

HONG KONG / JUDGMENT

HKSAR v. YIP WAI HUNG

COURT

Court of Appeal

DECIDED

23 January 2007

CASE / FILE NUMBER

CACC317/2005

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Before: Hon Stuart-Moore VP, Burrell and Lunn JJ Date of Hearing: 12 December 2006 Date of Judgment: 12 December 2006 Date of Reasons for Judgment: 23 January 2007 R E A S O N S F O R J U D G M E N T Stuart-Moore, VP (giving the reasons for judgment of the Court): The applicant, Yip Wai-hung, was convicted on 4 July 2005 on a charge of blackmail following a trial in the District Court before Judge Toh. He then sought leave to appeal against his conviction. At the conclusion of proceedings on 12 December 2006, we dismissed the application and now give our reasons for so doing. The particulars of the charge which are relevant for present purposes were that, on 14 December 2004, the applicant made an unwarranted demand of \$300,000 from the victim with menaces. There was no dispute at trial that the victim had been blackmailed in the manner the prosecution had alleged. The issue was, as the judge correctly stated in the Reasons for Verdict whether the defendant was the person who blackmailed him . The applicant did not give evidence or call any witnesses so that the prosecution was effectively put to proof of its case. The grounds of appeal, advanced by Mr Haynes on the applicant s behalf, make it largely unnecessary to go into many of the details of the evidence. Suffice it to say that the victim was telephoned at his home and at his office when the demands with menaces were made. The police were informed and a team of officers was immediately formed to investigate. DSPC 21313 (PW4), attached to the Hong Kong Island Regional Crime Unit was assigned to pose as the victim s driver with responsibility for the delivery of the money which had been demanded. For these purposes, the blackmailer was provided with a mobile telephone number (6225-8797) so that he could keep in touch with the victim driver . The number related to a prepaid SIM card which was brand new and was kept in PW4 s telephone. In due course, PW4 was told to go to a location and to throw the envelope containing the money into a rubbish bin nearby. The telephone calls between the blackmailer and PW4 took place, according to PW4, between 12.52 pm and 2.05 pm and his evidence about these timings was broadly in accordance with formal evidence (shown in exhibit P22) which was later obtained from the telephone company to confirm the calls received on PW4 s mobile telephone. One of these, at 1.21 pm, was from the number 2450-6244 which was a courtesy telephone outside the Fortune Restaurant in Tuen Mun. Surveillance officers had seen a

man make the call but it was not possible to prove that the applicant was that person. The remainder of the calls were from a telephone with the number 6436-2124. The most crucial part of the evidence called by the prosecution immediately followed the time PW4 had been told to leave the packet of money in a rubbish bin. A number of officers attached to the Hong Kong Island Surveillance and Support Unit had the area under surveillance. PC 34349 (PW7) had been watching the applicant from about 1.43 pm. He briefly changed places with a colleague for a time but, at 2.07 pm, he was once again able to see the applicant. This time, the applicant was on Wu Chui Road which, from the photographs we have seen, afforded clear views of the rubbish bin where PW4 had thrown the white envelope. The applicant walked up to the bin and took out the white envelope. Very soon after this, PW7 and Sergeant 7346 (PW8) stopped the applicant who immediately threw the envelope onto the ground. PW8 had also been observing the applicant earlier. He had seen the applicant peering round a supporting column of a footbridge to look at the opposite side of the road while he was using a mobile telephone. The vehicle CP1817, which was the car being used by PW4, was parked on the opposite side of the road at that time. Very shortly after this, after PW4 had driven the car away, the applicant walked to the rubbish bin and was seen by PW8 to remove the white envelope from the bin. On arrest, the applicant was searched for weapons. None were found, but his two mobile telephones (a Motorola and a Nokia) were taken from him by the arresting officer, PW10, who put them into an exhibit bag which he said he handed to PW12 at about 2.25 pm. The telephone evidence later established that the Nokia, allegedly one of the telephones in the applicant's possession, had been used to make calls to PW4's mobile number. The number of the Nokia was 6436-2124. In an interview later, the applicant denied the offence and said that he had just been walking around with no specific purpose in mind. These, essentially, were the circumstances described by the prosecution witnesses. On the face of it, the case was extremely straightforward. However, defence counsel at trial cross-examined on several aspects of the police evidence to suggest that the police had not spoken the truth. A particular focus of dispute related to the evidence given about the Nokia telephone as to which it was suggested that the police had in some way tampered with the SIM card or the telephone record allegedly associated with it. It is to this aspect of the trial that the grounds of appeal are mainly directed. The grounds were as follows:

