

HONG KONG / JUDGMENT

HKSAR v. TSANG WAI MAN

COURT

Court of Appeal

DECIDED

9 August 2007

CASE / FILE NUMBER

CACC288/2006

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bjbj on nomacro Applicant

Before: Hon Stuart-Moore VP and Suffiad J Date of Hearing: 9 August 2007 Date of Judgment: 9 August 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court):

Background

On 29 June 2006, the applicant, aged 22, pleaded guilty before Deputy District Judge S M Sham to two charges of robbery. He was sentenced on 5 July 2006 to 34 months imprisonment on each charge. The judge ordered that 17 months of the term of imprisonment on the 1st charge should be served consecutively, making 51 months imprisonment in all. In addition, a previously imposed suspended sentence of 4 months imprisonment for a drugs offence was activated and ordered to run consecutively. This brought the total sentence to 55 months imprisonment. At the time of sentencing, the applicant was serving prison terms totalling 8 months. The term imposed in the present case was ordered to run concurrently with what remained of that 8-month term. The applicant now seeks leave to appeal against sentence. The facts concerning the two robberies, separated in time by approximately 6 weeks, established that while no weapon was used in either of them, some violence was used and both were committed with the assistance of an unknown male accomplice. Dealing with each robbery in turn, and adopting in large measure the helpful outline provided by Mr Jonathan Man for the respondent, the first offence occurred on 17 February 2006 when the applicant and another man approached two boys (PW1 and PW2) aged, respectively, 13 and 15 outside a park in Choi Yuen Estate, Sheung Shui. They accused the boys of having assaulted the applicant's brother. The boys were then ordered by the applicant to hand over their mobile telephones. PW1 surrendered his mobile telephone and both the boys were body-searched. At that stage, the unknown male slapped the older victim on the face when the latter, who had failed to surrender his mobile telephone, was found to have one in his possession. The applicant and the unknown male also punched the older teenager when he shouted for help. In addition to the two telephones, \$590 was also taken from the victims. The

second robbery occurred during the early hours of 31 March 2006. The applicant, who was wearing a mask, and an unknown male approached their chosen victim, aged 18, who was with a friend at a convenience store at Sheung Shui Centre. Using the same pretext as before, saying that the victim had assaulted the applicant's brother, the applicant and the unknown male led the victim to a park at Sheung Shui Town Centre. After kicking him in the abdomen and punching him in the face, the applicant demanded the victim's property. The victim then handed over his mobile telephone, his wallet containing \$25 cash and a bank card. The total value of these items was \$2,375. The applicant was arrested on 1 April 2006 when PW1 and PW2, the victims of the first robbery, happened to see the applicant getting onto a public light bus in Fanling. The police were informed and the bus was intercepted. The applicant was arrested after PW1 and PW2 had identified him. During a subsequent interview, the applicant admitted his involvement in the second robbery. Grounds of appeal Mr Leslie Parry, for the applicant, raised four grounds of appeal. It is convenient to take the first three grounds together. These alleged that the judge erred in (1) considering that the [guideline sentence] for robbery without aggravating features was 4 years; (2) increasing the sentence on each charge for aggravating features when the guideline case he used had already taken into account similar features in arriving at sentence; and (3) by increasing the sentence for the violence involved in the offences when such violence caused no actual injury to the victims. The judge had made reference in his sentencing remarks to HKSAR v Ting Chiu and Anor [2003] 3 HKLRD 378 and went on to state: The prevailing sentencing guidelines for robbery without any aggravation, the usual norm would be one of 4 years (see Ting Chiu case CACC 174 of 2003). In the present case, although no weapon was displayed or used, there were aggravating factors in that the defendant was acting in concert with another person and violence had been used against the victims. However, the good thing that can be said in his favour was that no actual injury was sustained by the victims. (Appeal bundle p.10) (Emphasis added.) These words carry the clear implication that the judge was under the impression that a 4-year starting point was appropriate for an unarmed robbery where there were no aggravating circumstances. He went on to take a starting point of 51 months imprisonment for each of the robberies, reduced to 34 months to take into account the guilty pleas. However, as Mr Man was right to concede in his written submissions, the judge had apparently overlooked the fact that in Ting Chiu's case a starting point of 4 years had been taken after an aggravating factor had been identified, namely, that the robbery had been carried out by four men. In spite of what appears to have been a misunderstanding on the part of the judge, Mr Man contended that in the instant case, this did not necessarily render the sentences he had imposed manifestly excessive. This was, he submitted, because not only had two men participated in the robberies which was one aggravating factor but they had, unlike the robbery in Ting Chiu's case, also subjected their victims to more than minimal physical violence. In support of his argument, Mr Man reminded us that in *Mo Kwong-sang v R* [1981] HKLR 610, the Court of Appeal had issued a 5-year guideline for armed robberies, excluding firearms, in which a knife or some other dangerous weapon had been displayed, stating that a further year should be added to the sentence if: any physical violence, which includes tying them up, is used on any of the victims. As there had been little physical violence in Ting Chiu's case, Mr Man submitted that the judge was entitled to have gone beyond a 4-year starting point on the present facts. Mr Parry's most able reply to the respondent's

