

HONG KONG / JUDGMENT

HKSAR v. YIP WING FAT

[2024] HKCA 21

COURT

Court of Appeal

DECIDED

11 January 2024

CASE / FILE NUMBER

CACC85/2019

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CACC 85/2019

[2024] HKCA 21

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO 85 OF 2019

(ON APPEAL FROM HCCC NOS 395 OF 1993 and 28 OF 1994)

HKSAR

Respondent

v

Yip Wing Fat

Applicant

Before: Hon Macrae VP, Zervos and M Poon JJA in Court

Date of Hearing: 19 December 2023

Date of Judgment: 19 December 2023

Date of Reasons for Judgment: 11 January 2024

REASONS FOR JUDGMENT

Hon Zervos JA (giving the Reasons for Judgment of the Court):

We had before us a renewal application for leave to appeal against conviction, which was inordinately out of time. The refused grounds of the leave application were not pursued, but instead six new grounds were argued by the applicant. We received submissions in relation to the new grounds but found them to be wholly unmeritorious. We, therefore, refused the renewal application and dismissed the appeal against conviction. We considered that the circumstances of the case warranted a loss of time order of two months. These are our reasons for our decision.

The procedural history

The applicant faced a count of robbery, contrary to section 10 of the Theft Ordinance, Cap 210, which offence dated back to 15 February 1993. He had originally appeared for trial in 1994 with four accomplices, namely Wu Ngan Hang (D1), Li Shu Yan (D2), Chan Kin Man (D3) and Lee Wing Lee (D4) in the High Court before Deputy High Court Judge Cannon (Judge Cannon) and a jury. He was D5 at trial. After a voir dire in which he challenged the admissibility of his admissions under caution, he absconded on 11 July 1994, and the trial proceeded in his absence. D1 to D3 pleaded guilty at the outset of the trial, while D4 was convicted after trial of the robbery offence.

More than 23 years later, on 10 April 2018, the applicant voluntarily surrendered to the police and was subsequently tried for the original robbery offence. On 28 February 2019, following a trial before Deputy High Court Judge Woodcock (Judge Woodcock) and a jury, he was convicted of the robbery offence and sentenced to 15 years' imprisonment.

On 19 March 2019, the applicant filed a Form XI Notice, seeking leave to appeal against conviction and sentence. At the leave hearing on 10 January 2020, the applicant abandoned his application to appeal his sentence, and accordingly, it was dismissed. He was legally represented by counsel in respect of his application to appeal against conviction. The Single Judge, in a lengthy written judgment, found the three grounds of appeal against conviction advanced on his behalf not to be reasonably arguable and refused his application. These grounds alleged a lack of direct evidence showing that the applicant was party to a joint enterprise, an insufficient direction by the judge on the purported exculpatory part of the first record of interview, and the conviction was unsafe and unsatisfactory.

Following the refusal of his leave application, the applicant engaged in correspondence with the court, requesting a Chinese translation of the leave judgment and other records of the trial proceedings. But it was not until 12 August 2022, about two and half years after the leave judgment had been handed down, that the applicant filed an affirmation to renew his application for leave to appeal against conviction. He also indicated that he would apply to reinstate his abandoned appeal against sentence, but this was not pursued eventually. In a letter filed on 2

September 2022, the applicant informed the court that he would not pursue the refused grounds of appeal and instead would seek leave to advance six new grounds of appeal, which are summarised as follows:

The applicant involuntarily admitted some facts of the case because Judge Woodcock had threatened him. She told him that if he did not admit them, he would be subject to a very heavy sentence (Ground 1).

Contrary to the prosecution's allegation at trial, "Giant Fat" was not the applicant's nickname, which was the nickname of a well-known triad at the time (Ground 2).

The applicant was not cautioned upon his arrest at his home, nor subsequently at Kwun Tong Police Station and Happy Valley Police Station respectively. It was only after he had been assaulted at the Hong Kong Regional Headquarters that he involuntarily signed the first record of interview, which post-recorded a confession (Ground 3).

The jury should have been instructed that it was plainly insufficient and unfair to convict the applicant only on the applicant's first record of interview, which was made involuntarily as supported by the injuries found by two doctors who examined him (Ground 4).

The first record of interview made reference to an uncharged offence of forging an identification document but the judge failed to direct the jury to disregard this matter (Ground 5).

