

HONG KONG / JUDGMENT

HKSAR v. TSE YIU MING

COURT

Court of Appeal

DECIDED

8 May 2007

CASE / FILE NUMBER

CACC336/2006

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Before : Hon Stuart-Moore, VP, Stock JA and McMahon J in Court Date of Hearing : 8 May 2007
Date of Judgment : 8 May 2007

J U D G M E N T

Hon Stock JA (giving the judgment of the Court): AUTONUMOUT This is an application for leave to appeal against sentence. AUTONUMOUT The applicant pleaded guilty in the District Court before Judge Chua to three charges: false imprisonment, an allegation that he and three others between 21 April 2005 to 23 April 2005 unlawfully and injuriously imprisoned Lai Kai-pong and detained him against his will; theft, an allegation that on 21 April 2005 he stole a chose in action, namely a debt in the amount of \$500 owed to Lai by the Bank of China; and wounding, contrary to section 19 of the Offences against the Person Ordinance, Cap. 212; an allegation that on 22 April 2005 he together with another unlawfully and maliciously wounded Lai. AUTONUMOUT The judge took the view that an overall starting point of 40 months imprisonment was appropriate and proceeded then to apportion that sentence as follows: for the first charge, she took a starting point of two and a half years imprisonment and, giving credit for the plea of guilty, she imposed a sentence of 20 months imprisonment; in respect of the second offence, she took a starting point of 12 months imprisonment and imposed a term of eight months imprisonment ordering two months to run consecutively to the sentence imposed on the first charge; and in respect of the third offence, she took a starting point of two and a half years imprisonment, imposed a sentence of 20 months imprisonment and ordered 10 months of that term to run consecutively to the rest, making a total of 32 months. She then discounted two months from the total of 32 months in recognition of the applicant's assistance to the prosecution, in his offer to give evidence against other defendants who, in partial consequence, so it was assumed, decided to plead guilty. This resulted in an overall sentence of 30 months imprisonment, the total which is the subject of this

application. AUTONUMOUT The facts were as follows. The victim of these offences was a man called Lai. He had been engaged on a regular basis by someone called Fei to deliver dangerous drugs to customers. In March 2005, Lai was given \$5,200 to buy cocaine from a drug supplier, which he did but he failed to deliver the drugs to Fei, and instead sold them to someone else and pocketed the money, allegedly because Fei had not paid him salary. In the early hours of 21 April 2005, Fei, Lai and this applicant met in a restaurant and Lai was forced to board a taxi and taken to a flat where he was asked for his address and assaulted with punches and kicks. That afternoon he was taken to other premises where both Fei and the applicant punched him several times and pressed him for payment and refused to let him go. He was forced to part with his ATM card and provide its PIN number and with this \$500 was taken from one of his accounts this is the subject of the second charge. That evening, in the presence of the applicant, Fei continued to punch Lai and struck him on his knees and back with a hammer; again in the presence of the applicant. In the small hours of the following morning, 22 April, and in the presence of the applicant, Fei used a metal pipe to hit Lai on his head. Lai's face and the back of his head were injured and his wounds were bleeding, in consequence of which Fei asked another male to come to the premises and stop the bleeding by stitching the wounds with a needle. Thereafter the applicant and Fei took Lai to a discotheque in order to show him, and his condition, to people at that place. He was then taken to another flat wherein the applicant locked him. At about 3 p.m. on that day Fei intended to give Lai a further beating but was stopped from doing so by the applicant. Lai continued to be detained inside the premises by the applicant and five other persons, all youths. On the morning of 23 April the applicant and the others fell asleep at which time Lai called the police and escaped. AUTONUMOUT Upon medical examination, Lai was seen to have lacerations with stitches over his right eyebrow and left parietal region; there was multiple bruising over his face and a fracture of his nose. The applicant was identified at an identification parade some months later, but the others were not identified. Under caution, the application refused to answer any questions. His fingerprints were found at one of the premises. AUTONUMOUT There was some correspondence between those representing the applicant and the prosecution about the possibility of a plea of guilty by the applicant, and he agreed to plead guilty on the basis that the assaults would be charged, as against him, as a section 19 wounding rather than as wounding with intent. He offered to give evidence against the other defendants and made a statement. They pleaded not guilty and a voir dire in their case proceeded but in the course of that they changed their pleas to ones of guilty. The prosecution case against them depended upon cautioned statements they had made as well as the recent statement made to the police by this applicant. As we have recorded, the judge assumed in the applicant's favour that his willingness to give evidence against them was instrumental in effecting their change of plea. AUTONUMOUT The first ground of appeal is that the starting point of two and a half-years imprisonment in respect of the wounding offence was excessive, given that the maximum sentence for this offence was one of three years imprisonment. We do not agree. True it is that it was not the applicant himself who struck most of the blows, nor the applicant who used the metal pipe, the attack that is the specific subject of this charge. That said, the applicant was there ready by his presence to assist. These were serious attacks offered to a man in captivity, whose injuries were treated brutally. AUTONUMOUT Secondly, it is said that the discount of two months imprisonment for offering to

assist the police was insufficient and we are referred to authorities which, generally speaking, suggest a discount of something in the region of 40% in favour of a person who pleads guilty and offers to give evidence, which offer is instrumental in effecting a plea of guilty from the other defendants. The discount in fact given would constitute, on such a basis, something in the region of one month less than 40%. We do not think we are justified in interfering in this particular case. Given the facts of this case, we take the view that the overall starting point of four years imprisonment was too low and that the applicant was fortunate in the circumstances to have received a sentence as low as he did. We note too that the applicant is aged 29 years and has a bad criminal record including blackmail, claiming to be a member of a triad society, indecent assault, assault and theft, and the judge noted, correctly in our view, that it was not difficult in this case to discern triad overtones. AUTONUMOUT In the written submissions it is said that the judge made errors as to some of the facts. We have examined these and they were of no consequence. In those submissions, a complaint is further made that the judge had before her the fact that there were further charges facing the applicant. We are satisfied that these made no difference to the sentences imposed. AUTONUMOUT The application for leave to appeal against sentence is dismissed. (M. Stuart-Moore) Vice-President (Frank Stock) Justice of Appeal (M.A. McMahon) Judge of the Court of First Instance Ms Mary SIN, SADPP and Mr Derek LAI, SGC of the Department of Justice for the Respondent Mr BOK Tin-yuen, instructed by Messrs Chan, Wong & Lam, assigned by D.L.A. for the Applicant PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$ &`#\$ % ^,X v?_. J[6 vx@n .l^L k1B[p "E)`r c@sH <~j6 J[ 6 .l^L k1B[ v?\_. "E)` & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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