1. The trial judge should not have accepted the evidence of PW12 and the supporting police evidence as being capable of proving to the required standard that the red Nokia telephone's number was 64362124 (or that it contained a call record) at whatever time that telephone was first seized from the applicant.
2. The judge failed to approach the evidence of PW12 (Chan Kin-ki) and the police witnesses with the judicial scepticism appropriate to the witness testimony and conduct.
3. The judge was wrong to interrupt and seek to inhibit defence counsel in his proper dutiful cross-examination of PW12. The challenge to that witness was crucial to the defence case.
4. The reasons for verdict contain unjustified comments on the conduct of the defence which indicate that the trial judge was not sufficiently mindful that the burden remained on the prosecution to establish the contemporaneity and veracity of the evidence of the police.

There is nothing in the reasons for verdict to show that the judge did take into account the informalities, omissions, inconsistencies, conundrums and contradictions disclosed by the police evidence before accepting that evidence. A properly directed tribunal of fact could not and should not have accepted that evidence without first analysing the contradictions and inherent improbabilities. The treatment of the telephones was unprofessional and inherently unfair to the applicant.

5. The trial judge failed to properly consider the potential significance of the video-recorded interview in the light of her conclusions that there was no proof that the man using a phone outside the Fortune Restaurant was in fact the defendant. The result was that the defence case and its logical ramifications do not appear to have been given due, or any, consideration. This, and other lurking doubts were not given due consideration by the trial judge. We have recited the grounds in full as they contained the essence of Mr Haynes lengthy address to us. Mr Haynes did not appear in the court below but we can say immediately that he was unable to demonstrate anything which supported ground 3 (judicial interruptions) or that part of ground 4 which criticised the judge for having made unjustified comments. We propose to say no more about these grounds save that these complaints were made without a sufficient foundation. The remaining grounds, including ground 5 as it was developed in argument, criticised the judge for having failed to go into greater detail about the telephone evidence discrepancies that emerged from the police evidence. It was submitted that the failure to undertake a more thorough analysis meant that the defence case was never properly examined and serious doubts in the prosecution's case were left unresolved. The cross-examination of the police witnesses in the lower court was fuelled by the evidence of the seizure of the telephones by police at about 2.10 pm after the search of the applicant in the street when compared to an entry in the Prisoner's Movement Record which made reference to the seizure of exhibits from AP timed at about 5.00 pm. Mr Haynes submitted that this left open the possibility that no responsible effort was ever made to preserve the integrity of these articles. PW10, who stated that he had taken possession of the telephones from the applicant just after his arrest, conceded that he had not made a record in his notebook or statements about having handed over the telephones to PW12 in the Report Room at the police station. PW12 supported the account that he had taken possession of the mobile telephones at about 2.25 pm from PW10. There was, apart from the entry in the Prisoner's Movement Record, one other contradiction to which the defence at trial, and Mr Haynes in these proceedings, attached particular importance. PW10 had stated that when the applicant was asked for the numbers of his two mobile telephones, he had declined to give a reply. However, PW12 said that PW10 had told him that the applicant's personal mobile number was 9033-2803. Indeed, it was as a result of this that PW12 said he used the Nokia telephone, which he suspected had been used in the blackmail, to dial this number. Immediately, the other mobile telephone seized from the applicant rang and showed the caller's number (on the Nokia) as 6436-2124. This experiment provided the prosecution with evidence to link the Nokia's telephone number, on the day it was retrieved from the applicant, to the telephone which had been used to call PW4 to tell