The fact that the applicant was to receive an insignificant reward of \$50,000 would negate the inference that he was the planner of the robbery (Ground 6).

On 24 October 2022, the applicant filed a Form XIII Notice, seeking to renew his application for leave to appeal his conviction out of time. He affirmed that the application was filed late because (1) his counsel was out of Hong Kong because of the COVID-19 pandemic and not available to give him advice; (2) he did not receive an audio recording of the trial proceedings until August 2021, which he sent to his daughter, who lived abroad, for translation but it took her a long time to translate because it was of poor quality.

On 23 February 2023, the applicant submitted a written submission, elaborating upon the first and second new grounds of appeal as follows:

Judge Woodcock threatened him when he was represented by Mr Chong Tin Chun, not Mr David Boyton, who represented him at trial.

Mr Boyton failed to object to any incorrect reference to him as "Giant Fat", suggesting that Mr Boyton acted incompetently on his behalf.

The applicant also stated that he might advance other grounds in future.

On 4 October and 23 November 2023, the applicant wrote to the court requesting that he be provided with the notebooks of the police officers who arrested him. He alleged that he was not cautioned when arrested at his home on 16 July 1993, and involuntarily signed the cautioned statement after the police officers assaulted him. He asserted that the police notebooks contained

no record of him having been cautioned at his home. In a letter dated 7 November 2023, the police informed the applicant that none of the police notebooks were produced at trial, nor were any of them kept due to the lapse of time.

On 11 December 2023, the applicant filed a further written submission which substantially repeated his new grounds of appeal. The additional points he made can be summarised as follows:

The applicant submitted that he agreed the facts because he feared Judge Woodcock would impose a heavy sentence if he was convicted.

The complaint regarding the reference to the applicant by a nickname was not raised in the leave application because his counsel, Mr Ng, failed to discuss with him the arguments that would be advanced on his behalf.

Without the notebooks of the police officers the applicant requested, it was difficult for him to argue his case. He also changed his position by admitting that he was in fact cautioned by the police when arrested, but he did not say or sign anything.

The applicant appeared in person in the renewal application hearing, having been refused legal aid on 10 July 2023, and assistance from the Bar Free Legal Service Scheme on 19 September 2023 and the Clinical Legal Education, Faculty of Law of the University of Hong Kong on 11 December 2023.

The prosecution case

The offence concerned an armed robbery of a jewellery shop on the ground floor of Metropole Building, Nos 416-438 King's Road, North Point on 15 February 1993. The robbery netted gold jewellery valued at more than \$1.25 million. It involved D1, D2, D3, D4, the applicant and other persons, who played the following roles:

The applicant was the planner of the robbery and introduced the two masterminds to each other.

D4 and a male nicknamed "Tai Hau Chai" were the masterminds.

D1 and a male nicknamed "Hoi Por" were the persons who actually robbed the jewellery shop.

D2 acted as the lookout.

D3 was the driver of a getaway car, which was a stolen vehicle.

The narrative of the actual robbery was largely agreed by way of admitted facts. On 15 February 1993, two staff members of the jewellery shop were threatened to open the gold display cases by D1 and Hoi Por, who wore stocking masks, and were armed with a pistol and a hand grenade respectively. One of the staff members was pistol whipped, resulting in a laceration to his head. Whilst the robbery was being carried out, D2 acted as a lookout, armed with a pistol and grenade. Meanwhile, D3 remained in the getaway car, a stolen vehicle with false number plates, in the vicinity of the jewellery shop, where he waited for D1, D2 and Hoi Por to return. However, the

three of them could not find the getaway car after the robbery. They forcefully hijacked a private car and LPG lorry (both with drivers inside) and attempted to flee, but in vain. There followed a violent confrontation between the three robbers and police officers who arrived at the scene, during which shots were fired and a hand grenade detonated. One shot fatally wounded Hoi Por, who died, while five police officers and a civilian were injured. The three robbers surrendered and were duly arrested. D3 was also arrested nearby. The stolen jewellery items consisted of some ten trays of gold ornaments. Except for seven items of gold jewellery, which were lost, all the other items were eventually recovered.

