct to take them into account, notwithstanding that they occurred some time ago. The judge was also entitled to take into account that D4 had been only released from prison shortly before he committed the present offence.

In the circumstances, I do not find the complaint regarding the 12 months’ enhancement to be reasonably arguable.

Ground 2 avers that the judge erred in not paying sufficient regard to the additional sentence of 5 months’ imprisonment that D4 received for driving offences related to his role in the present case, which should have been concurrent to the sentence of the robbery.

The driving offences concerned three sets of offences of using a vehicle without third-party insurance (Charges 1, 3 and 5) and driving without a driving licence (Charges 2, 4 and 6). D4 was separately dealt with for these offences in the Magistrate's Court. Charges 1 and 2 were committed on 8 August 2018, the day of the robbery; Charges 3 and 4 on 9 August 2018, the day after the robbery; and Charges 5 and 6 on 27 August 2018, 19 days after the robbery. Putting aside the driving disqualification orders, D4 was sentenced to 4 months' imprisonment on Charge 1; 2 months' imprisonment on Charge 2, which was made concurrent to Charge 1; 4 months' imprisonment on Charge 3, which was made concurrent to Charges 1 and 2; 2 months' imprisonment on Charge 4, which was made concurrent to Charge 3; 4 months' imprisonment on Charge 5, of which 1 month was made consecutive to Charges 1 to 4; and 2 months' imprisonment on Charge 6, which was made concurrent to Charge 5.

Mr Prakash Daryanani, for the respondent, has extensively examined the impact that the 5 months' imprisonment for the driving offences may have had on D4's overall sentence for the robbery offence of 8 years' imprisonment. I do not consider that this examination achieved anything. As Mr Daryanani explained, it only concerned the fact that no allowance was made for the one third remission for good conduct on the sentence of 5 months' imprisonment. It seems the prison authorities did not make an allowance for remission because the applicant had already been detained for a period in excess of 5 months. As he acknowledged, there are two reasons why the driving offences had no bearing on the sentence imposed on the robbery offence. First, the driving offences would have been an aggravating factor in respect of the robbery offence, possibly warranting a further enhancement to D4's sentence. Secondly, the last set of the driving offences had nothing to do with the robbery and those sentences were separate and distinct from the robbery sentence.

In my view, the judge was correct to treat the sentence for the driving offences as separate and distinct wrongdoing on the part of D4. The fact that he was driving an uninsured vehicle without a driving licence at the time of the robbery and afterwards was deserving of a separate sentence for the dangerous risk he posed to members of the public.

I consider this ground of appeal to be devoid of merit and the examination of the issue of remission to be a wasteful exercise.

Ground 3 complains that the further enhancement of 6 months to his sentence for D4's recruitment of D2 was manifestly excessive and wrong in principle and inconsistent with the same enhancement imposed on D1 and D5, who were higher up in the hierarchy of this gang.

I am not persuaded by the argument that the enhancement for recruiting another person to join the gang should be quantified on the basis of the position the accused holds in the hierarchy of the gang. The role of the accused is a separate consideration to be taken into account when passing sentence.

Mr Lee also argued that the judge had incorrectly regarded that D4 had recruited D2. It was accepted by D4's counsel in mitigation before the judge that D4 recruited D2 was "beyond dispute".

This ground of appeal is not reasonably arguable.

D5's leave application

D5 has not filed any Perfected Grounds of Appeal, nor a written submission supporting his application. In his leave application, D5 complained that the sentence was too heavy, particularly when compared with other cases that involved smaller quantities of money and more serious injuries to the victims. He also generally complained about the judge's handling of his case but there was no justification in his criticisms.

Mr Daryanani has raised for consideration whether the judge failed to address D5's possible assistance to the authorities in providing information regarding the involvement of D6. In the summary of facts, it is stated that D6 was identified after D4 and D5 spoke about his involvement in the robbery in their respective interview. When they were interviewed under caution, they gave details of their involvement and that of others in the robbery. Neither of them actually identified D6, although they did refer to the involvement of another person by a nickname. This was not a case where D4 and D5 had volunteered to assist the authorities and provide information to further the police investigation. The police had to conduct an extensive set of inquiries to identify D6, including examining CCTV footage and public records.

In mitigation before the judge, it was not submitted on behalf of D4 or D5 that they had rendered assistance to the authorities for which they should receive a discount to their sentence.

As the judge rightly remarked, D5 played a pivotal role in this robbery, and the sentence he received was not a day too long. The judge's sentencing reasoning and remarks cannot be faulted.

D5's general complaint about his sentence is without merit.

Conclusion

The applications of D4 and D5 are refused. They are reminded of their right to renew their respective application to the Court of Appeal but they are also informed that the Court has the power to order loss of any time they have served in custody pending the hearing of the appeal, if it were to come to the view that there was no justification for the renewal of the application.

(Kevin Zervos)

Justice of Appeal

Mr Prakash L Daryanani, SPP, of Department of Justice, for the respondent

Mr Victor Lee, assigned by Director of Legal Aid, for the 1st applicant

The 2nd applicant appeared in person

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