

HONG KONG / JUDGMENT

HKSAR v. WONG KEI FU

COURT

Court of Appeal

DECIDED

9 May 2007

CASE / FILE NUMBER

CACC234/2006

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Before : Hon Stuart-Moore, VP, Stock JA and McMahon J in Court Date of Hearing : 9 May 2007
Date of Judgment : 9 May 2007

J U D G M E N T

Hon Stock JA (giving the judgment of the Court):

Introduction

AUTONUMOUT This is an application for leave to appeal against conviction. AUTONUMOUT The applicant was tried in the District Court before Deputy Judge Anthony Kwok upon three charges, numbered as against this applicant the second, third and fourth charges on the charge sheet because there were other charges against another defendant: Charge 2: that on 11 January 1998 he acted as a member of a triad society, namely the Wo Hop To triad society. Charge 3: that on 12 January 1998 he assisted in the management of that triad society; and Charge 4: that on 23 June 1998 he assisted in the management of that triad society. AUTONUMOUT On 25 May 2006 he was convicted upon all three charges. The Evidence AUTONUMOUT In October 1997 the police launched an undercover operation in the course of which a police officer infiltrated the society, was made a member of it in January 1998 and acted as a member until June 1998. AUTONUMOUT The officer gave evidence that on the evening of 11 January 1998, he and members of the society went to a restaurant in Causeway Bay and there he was introduced by his Big Brother a person called Ah Tak, to Ah Tak Big Brother , a male named Fu Gor. Fu Gor acknowledged his own role and he and the officer spent over two hours in each other s company that evening. That event gave rise to Charge AUTONUMOUT On the following day, the officer went to another restaurant and again joined a number of triad members and they in turn were joined by Fu Gor and Ah Tak and others. A conversation ensued in which Fu Gor asked whether a certain person had been

attacked and there was a discussion about this attack upon someone who was a member of a rival triad gang. Fu Gor gave instructions for the attackers to hide and spoke about arranging bail for anyone who might be arrested. This event gave rise to Charge AUTONUMOUT Charge 4 related to yet another meeting at a restaurant, this time on 23 June 1998 at which Fu Gor was present and took a leading role. This time the discussion centred on a possible affray with an opposing party and a complaint by Fu Gor about a particular member who was, so he said, too readily in the habit of blowing the whistle , a well-known triad phrase for calling followers out to fight.

AUTONUMOUT The evidence of the officer was that apart from these three occasions he met Fu Gor on numerous other occasions; on about 13 occasions in all. AUTONUMOUT On 24 May 2005 the officer attended an identification parade where he identified the applicant as Fu Gor. The judgment AUTONUMOUT The applicant did not himself give evidence at his trial and the issue was whether the identification by the officer was correct. The trial judge warned himself about the dangers of identification evidence, noting in particular that some seven years had passed between the events in question and the identification. The judge noted that whilst the officer had come into contact with many triad followers, the role played by Fu Gor was, in relation to that officer, a most particular one, namely that of big brother to the officer's own big brother, a relationship with the specific designation in triad terminology, Ah Kung . The contemporaneous description of Fu Gor made by the officer largely matched that of the applicant and none of the encounters between Fu Gor and the officer had been fleeting. The judge was satisfied that the identification was correct. AUTONUMOUT The judge was also invited to view a video recording made on 23 June 1998 in the course of the police surveillance operation to which the officer was a party. The judge was satisfied that one of the men shown in the recording was the applicant. He made clear that the case was proved on the officer's identification alone but stated that the recording provided separate and additional confirmation. In the circumstances, the judge convicted the applicant upon each charge. The complaints AUTONUMOUT The first complaint advanced upon this application is that the judge erred by failing to direct himself adequately or at all concerning the prejudicial effect of the photo-identification from a Registration of Persons photograph of the applicant . This complaint arises from the fact that in February 1998, in the course of the operation then under way, the officer was shown photographs, one of which was the applicant, whom he then identified as Fu Gor. He was not shown a photograph subsequently and certainly not at the time of the identification parade in 2005. It is suggested that the officer ought not to have been shown a single photograph in 1998 but that some sort of photographic identification parade should have been conducted and that as a result, the officer's identification of the applicant in 1998 was inherently unreliable for the photograph was then still fresh in his memory and that, further, the suggestibility effect was at play, in other words that the officer must or may have said to himself that as the photograph was in the police records the person shown was likely to be a rogue and therefore likely to be the culprit. It is possible, so it is argued, that the many times the officer saw Fu Gor was after he had been shown the photograph so that somehow this distorted his identification in 1998 of the person referred to as Ah Kung. Similarly, it is said, the photo identification in 1998 might have affected the identification in 2005, rendering the latter unreliable. AUTONUMOUT Questions of identification in criminal cases and subsequent arguments on appeal should, we suggest, be contextual and not ritualistic, and the