Some five months after the robbery, at 10 am on 16 July 1993, the applicant was arrested by police officers at his home in Lam Tin. He was then taken to Kwun Tong Police Station, Happy Valley Police Station, where he had lunch, a garage at Kam Tin for a search, and Hong Kong Island Headquarters where, between 6:38 pm and 10:09 pm that day, a written record of interview (the first interview) was taken from him. It was recorded that when he was cautioned at his home, he said:

“Ah Sir, in respect of this robbery case, I was only a middleman responsible for introducing Tai Hau Chai to Fei Chu [it was an admitted fact that Fei Chu was D4]. The two of them were the masterminds.”

It was also recorded that he signed the post record of his cautioned statement, which was given to him to read and which was also read over to him, following which he was invited to make any alteration, correction or addition he wished. There immediately followed a signed declaration by the applicant that the statement was true and that he had made it of his own free will. Upon further questioning in the interview, the applicant also admitted that he “was responsible for introducing Fei Chu to Tai Hau Chai so that they could prepare themselves to commit the robbery and that would give me [the applicant] \$50,000 as reward after the robbery”. When asked how the robbery was planned, he said:

“One night in early February this year, 1993, Fei Chu [D4] came to the Kai Kai Dessert Shop in Jodan, Parkes Street, to see me. He said he had no money to spend and wanted to commit robbery. He then asked me if there is anything I could do about that. On the following night, I paged Tai Hau Chai, asking him to come out to Kai Kai Dessert Shop where I introduced the two of them to each other. Later, they left Kai Kai Dessert Shop to carry on their talk. However, I did not know what they were talking. About 5 days later, Tai Hau Chai came alone to Kai Kai Dessert Shop to see me. He asked me to look for a man who knew cars well on his behalf. I then told him to page Wong Lin-fat. I also did not know they had discussed about. Around 11 p.m. or so on February 13, Fei Chu [D4] and Tai Hau Chai came to Kai Kai Dessert Shop and told me that they would commit a robbery in North Point two days later and that they would give me \$50,000 as reward after the robbery.” (Emphasis added)

It was argued that the above italicised sentences should be regarded as exculpatory, and the applicant’s statement was therefore a “mixed statement”.

The applicant further stated that, after the armed robbery on February 15 Fei Chu called him on his portable telephone telling him that the gold shop robbery had “fouled up” and that they were in “great trouble”. He asked him what to do and whether he should leave Hong Kong. The

applicant told him to figure it out for himself. About 10 days later, Fei Chu called him again and told him that he was in Shenzhen and asked him to lend him some money. The following day, the applicant left Hong Kong for Shenzhen and gave Fei Chu three thousand dollars. In early April, Fei Chu called him again and told him that he had sneaked back into Hong Kong and asked him to make a forged identity card for him. The applicant said, "About 10 days later, I took a forged identity card to the Kai Kai Dessert Shop and put the forged identity card somewhere near the cashier counter." At this stage of the interview, at 8:30 pm, the applicant had to take a meal break, and the interview was suspended. The applicant signed and confirmed the record of interview.

It was also an admitted fact that at 9:15 pm Mr Nicholas Barr, of counsel, and his clerical assistant, arrived at the interview offices to see the applicant. Between 9:28 pm and 9:40 pm, the applicant was permitted to privately meet with his legal representatives. The applicant thereafter refused to answer any further questions or sign his statement. However, at the end, it was stated that the statement was read over to him, and he had no correction, alteration or addition to make. No formal complaint had been made against the police by either the applicant or his legal representatives.

It was an admitted fact that, on 17 July 1993, the applicant was seen by his solicitor, Mr Crawford, and the applicant made a complaint of assault by the police at North Point Police Station. Mr Crawford took two photographs of the applicant. The medical evidence showed that the applicant had a red bruise measuring 12 cm x 10 cm on his epigastric area after he was examined by Dr Yuen Ka Hong on 17 July 1993, and a yellow bruise mark over the upper abdominal wall measuring 15 cm x 15 cm after Dr Noon Sai Hsam examined him on 21 July 1993. By way of an admitted fact, the two photographs depicting the applicant's injuries were adduced into evidence.

In a second record of interview conducted on 18 July 1993, the applicant refused to answer any of the questions put to him.