argument was that in *R v Yau Kwok-tung* [1987] HKLR 782, a 4-year sentence after trial for robberies where weapons had not been displayed was described by Roberts CJ as at the top end of the tariff. He argued, therefore, that a 4-year starting point was already at the top end of the range and, bearing in mind that no injuries were in fact caused arising from the violence admittedly inflicted on the victims, there should not have been any enhancement of sentence beyond that measure. Perhaps the first observation we should make is that *Ting Chiu s case* (above) was not a guideline case for the sentencing of unarmed robbers in terms of the length of sentence to be imposed. What that case determined, in the words of Woo JA (as he then was) who gave the judgment, was (at page 383) that: a proper starting point, taking into account the robbery in our case being an unarmed one, should, as a matter of principle, be lower than that for an armed robbery of the kind envisaged in *Mo Kwong Sang v The Queen* [1981] HKLR 610. Every case, as has so often been said, must be determined on its own merits. Here, the judge was faced with facts which revealed that the applicant twice picked on young victims when he was himself accompanied by another man. In the first case, PW2 s face was slapped gratuitously when it was found that he had failed to hand over his property and he was then punched by both robbers when he called out for help. This offence occurred during the evening. In the second case, the robbery took place in the early hours. An additional feature, which can only have added to the frightening nature of the offence, was that the applicant was masked. The applicant punched and kicked the victim simply because the victim had, with ample justification, denied assaulting the applicant s brother. There were, however, other factors which the judge would have had in mind when arriving at a starting point. These are relevant to the 4th ground of appeal so that it is perhaps more convenient to deal with them in that context before reaching any conclusion on grounds 1 to 3. The 4th ground criticised the judge for arriving at an aggregate sentence which, Mr Parry submitted, was manifestly excessive. In totality, in the manner we have indicated already, the applicant was sentenced to 55 months imprisonment. Aside from the complaint that the judge had imposed individual sentences which were higher than charges 1 and 2 deserved, it was submitted that the judge ought to have made a greater part of the sentence on the 1st charge concurrent with the sentence on charge 2 particularly given that the [applicant] had owned up to the 2nd charge in order to enable it to be taken into consideration. No criticism was made of the activation of the suspended sentence. The judge, in approaching totality, took various factors into account. He considered that the main mitigation was the fact that the applicant had pleaded guilty. As to this, Mr Parry, in these proceedings, made an entirely valid point when he laid emphasis on the applicant s confession to the second robbery in his interview by the police which had in itself enabled the prosecution to charge him with that offence. There would in all likelihood have been no prosecution of the applicant for that robbery if he had not admitted this offence as the fact that he was masked at the time of its commission would have made identification virtually impossible. Another aspect of mitigation, as the judge noted, was the fact that the applicant could expect parental support when he was released from prison. Next the judge considered the applicant s six previous convictions most of which were for theft. On two occasions, the applicant had been placed on probation, once with a condition that he should attend a boys home. Thereafter, he was sent to a Detention Centre. On 19 January 2005, the applicant received a 4-month suspended sentence for a dangerous drugs offence. He then

committed an offence related to dealing with property known or reasonably believed to represent the proceeds of an indictable offence for which he received an immediate custodial sentence of 4 months on 13 April 2006. Finally, on 30 May 2006, the applicant received an additional 4 months imprisonment for theft. Hence the applicant was serving what amounted to an 8-month sentence at the time he appeared in the District Court for the present offences. The judge, who had very properly obtained the fullest information about the offence for which the applicant had received a suspended sentence, as well as the files relating to the other offences committed at a similar time, noted that the last theft on the applicant's record had been in breach of the suspended sentence albeit the sentence had not been activated. In the result, therefore, the applicant had, as the judge noted, effectively breached the suspended sentence three times, once by committing a theft (his last conviction) and twice more within six weeks by virtue of these two robberies. From this recitation of the applicant's recent behaviour, it is apparent that there was good reason to consider that the applicant had received more than enough opportunities from the courts to change his way of life and had taken advantage of none of them. We cannot, therefore, having regard to all the circumstances, describe the overall sentence as having been manifestly excessive. Nevertheless, we accept, as a matter of principle, that if the judge had acted under a false impression arising from a misreading of Ting Chiu's case that a sentence of about 4 years was the prevailing [sentence guideline], for robbery without any aggravation, this may have led him, as it seems with respect happened, to enhance the starting point by 3 months to 51 months for each robbery. To this limited extent, we consider that we must interfere.

Conclusion

Accordingly, we shall grant leave and, treating the hearing as the appeal, we shall reduce the sentence the applicant is now serving by 3 months in total. This will be achieved by taking a 4-year starting point for each robbery. With a one-third reduction for the guilty pleas, the sentence on each charge will be 32 months imprisonment. We shall order that half of the sentence on the 2nd charge, which is the same proportion that the judge took, shall be served consecutively to the sentence on the 1st charge, making 48 months in all. The suspended sentence of 4 months imprisonment which the judge activated with consecutive effect will remain, making a total sentence of 52 months. The applicant's sentence is, as a matter of principle, therefore, reduced by 3 months and to this extent the appeal succeeds. (M. Stuart-Moore) macrobutton nomacro Vice-President (A.R. Suffiad) Judge of the Court of First Instance Mr Jonathan Man, SGC, of the Department of Justice, for the Respondent. Mr Leslie J Parry, instructed by Hong Kong Bar Association, Bar Free Legal Service Scheme, for the macrobutton nomacro Applicant PAGE - PAGE - A 1udk 1udk 1udk 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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