Privy Council Appeal No. 65 of 1995

Wu Chun-piu *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 14th May 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Browne-Wilkinson
Lord Mustill
Lord Nicholls of Birkenhead
Sir John May

*[Delivered by **Sir John May**]*

This is an appeal with special leave from a judgment of the Court of Appeal of Hong Kong of 1st July 1993 dismissing the appellant's application for leave to appeal against his conviction out of time. The appellant was convicted by a jury in Hong Kong on 14th December 1990, with two other defendants, of robbery and possession of a firearm and was sentenced to 14 years' and 6 years' imprisonment respectively and concurrently. Special leave to enter and prosecute this appeal was granted to the appellant on 24th November 1994.

At about 3.00 a.m. on 27th February 1990 three armed and masked men entered the Kam Doa Night Club in Bute Street, Kowloon at the close of business. They were armed with a real or imitation pistol and two knives. In circumstances into which it is not necessary to go, three men were seen to leave the club and were detained by three police officers. As the latter were about to search the men, the one alleged to have been the appellant produced the pistol and shouted "we just want money". The three men then fled in different directions. The officers gave

chase and quickly caught and arrested one of the three. The other two men escaped.

When subsequently questioned by the police the first man admitted the offence and implicated the present appellant and a third man, one Yu Sze-ming.

At 5.00 p.m. on the same day police officers entered a flat in Kowloon with a search warrant. There were two men and two women in it, one of the former being the appellant, with his girlfriend, Ho Ka-man. In the search of the flat the police officers found an empty knife box with a picture of a knife and the word "Rambo" on its lid. Subsequently the appellant was arrested and taken to Mongkok Police Station. In the early hours of the following morning, 28th February, he was interviewed by police and what he had to say was recorded in writing. He admitted knowing the first robber, who had been caught by the police and whose name was Leung Kwok-man, since his school days and that Leung had stayed in the flat which the police had searched for two or three nights prior to the robbery. The appellant also said that Leung had brought a knife which he had purchased in its box to the premises but the appellant did not know when he had taken the knife away. Leung had left the premises before midnight on 26th February and he, the appellant, had remained behind with his girlfriend watching television.

On 2nd March an identification parade was held at which the appellant was identified by two of the three police officers as the man who had wielded the gun at the scene of the robbery. Initially he chose to stand at position no. 8 in the identification line and was there identified by the first police officer who said "no. 8". The appellant then moved to position no. 2 on the parade. The second police officer then entered the room in which the parade was being held and also said "no. 8", thereby identifying another person who was standing in the position which had previously been occupied by the appellant. The appellant remained at position no. 2. The third officer then entered and said "no. 2", thereby identifying the appellant. There was in addition evidence from one of the police officers that the robber holding the gun had had a bandaged right palm and some other evidence that when arrested the appellant had two injured right fingers and that they were bandaged. However the evidence of the hand injury and its dressing was imprecise and it does not seem to have been relied on by the Crown in the course of this appeal.

On the same day at a subsequent further interview under caution, the appellant maintained his earlier denials that he had been involved in the robbery.

Eye witnesses other than the police officers were unable to identify the robbers because they were all masked. Three of them, however, said that a serrated knife, similar to the illustration on the Rambo knife box, was used. This apart there was no other evidence implicating the appellant. He did not give evidence in the trial, but his girlfriend, Ho Ka-man, was called to give evidence in support of his alibi.

At 11.00 p.m. on 3rd March, police officers arrested the third defendant, Yu Sze-ming, at a restaurant in Kowloon. He too was interviewed at Mongkok Police Station early the next day. He said that he knew the present appellant, but did not know the first man, Leung. He made no admissions of complicity in the robbery. Later, on 14th March, this third man, Yu Sze-ming, was also placed on an identification parade. He stood in three different positions, but was identified by each of the same three police officers who had attended the parade involving the appellant on 2nd March. There was no other evidence implicating Yu Sze-ming.

At the trial, which took place between 5th and 14th December 1990, the first man, Leung, pleaded guilty. The other two men pleaded not guilty but were ultimately convicted by the jury's unanimous verdict on both counts. Each was then remanded in custody for probation reports and ultimately came up for sentence on 8th January 1991.

The probation report on the appellant contained the following paragraph:-

> "Towards the present crime, the accused frankly admitted that he was involved. He gave the reason for committing the crime as follows. Allegedly, he and Yu Sze-ming (A3) were betting in horse-race in an unlicensed gambling stall. Given tips, they had won about $10,000 - 2 days prior to the crime. Being too ambitious, they betted $140,000 on the following races but eventually had lost all the money on that day. As they were forced to repay about $110,000 within 2 days time, they committed the offence under mutual agreement. As the accused claimed, they thought that they could rob about $200,000 by committing the present crime."