The applicant was on court bail during his trial before Judge Cannon, but he absconded on 11 July 1994 and was absent from the trial which proceeded against the other four defendants. On 10 April 2018, the applicant voluntarily surrendered to the police and he was rearrested at Wanchai Police Station.

The voir dire

The voir dire before Judge Cannon concerned D4 and the applicant, who testified and called four other defence witnesses. The voir dire lasted 16 days and was concluded on 8 July 1994.

Due to a significant lapse of time, there was not a complete record of the voir dire. As noted by Judge Woodcock:

"It is not surprising to find in a court file 25 years old that the record of Cannon DJ made during the voir dire was by hand but her ruling of admissibility in relation to both defendants was typed up. There is also in the file typed objections to the admissibility of the defendant's record of interview as well as a typed written submission by defence counsel made at the conclusion of the voir dire. The prosecution tried to locate all original witnesses in the voir dire and out of 13, they can only locate one prosecution

witness. That witness was the arresting officer of the defendant and the statement taker of the material record of interview.”

In a document setting out the grounds of objection to the admissibility of the applicant’s first interview, which was signed by the late Mr Kevin Egan, who, together with Mr Alex Ng, represented the applicant in the 1994 trial, it was stated that:

“The caution statement was given by the 2nd accused Yip Wing Fat involuntarily after he had been assaulted by the Police:

1.

En route from Happy Valley Police Station to Kam Tin, the 2nd accused was driven to Tai Mo Shan Country Park and was assaulted by DPC 3069 inside police vehicle on the lower part of his chest several times. DPC 3069 also squeezed the scrotum of the 2nd accused on the instruction and in the presence of CIP Sh’e Hing Wan.

2.

Inside Room 115 of Hong Kong Island Regional Crime Unit Headquarters, whilst the 2nd accused was hooked on his head, the back of his head was hit once before he was asked to supply information to the police. The 2nd accused said he knew nothing and was then beaten ten odd times on the chest and stomach. The 2nd accused’s scrotum was then squeezed for two to three times. The hood was then removed from the 2nd accused’s head. He identified three police officers then present in the room as DPC22988, Sergeant 12292 and Sergeant 11296. The gist of the contents of the caution statement was suggested to DPC22988 by Sergeant 12292.”

The court records show that on 8 July 1994, Judge Cannon ruled that the statements of the applicant and D4 were made voluntarily, and there was no ground to exercise her discretion to exclude them.

The refusal of a second voir dire

At the second trial, on 13 February 2019, the applicant pleaded not guilty to the charge and his counsel, Mr Chong, applied for a second voir dire to redetermine the admissibility of his first interview. After hearing argument from both sides, Judge Woodcock on 14 February 2019 refused the application and handed down her reasons for doing so on 28 February 2019. The judge, in a thorough and meticulous analysis of the law and the relevant issues in the present case, correctly concluded, in our view, that the due administration of justice demanded that she should not exercise her discretion to conduct another voir dire.

The case was adjourned to 18 February 2019 for the commencement of the trial proper, which proceeded on the basis that the first interview was voluntarily made and admissible as previously ruled by Judge Cannon. In the meantime, Mr Chong had been replaced by Mr Boyton, who represented the applicant at trial.

The defence case

The applicant elected to testify but did not call other defence witnesses. His defence was that he had nothing to do with the robbery. When cross-examined, he denied having the nickname Giant Fat (or Kiu Yan Fat, in transliteration), and he said his height and weight were slight and his nickname was Fat Chai.

Of the alleged police misconduct, DPC 22988 (PW5) was the only material witness who could still be located and was called by the prosecution and cross-examined by the defence. PW5 confirmed in evidence that he had cautioned the applicant, who was arrested in his home. PW5 denied the suggestion that the police car detoured to Tai Mo Shan Country Park, where the applicant claimed he had been tortured. He also denied the allegations of impropriety and assault by any of the police officers as suggested by the defence.

The applicant's evidence on this topic was briefly summarised by Judge Woodcock as follows:

"... he was taken from his home in front of his family, but was not cautioned by PW5 in his home, nor did he make any admission of involvement in the robbery.

His evidence was that the first time he heard about this North Point robbery was on the day of his arrest and it was the Chief Inspector who told him. He did not read newspapers or watch the television at about that time because he was busy working. He worked shifts.

