

HONG KONG / JUDGMENT

HKSAR v. YIP CHUNG MAN

COURT

Court of Appeal

DECIDED

20 June 2007

CASE / FILE NUMBER

CACC246/2006

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Before: Hon Stuart-Moore VP and Beeson J Date of Hearing: 13 June 2007 Date of Judgment: 20 June 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court): This application gives rise to important considerations when sentencing pickpocketing offenders whose activities will potentially lead to dangerous consequences to the public. On 23 May 2006, the applicant was convicted of conspiracy to steal and dangerous driving following a trial before Deputy District Judge R Chan. A total sentence of 45 months imprisonment was imposed on 12 June 2006 after the judge had obtained a probation officer s background report. There was, in addition, a disqualification for 12 months. The applicant now seeks leave to appeal against sentence out of time. This is solely directed at the length of his term of imprisonment. The disqualification will remain undisturbed. The two charges were closely linked. The applicant was found guilty on the 1st charge of conspiring with Chung Tat-hung (Chung) and another person unknown to steal a wallet and its contents from a member of the public. The 2nd charge related to the applicant driving his taxi dangerously near the busy junction at Shantung Street and Nathan Road in Mongkok. The conspiracy was straightforward but the facts were somewhat unusual. In short, the applicant, a taxi driver, agreed with two accomplices who were pickpockets to use his vehicle to frighten pedestrians by driving into their path as they were crossing the road, causing them to scatter. In the confusion which followed, the victim would have property taken from his pockets by one of the co-conspirators now identified as Chung. The plan was to identify a potential victim amongst a crowd of people in a busy area of Mongkok. The victim would then be followed by Chung and the other, unknown, conspirator on the pavement until the victim was on the point of crossing the road. At that moment, when the applicant was able to see the pedestrians start to cross the road, he would drive his taxi towards them appearing at first to give the pedestrians the right of way. Then he would drive into the crowd, creating a temporary scene of chaos as pedestrians were forced to retreat towards the kerb for their own safety. In those same few moments Chung would take the opportunity, while everyone s guard was down, to steal from the chosen victim. This is precisely what occurred on 24 August 2005 when the victim (PW2) was relieved of his wallet and contents. The plan, it hardly needs to be said, was one

which had obvious and real dangers attached to it. In this case, PW2 was with his wife and three sons. As the taxi drove towards him, his children were ahead of him. PW2 had observed the taxi driver, now known to be the applicant, apparently stop and wave the pedestrians across. Then, when PW2 and his family were in the middle of the road, the taxi suddenly approached. PW2 tried to pull his children to safety but his 11-year-old son (PW3) was unfortunately struck by the taxi and he suffered a minor leg injury. Another pedestrian in the crowd, Sham Yue-shum (PW1), observed Chung stealing PW2's wallet in the confusion which followed. He also had the presence of mind to note down the registration number of the taxi. The applicant, aged 46, has fifteen previous convictions. With his considerable experience of the courts in mind, his affirmation, dated 18 April 2007, explaining why he was about six months out of time in making his application for leave to appeal against sentence, is simply not a credible one. He stated that he mistakenly believed that [he] should proceed with [his] appeal against sentences if and only if [his] appeal against conviction was dismissed. Plainly, also, the applicant had forgotten his earlier explanation, given in a handwritten notice dated 15 January 2007, that: because of appealing against conviction, I was not aware of the sentencing judgment by the judge. Later on, because the application for leave to appeal against conviction was not accepted, I thus appeal against sentence now. We are satisfied that the applicant was well aware of the importance of making his application within time and that his latest excuse for having failed to do so is not an honest explanation. Turning to the nature of the application itself, this made the complaint that the judge had enhanced the applicant's sentence by 50 percent on top of an increased starting point to take into account various aggravating factors. The judge had rightly and sensibly made the following observations when passing sentence:

17. The present case is no ordinary case of pickpocketing. It involves three people working together at a busy Mongkok road junction targeting pedestrians who were about to cross the road, and a deliberate, sudden and dangerous act of stopping and [then] moving his taxi towards the pedestrians by the defendant was adopted as a means by which chaos were caused and pickpocketing was committed.
18. Though no weapon or sharp objects had been used in cutting open victims handbags or wallets, a motor vehicle had been used to frighten the pedestrians in order that the two co-conspirators were able to steal from the panicking pedestrians. As a result of the defendant's act of driving, a young child, who is the son of PW2, was injured. (Appeal bundle pp. 150-151) The judge went on to review a number of the decisions of this court in regard to various sentencing factors to be taken into account when dealing with pickpockets including, amongst others, HKSAR v Yip Wai-leung and Ors CACC 430/2004, HKSAR v Ngo Van-huy [2005] 2 HKLRD 1, and HKSAR v Liao Mei and Ors CACC 432/2004. The judge then returned to the facts, saying:
35. The defendant was driving his taxi, not as a lookout, nor making the taxi ready to be used as a getaway car. He was there actively involved in the scheme. He drove his vehicle slowly up to the pedestrians before stopping to give the impression that the pedestrians were given a right of way to cross the road. He then suddenly drove off, not because he was impatient but

because he was to do that deliberately to create a situation of chaos, so that his co-conspirators could have a better opportunity to steal from the pedestrians. Of course he would not be bothered about the safety of the pedestrians. From the evidence accepted by this court, I am able to conclude that the defendant was prepared to drive his vehicle against the pedestrians at all costs; that is, he did not care whether the pedestrians were going to be hit or not. And as a matter of fact, the boy Chung San-ming [PW3] was injured by the defendant's taxi.