submissions in this case are, with respect, non-contextual as well as unrealistic. This was not a case of a lay person shown one photograph of one suspect. This was a case of an officer in the throes of a prolonged undercover operation in the course of which he was seeing one or more triads in operation over extended periods and who, for investigative and operational purposes was shown a set of photographs of persons whom he knew and to whom he could put names known only to him. Exactly what happened in relation to the showing of one or more photographs in 1998 is not completely clear from the evidence adduced at trial, but we are satisfied that the effect of it was that in the course of the operation the undercover officer was shown by a senior officer a number of photographs, eight in all, each one of which suspects the officer identified as taking part in the events under investigation and that he himself pointed to one as a person he had seen and who was the person Fu Gor. There was in our judgment nothing improper in the course adopted, a course adopted in the throes, and for the purpose, of the investigation then underway. It is suggested that it would have been better had the undercover officer been shown a full album of potential suspects and perhaps others, but even if there were something in that suggestion the question at the end of the day was, as it always is, whether the identification was reliable and that is what the judge found and there was ample material to justify that finding. The contention that the photograph somehow blurred the officer's vision or impression of the man who was playing the role of Ah Kung is far-fetched, as is the suggestion that the identification in 2005 was affected. Fu Gor was someone who was seen on no fewer than 13 occasions by this officer and on each occasion for an extended period playing a particular and vital role. In these circumstances and given that the judge found that the officer was a wholly credible witness, the point made about the photographic identification some seven years earlier is wholly without merit. The judge noted the point made but, quite rightly, thought little of it. It is suggested further in the course of argument today that an identification made seven years later is perforce unreliable and that the judge failed to apply the necessary Turnbull test. He self-evidently applied that test very carefully and in the factual circumstances we have described, there is no cause to undermine the judge's assessment of the reliability of the officer's identification. AUTONUMOUT Then complaint is made that the judge did not give due weight to certain weaknesses in the evidence of the officer. We have read the judge's careful and clear judgment and each of the points said to have been ignored were in fact recognized. There is nothing in this complaint. AUTONUMOUT The next point is a suggestion of apparent bias of a witness. The officer in-charge of the identification parade in 2005 was said not to be independent of the investigation of the offences themselves. That is because he had joined the unit which had been involved in the 1998 surveillance. The problem with this submission is that he had joined that unit six years after the surveillance in question and had no personal knowledge whatsoever of this case. The judge specifically addressed this point and said that there was nothing in the circumstances disclosed, given in particular the impressive way in which the Chief Inspector had given evidence, as to cause the judge to have any doubts about the safety of the identification. That is the end of that point. AUTONUMOUT Then it is said that the judge ought not to have regard to the surveillance videotape because this constituted a dock identification. This point is misconceived. The prosecution was perfectly entitled to place the surveillance tape before the judge. It was relevant evidence because it showed the applicant, who was the accused, under

surveillance at the material time and at the material place. In any event the judge made perfectly clear that he would have convicted even without this evidence. AUTONUMOUT Finally it is said that there should be a lurking doubt as to the applicant s guilt. The basis for this suggestion is a reversion to the complaint that the officer had been shown a photograph in the course of the operation. We see nothing in this case to give rise to a lurking doubt. AUTONUMOUT The application for leave to appeal against conviction is dismissed. (M. Stuart-Moore) Vice-President (Frank Stock) Justice of Appeal (M.A. McMahon) Judge of the Court of First Instance Mr Laurence J. Poots, instructed by Messrs Yip & Co., assigned by D.L.A. for the Applicant Mr Robert S.K. Lee, DD 1udk 1udk 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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