He says that after a visit to Kwun Tong Police Station to give details of his arrest, they then went to a garage which was searched, in Happy Valley. After reporting the matter to Happy Valley Police Station, they were there for some time, he was taken by car to Kam Tin. He was told he was going to Kam Tin, but on the way, the police drove into Tai Mo Shan Country Park.

In the park he was assaulted by another police officer, acting on the instructions of the Chief Inspector, Shi Hingwan. He was punched in the stomach, chest area several times, and his scrotum was squeezed after the chief inspector told that officer to squeeze his scrotum to see if he had anything to say.

The defendant did not, at that time, admit anything but they suddenly left the country park and drove back to Central to the Regional Crime Unit Office.

They never went to Kam Tin, as described by PW5."

In cross-examination, the applicant also disagreed with the prosecution's suggestion that his injuries were self-inflicted.

The summing-up

Judge Woodcock, at the commencement of the summing-up, told the jury that:

"...The defendant says he was forced to sign a record-of-interview because he was assaulted by the police after his arrest and before that record-of-interview was taken.

He says those incriminating answers were fabricated by the police. He did not make that statement voluntarily and you should not place any weight on it because it was not true.”

Of the applicant’s allegations regarding what happened between his arrest at home and the first record of interview, Judge Woodcock directed the jury in accordance with the terms of Specimen Direction 39, and went on to say:

“In this case, the defendant alleges that he was assaulted in a police car in the course of the day, after his arrest, as well as later in the interview room, just before the record-of-interview commenced, on two occasions. He also alleges that he was not cautioned at home. Nor did he admit to the involvement, as post-recorded in the record-of-interview, he says he made no such oral verbal admission at home.

He says that the sergeant who was present at the record-of-interview with PW5 who wrote the interview, taught PW5 what to write. If you conclude that the allegations are, or may be, correct and that the admissions were, or may have been obtained as a result of that conduct, then you must disregard the admissions.

If however, you were sure that the defendant made admissions and that they were not obtained in the way he describes, you must nonetheless decide whether you are sure that the admissions are true. If, for whatever reason you are not sure that the admissions are true, you must disregard them. If, on the other hand, you are sure that they are true, you may rely on them.”

In the course of giving legal directions to the jury, Judge Woodcock reminded them that “the defendant was not charged with other crime, such as supplying a forged identity card, so there is no need to consider that here.” She went on to summarise the evidence of the prosecution witnesses who had testified at the trial, the three staff of the jewellery shop and two police officers. She gave a lengthy summary of the applicant’s evidence and reminded the jury of the points made in counsel’s speech in respect of the defence case.

The respondent’s submissions

Ms Jessie Sham, for the respondent, submitted that the applicant’s delay in lodging the present application was substantial and unwarranted on the new grounds. She contended that the new grounds were devoid of merit.

As for Ground 1, Ms Sham pointed out that the Admitted Facts were signed by Mr Boyton on behalf of the applicant. There was no substance to the suggestion that the signature was obtained by means of improper pressure by Judge Woodcock.

As for Ground 2, Ms Sham submitted that whilst the applicant was referred to at trial by his real name and nickname, there was no issue of mistaken identity as both were used to refer to the applicant. In any event, the applicant demonstrated no prejudice under this ground.

As for Grounds 3 and 4, Ms Sham contended that the issues of voluntariness and admissibility were resolved at the voir dire and the ruling was adopted in the trial proper. In any event, Judge Woodcock had summarised to the jury the applicant's case regarding how his confession was obtained after the police assaulted him, and this was in addition to Judge Woodcock's direction to the jury that it was for them to decide the facts of the case.

As for Ground 5, Ms Sham submitted that Judge Woodcock had fairly directed the jury that there was no need to consider a crime for which the applicant had not been charged.

As for Ground 6, there was ample evidence at trial to show that the applicant was the planner of the robbery.

Discussion

In Ground 1, the applicant complained that Judge Woodcock pressured him to agree to the Admitted Facts. It was the case that the Admitted Facts were signed by his counsel on his behalf and agreed in open court. He accepted that counsel did this but he could not remember. The Admitted Facts set out the factual particulars of a robbery of the jewellery shop in North Point on 15 February 1993 and the subsequent shootout between the robbers and the police. He did not dispute there was such a robbery and subsequent shootout. His case was that he was not present and not involved in the robbery. Judge Woodcock told the jury at the beginning of the summing-up:

"The prosecution case is that the defendant, the other four defendants named in the charge and other persons, committed the robbery together. There was a joint enterprise. The defendant was not present at the scene of the robbery or the shoot-out, but he was part of the robbery because he assisted in the commission of the offence."