36. Although I acknowledge that the speed of the defendant at that time was slow, this is not going to be too helpful for him. It may only help the defendant to the extent that I would have taken a higher starting point for this offence had he driven his taxi at fast speed. (Appeal bundle p. 156) The judge later summarised a part of the applicant's interview with the police in these terms:
46. At Counter 202 the defendant was asked how he communicated with the other co-conspirators, whether he had received any signal or phone call before he drove towards the crowd. The defendant in his answer said, Saw them crossing. Lunged forward -- lunged towards them. The officer then clarified by asking the defendant if he meant to say when he saw them crossing he lunged towards them. The defendant gave a sound, , in reply. The officer then went on to ask the defendant that before he and other people did that, did they discuss about doing it this way? At 207, which is the relevant part, the defendant answered, I mean, it's the usual practice. (Appeal bundle pp. 158-159) The approach taken by the judge was to adopt a starting point of 30 months imprisonment in view of its gravity and to enhance this by 50 percent as an organized crime under the Organized and Serious Crimes Ordinance, Cap. 455, having found that the offences involved substantial planning and that the usual practice, in the phrase used by the applicant in his interview, meant that the conspirators had formulated an accepted mould for perpetrating the crime. The judge was extremely careful in his sentencing exercise to spell out with absolute clarity the steps he had taken before arriving at the eventual sentence he imposed. We make no criticism of his approach whatever bearing in mind that he had plainly given full attention to all the relevant sentencing authorities pertaining to pickpocketing offences which were available to him at that time. However, as the judge recognized, this offence represented a dangerous departure from the usual pattern of pickpocketing to have come before the courts and none of the earlier authorities envisaged a pickpocketing offence of this kind. It was, in fact, if not technically robbery, so close to robbery that we consider for the future that those who engage in conspiracies to steal of the same nature, using a motor vehicle to drive into a crowd of pedestrians to enable thieves in the ensuing chaos to carry out their work as pickpockets, should receive a significantly higher sentence than pickpockets whose activities do not endanger the physical safety of their victims. When considering what starting point it would be appropriate to adopt, we have had in mind that a robber who threatens a victim with a bladed weapon without causing the victim injury will usually receive a sentence in the region of 5 years imprisonment (see: *Mo Kwong-sang v R* [1981] HKLR 610). In offences of the kind presently before us, the victims, whilst put in fear for

their safety, will not immediately appreciate that the motor vehicle is being driven at them deliberately. There is, perhaps, in this respect a slight distinction to be drawn with the knifeman who directly confronts his victim. We consider, depending upon all the circumstances, that a starting point of 4 years imprisonment for all members of the pickpocketing gang who agree to use a motor vehicle to scare their victims would be appropriate where no injury has been caused to anyone. Theft and conspiracy to commit theft are offences which render offenders liable to a maximum of 10 years imprisonment and the circumstances of offences such as this may be so aggravated, in terms of the speed at which the motor vehicle is driven into the crowd or the injuries which are caused, that the sentence will have to be adjusted upwards to take these factors into account. The sentence we have indicated as being appropriate for pickpocketing conspiracies involving the deliberate driving of a motor vehicle into pedestrians can, of course, only have effect in regard to offences committed after this judgment has been given and it follows that the applicant can regard himself as fortunate not to have been more severely sentenced. We have some sympathy for Mr Kevin Chan in making this application to the extent that the points we have raised have not previously been considered. His submissions were characteristically realistic and succinct. Nevertheless, for the reasons we have given, we can find no merit whatever in this application. Leave is refused and the application is dismissed. We should add, lastly, that we consider the actions of Sham Yue-shum deserve the commendation of this court. He showed considerable presence of mind in the midst of this alarming incident when the taxi was driven into the crowd. Not only did he observe the theft taking place but he was able to note down the taxi's registration number. His evidence provided a vital link in the prosecution's case. Such public-spiritedness is not to be ignored and we commend him for his actions. We would ask the respondent to ensure that this commendation is communicated to Mr Sham and for him to be supplied with a copy of the judgment. We would like to be informed when this has been done. (M. Stuart-Moore)

macrobutton nomacro Vice-President (C-M Beeson) Judge of the Court of First Instance Ms Wong Kam-hing, SGC, of the Department of Justice, for the Respondent. Mr Kevin Chan, instructed by Messrs Au, Thong & Tsang, assigned by Director of Legal Aid, for the macrobutton nomacro Applicant

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