him where to place the money. Indeed, it was because PW12 was able to provide this evidence that he was made a late addition to the witnesses called by the prosecution which Mr Haynes described as another factor in the negligent and calamitous lack of professionalism on the part of the police. Mr Haynes also suggested that the means by which PW12 had discovered the Nokia s number was in some way sinister because this had neither been done in front of the applicant nor had it been properly documented. For our part, we were unable to see anything difficult or sinister about the experiment carried out by PW12. As a means of finding out the Nokia number, this might just as easily have been discovered by telephoning any known telephone number which had been fitted with a dial designed to show the incoming caller s number. It was also pointed out by Mr Haynes that the telephone record (exhibit P21) of calls made on the Nokia telephone, 6436-2124, ended at about 2.03 pm and provided some support for saying that PW12 had not used that telephone, as stated by him at about 2.25 pm, to telephone the number of the Nokia. This last aspect is unexplained, but the judge, with the great advantage of having heard and seen the evidence, was plainly alert to all the matters raised by Mr Haynes. Having recounted the fact that PW10 had said he handed the applicant s mobile telephones to PW12 to check their numbers because the applicant had chosen not to answer when asked what they were, the judge continued:

18. Under cross-examination PW10 agreed he had omitted to write in his statement about finding two mobile telephones on the defendant and he agreed that the phones were actually seized as exhibits from the defendant at 5 pm and that prior to that they were merely taken by the police to assist in their investigation.
19. PW12, Detective Sergeant 22503, said he took the two mobile telephones from DSPC 10206 [PW10] and examined them at Castle Peak Police Station. He said he examined them in the report room of Castle Peak Police Station and Inspector Kwan was in that room, although he was not beside him. He found from the Nokia phone call record there was one call to PW4 s mobile number. He learned that the defendant had told DSPC 10206 that his mobile number was 90332803 so he dialled that number and the Motorola phone rang. Then he checked the Nokia phone and found its number to be 64362124 and subsequently the two phones were seized as exhibits at 5 pm by DSPC 45885 [PW13]. The Nokia telephone was produced as P19 and the Motorola P20.
20. Much time was spent in cross-examination about what the witness may or may not have written in Pol 154 or 155 and that he had fabricated the records of the SIM card of the Nokia telephone. But at the end of the day PW12 said that he had in fact written out what he did in his notebook on 14 December 2004 but [defence counsel] chose not to ask to see that notebook or cross-examine him further on that notebook. (Appeal bundle p. 14) Later, the judge stated:
26. [Defence counsel] was alleging that the police had fabricated the evidence of the SIM cards in the mobile telephone[s]. I do not accept that at all. The sergeant, PW12, may have been careless in making his police report but his evidence, which I accept, is that he had written

it all down in his police notebook what he did and as I have said [defence counsel] chose not to cross-examine him on that part of his evidence. I find no evidence whatsoever to say that the police had tampered in any way with any of the SIM cards of the telephones found from the defendant.

28. [Defence counsel] in his final submissions made several points which I do not feel I need to deal with here but I only wish to say that his allegation about the SIM card being tampered with is not supported by any evidence and also I would like to comment on the fact that [defence counsel] had brought up the point that PW10 had said that the defendant had refused to give him the numbers of the two mobile telephones found on him whereas PW12 said PW10 told him the defendant told him his mobile number was 90332803. This, [defence counsel] says, is contradictory. Well, it is in evidence that PW10, when he took the defendant back to the police station, interviewed the defendant about his background. Although PW10 may not have specifically asked the defendant the numbers of the two mobile telephones found on him it could be that the mobile telephone of the defendant was asked of him at the time of that interview.
29. Nevertheless even if accepting that there was a contradiction in this evidence, accepting that even if PW10 was wrong in his evidence that the defendant did not give him the telephone number, or that PW10 was mistaken in his evidence when he gave the evidence when he gave the evidence in court that the defendant did not give him the telephone number, it is not so serious as to affect my verdict because one has to understand that there has been a long time from the matters that are before the court to the day when he gave evidence and one has to take into account the lapse of memory and genuine mistake (Appeal bundle pp. 16-17) The judge's analysis, in our opinion, adequately dealt with the issues raised which, despite Mr Haynes complaints to the contrary, related to peripheral matters of no great moment. In a case where the applicant had been caught virtually red-handed, these were the only points on which the defence could make some headway but we are satisfied that they were points without real substance. The application, therefore, was dismissed. (M. Stuart-Moore) Vice-President (M.P. Burrell) Judge of the Court of First Instance (Michael Lunn) Judge of the Court of First Instance Mr Gavin Shiu, SADPP, of the Department of Justice, for the Respondent. Mr John Haynes, instructed by Messrs Jennifer Wu-Scharsig, for the Applicant. PAGE - A B C D E F G H I J K L 1udk 1udk "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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