The prosecution relies on the defendant's admission, under caution, at the scene of his arrest where he said he was only a middle man in respect of this robbery because he had introduced the two masterminds of the robbery to each other. This admission was later recorded in a record-of-interview by PW5 and further questions were asked to clarify what he had admitted.

He told PW5 that he introduced two men. One of them was the 4th defendant in the trial, to each other so that they could plan and commit a robbery. There were four meetings in relation to this robbery involving the defendant himself and he knew that the gold jewellery shop was to be robbed on 15 February and he would receive \$50,000 after the robbery as a reward for the introductions he made.

He gave information to the police about how he found out that the robbery had failed and what he did for the 4th defendant, who turned to him for help after it had all gone wrong.

The prosecution also relies on the fact that the defendant fled his first trial and disappeared for 24 years, as evidence to support his guilt.

The defence case is that the defendant had nothing to do with the actual robbery itself, nor did he have any involvement in its plan. The details and the admission in the record-of-interview were not true. The defendant says he was forced to sign a record-of-interview because he was assaulted by the police after his arrest and before that record-of-interview was taken.

He says those incriminating answers were fabricated by the police. He did not make that statement voluntarily and you should not place any weight on it because it was not true.”

There was no issue about the factual circumstances of the robbery between the prosecution and the defence because it was accepted that the applicant was not present. The defence was simply being asked to agree with the historical and indisputable facts regarding the robbery that had occurred. Hence, there was no prejudice to the applicant in agreeing to the admitted facts in question.

The applicant produced his own transcript of a discussion between Judge Woodcock and counsel concerning the progress in agreeing on the draft admitted facts. It does not fully record the discussion that took place on 14 February 2019. Mr Chong, who was then representing the applicant, mentioned that the applicant could agree the robbery inside the jewellery shop, but could not agree on what happened before or after the robbery, including the shootout. As the applicant could agree with the facts of the robbery, the judge queried why he could not agree on what happened before and after it, particularly as it was agreed that the applicant was not present and the events of the robbery were a matter of record. She reminded counsel that it would be wasting time by challenging the events of the robbery, which were not in dispute, and mentioned that if the applicant was convicted, such a matter could be reflected in the sentence. However, she left the matter for defence counsel to discuss with the applicant and inform prosecuting counsel what could or could not be agreed. At the next day on 15 February 2019, new draft admitted facts were submitted to the court, which were discussed. At the resumed hearing on 18 February 2019, Mr Chong informed the court he was no longer acting for the applicant, and Mr Boynton was engaged to represent him. On 20 February 2019, admitted facts were agreed upon and the amendments to them were discussed. After the empanelling of the jury that day, the admitted facts were read out in open court after prosecuting counsel’s opening speech.

As a matter of case management and what was in issue in the case, Judge Woodcock discussed the draft admitted facts, during which she reminded counsel that not agreeing the undisputed facts of the robbery was unnecessarily wasting time, which could have consequences. We do not see any prejudice to the applicant as he was agreeing historical facts regarding the robbery that were not in dispute. The applicant also had time to reconsider his position, having commissioned new counsel, and in open court, he agreed to the admitted facts.

We are not persuaded that any prejudice or improper pressure resulted from the judge’s comments. This ground of appeal fails.

In Ground 2, the applicant complained that he had been referred to by the nickname “Giant Fat”, which he said was the nickname of a well-known triad at the time. Even if the nickname was associated with a well-known triad figure in the 1990s, the present jury were sitting nearly 30

years later and would be unlikely to remember or be aware of such a matter. Originally, it had been stated in the Admitted Facts that his nickname was Giant Fat but this had been deleted. Prosecuting counsel was still entitled to question him as to whether it was his nickname. When the applicant was cross-examined if this was his nickname, he denied it. Moreover, there was no evidence before the jury that the nickname was related to a triad figure.

Ground 3 concerned whether he was cautioned at the time of his arrest or subsequently. The applicant contended that he was not cautioned at his home when he was arrested or subsequently at Kwun Tong Police Station or the Happy Valley Police Station, where he had been taken. He alleged that it was only after he had been assaulted at Hong Kong Regional Headquarters that he was forced to sign the first record of interview, which post-recorded his confession.

In the applicant's record of interview dated 16 July 1993, it was recorded that at his home, he had been arrested and cautioned, and responded by making a statement that he was only a middleman in the robbery, which he denied was said by him. He accepted before us that he had been cautioned and signed the record of interview, but he did not say anything. At the voir dire in the 1994 trial, he did not testify. However, he did testify in the 2019 trial and his defence, that he had been assaulted by the police and did not make this statement, was put before the jury.

The applicant complained that he had recently requested the notebooks of six police officers, but they had not been supplied. As already noted, the applicant had been represented by Mr Egan and Mr Ng in the 1994 trial. Mr Ng also represented the applicant at the leave hearing but any issue about the police notebooks was not raised. It was confirmed that no request had been made for the police notebooks in the 1994 trial, nor were they made exhibits in the voir dire. In the written grounds of objection to the admissibility of the applicant's cautioned statement that formed the basis of the voir dire, nothing turned on the police notebooks. They focused solely on an allegation that he had been assaulted by police officers. It was also pointed out to him that Mr Boyton submitted in the 2019 trial that the post-record of the admission was not made until over eight hours later and should have been made as soon as practicable by the police officer at 10 am. He suggested that the officer had plenty of opportunity to make the post-record at the scene, and the fact that no record was made at 10 am, meant that no admission had been made.

Ms Sham informed us that in the 1994 trial, no request had been made to the prosecution to provide a copy of the police notebooks, nor was any indication given as to which of the police officers the notebooks related. Only the case exhibits were kept, while other materials, including notebooks, would not be kept beyond 10 years. The notebooks no longer existed because the applicant had absconded and had been wanted for over 25 years. Ms Sham also pointed out that no request had been made for the notebooks in the 2019 trial. The applicant stated that when he changed counsel to Mr Boyton, he did not mention the notebooks to him. We had no hesitation in finding that this was a last minute request for no apparent reason and that the applicant brought this matter upon himself by absconding and waiting until 25 years later to face trial for his alleged crime.

In Ground 4, the applicant complained that it was unfair for him to be convicted on the statement recorded in his first interview because of medical evidence he produced that showed he sustained injuries. His medical evidence formed part of the Admitted Facts, which stated as follows:

“Defendant’s injuries

10.

Mr. Crawford of Messrs. Crawford & Co, the then solicitors for the Defendant, saw the Defendant on the 17th July 1993, when the Defendant made a complaint of assault by the police at North Point Police Station. Mr. Crawford took 2 photographs of the Defendant which are now produced as Exhibit D-1(1) & (2).

11.

At 4:26pm of the 17th July 1993, the Defendant was examined by Dr. YUEN Ka Hong in Tang Siu Kin Hospital, the doctor found a red bruise 12cm x 10cm on the Defendant’s epigastric area.

12.

On the 21st July 1993, the Defendant was examined by Dr. NOOM Sai Hsam of Lai Chi Kok Reception Centre, Dr. NOOM found a yellowish bruise mark over the upper abdominal wall measuring 15cm x 15cm.

Photographs

13.

In August 1993, Mr. Kwong Shau Yan (also known as Tai B), clerk of Messrs. Crawford & Co, in the presence of the Defendant, took 5 photographs of the Defendant’s home and other places which are now produced as Exhibit D-2(1)-(5).”

The applicant’s case that the police assaulted him was fairly put before the jury by Judge Woodcock in her summing-up as evidenced by the following passages:

“The defence case is that the defendant had nothing to do with the actual robbery itself, nor did he have any involvement in its plan. The details and the admission in the record-of-interview were not true. The defendant says he was forced to sign a record-of-interview because he was assaulted by the police after his arrest and before that record-of-interview was taken.”

“The prosecution further contends that those admissions are the truth and enough to prove he was part of a joint enterprise.

The defendant's evidence is that he made none of those admissions and that they were fabricated by the police after he had been physically assaulted whilst in their custody. He agreed to cooperate only to stop them assaulting him further. He said he was forced to adopt the untrue admissions by appending his signature to that document and that therefore, the signatures were worthless."

"In this case, the defendant alleges that he was assaulted in a police car in the course of the day, after his arrest, as well as later in the interview room, just before the record-of-interview commenced, on two occasions. ..."

"Mr Percy suggests that this is because he gave his answers voluntarily and the record was made voluntarily, without impropriety by the police. The impropriety was fabricated the following day, to try and save himself. The doctors found a bruise, not bruises. That fact alone does not prove the truth of the defendant's allegations of an assault by the police, it proves the doctors saw and found a bruise on the date of examination."

Mr Boyton asks you to consider the fact that the defendant lifted up his shirt to show his body to his lawyers, as soon as they arrived on the date of arrest. He says the significance of that is to support his evidence that he was assaulted that day. He suggests that this shows the defendant did not inflict injuries upon himself later.

Mr Boyton submits that the defendant's evidence is credible and further supported by the fact the doctors found a bruise. The defendant's answer that he was too frightened to make a formal complaint on the first day, in case he was assaulted again, Mr Boyton says is entirely credible."

The applicant confirmed that his complaint was that Judge Woodcock did not mention the injuries to the jury but that is precisely what she did do. She specifically mentioned the photographs and the findings of the two doctors. This ground is wholly without merit.

In Ground 5, it was complained that Judge Woodcock did not address the suggestion that the applicant provided a forged identification document to one of the robbers, which was an uncharged act. As already noted, the judge addressed this matter and directed the jury that the applicant in his first interview referred to the assistance he gave Fei Chu, which "contains details of what the defendant did to help him after he left Hong Kong. I will say here that the defendant was not charged with any other crime, such as supplying a forged identity card, so there is no need to consider that here." She went on to remind the jury that they were only to consider the evidence before them and that they must not speculate about what other evidence there might have been. The applicant also complained that because of this matter, the judge extrapolated that he was the mastermind. This had not been said by the judge.

In Ground 6, the applicant contended that receipt of only \$50,000 reward negated the inference that he was the mastermind. There is no substance to this complaint for two main reasons. First, it was the prosecution case that he was the planner of the robbery. Secondly, his admissions, if accepted by the jury, provided ample evidence to infer that he introduced the two masterminds to each other and acted as a middleman. We should also add that \$50,000 was not an insignificant sum of money 30 years ago.

Loss of time

The Court of Final Appeal in *Chau Ching Kay v HKSAR*, emphasised that the objective of a loss of time order was “to ensure that only reasonably arguable cases should go to the Court of Appeal” and thereby “to deter unmeritorious applications because they would otherwise engage judicial time which may well be better spent on other meritorious cases. The result of wasting judicial time is that meritorious cases would have to be deferred or delayed, thus causing injustice to the parties in those cases.”

While a degree of latitude is given to applicants in person, if the application is patently devoid of merit or frivolous, consideration will be given to a loss of time order. Such cases can inflict serious injustice and undermine the criminal justice system by unnecessarily occupying valuable resources and impeding the expeditious disposal of other cases. However, this does not detract from the fundamental importance of a person’s right to challenge the correctness of their conviction or sentence.

We did not accept the applicant’s explanation for the inordinate delay in renewing his leave application, which was not a renewal of his previous grounds of appeal, but instead a means to advance new grounds that were over three and a half years out of time. It was simply an exercise to chance some new grounds after the previous grounds had not succeeded. This was apparent from the request for the police notebooks which had never been requested in the 1994 trial, where the ground of objection in the *voir dire* was that he had been assaulted by the police. The request by the applicant for the police notebooks was to show that no caution had been administered to him at the time of his arrest, but that was not a ground of objection. This was a baseless argument, since the applicant in his written and oral submissions, confirmed that he had been cautioned.

Overall, we found the new grounds of appeal were patently devoid of merit and an attempt to make points that simply had no substance to them, some of which seem to be crafted to take advantage of the inordinate lapse of time in trying this case due to the applicant absconding. It was for the foregoing reasons that we ordered two months’ loss of time.

(Andrew Macrae)

(Kevin Zervos)

(Maggie Poon)

Vice President

Justice of Appeal

Justice of Appeal

Ms Jessie Sham, SPP, of Department of Justice, for the respondent

The applicant appeared in person

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