When the appellant came up for sentence the court had the probation report before it and in addition in mitigation the appellant's counsel, Mr. Thomas Iu, said:-

> "My Lord, there are just a few matters I would like to draw your Lordship's attention to by way of sentence. My Lord, I would ask you to bear in mind his age. He's still

a very young man at the time he committed the offence - aged 20 (19 and 4 months). And the unfortunate thing in this case, my Lord, is that he has been making good progress in the training centre and it can be said, of course, that his chances of rehabilitation appear now genuine.

Also, my Lord, apparent from the probation officer's report, is some sort of remorse on his part since the conviction. He gave to the probation officer the reason why he committed the robbery now, namely that he was in debt, in a gambling debt situation, that the robbery was committed really to get some money to repay the gambling debt.

His situation, my Lord, apparently is a classic example of a young man coming from a broken family, without adequate parental supervision or education or guidance, that he would have gone astray as it were, had associated himself with bad company, ... got himself into heavy debt and then had to, as it were, commit the present robbery, which is rather serious.

My Lord will also bear in mind that in the course of the robbery, very minimal violence was used, and as is evident from the evidence, that the defendant never intended to inflict any bodily harm on anyone, it's money that they were after. You will recall, my Lord, the evidence of the old lady who came here, who said the robbers told her, 'Don't be afraid. We are only after money'. ... It clearly indicated, my Lord, that they never intended to use any undue violence or force on anyone than is required.

My Lord, I don't propose to submit to your Lordship what I don't really believe in, namely that training centre is a viable option in the circumstances. It is inevitable that this young man would have to face a rather lengthy sentence, but I do ask your Lordship to be as lenient as you possibly can with him.

My Lord, that's all I can usefully say."

The learned trial judge then heard counsel in mitigation on behalf of Yu Sze-ming and thereafter passed sentence on him and on the present appellant.

In so far as appeals in criminal cases in Hong Kong are concerned, the relevant statutory provisions are contained in sections 83Q and 83 of the Criminal Procedure Ordinance Cap. 221. In so far as is material for present purposes, these read as follows:-

"83Q (1) A person who wishes to appeal under this Part to the Court of Appeal, or to obtain the leave of that Court to appeal, shall give notice of appeal or, as the case may be, notice of application for leave to appeal, in such manner as may be provided by rules and orders made under section 9.

(2) Notice of appeal, or of application for leave to appeal, shall be given within 28 days from the date of the conviction, verdict or finding appealed against, or, in the case of appeal against sentence, from the date on which sentence was passed, or, in the case of an order made or treated as made on conviction, from the date of the making of the order:

Provided that, where sentence was passed more than 7 days after the date of conviction, verdict or finding, notice of appeal, or of application for leave to appeal, against the conviction, verdict or finding may be given within 28 days from the date on which sentence was passed.

(3) The time for giving notice under this section may be extended, either before or after it expires, by the Court of Appeal.

83(1) Except as provided by this Ordinance, the Court of Appeal shall allow an appeal against conviction if it thinks

(a) that the conviction should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or

(b) that the judgment of the court of trial should be set aside on the ground of a wrong decision on any question of law; or

(c) that there was a material irregularity in the course of the trial, and in any other case shall dismiss the appeal:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.

(2) In the case of an appeal against conviction the Court of Appeal shall, if it allows the appeal, quash the conviction."

However before turning to the substantive issues which arose on the appeal in the Hong Kong Court of Appeal, their Lordships refer first to the extension of time sought in any event by the appellant. Their Lordships were referred to *R. v. Marsh* (1935) 25 Cr.App.R. 49, at page 52, where the Court of Criminal Appeal in England stated that the rule and practice of the court was not to grant any considerable extension of time unless the court was satisfied that there were such merits that the appeal would probably succeed. This is also the rule in Hong Kong.

Nevertheless and despite the delay of some 16 months in this case, it does not seem to have been relied on substantially by the Crown in the Court of Appeal. Neither does the delay appear to have been considered as fatal by the court itself: there was no specific reference to it in the judgment of that court. Further, their Lordships note that in that judgment, when referring to the merits of the appeal, the Court of Appeal expressed the view that the point raised in the latter might have been decided in the appellant's favour.

In these circumstances their Lordships do not think that at this stage the delay that there undoubtedly was in the start and prosecution of the appeal in Hong Kong should of itself be fatal to the appellant's present appeal.

Returning to the further history of this case after the trial, on 18th January 1991 the appellant filed his own Notice of Application for leave to appeal against sentence. As part of his Grounds, he wrote:-

> "I was young when the incident in question happened ... In fact, I was the youngest among all co-defendants. I was deceived by the 1st defendant into committing the crime of armed robbery. It was a big mistake, but fortunately no one was hurt. Otherwise, the consequences would be more serious."

The standard form of Notice of Application in Hong Kong contained the following printed statement in both English and Chinese:-

> "It has been fully explained to me that if I appeal against both conviction and sentence at the same time, one will not have any adverse effect on the other."

The appellant ultimately abandoned this appeal against sentence on 1st May 1992.

However, the third defendant, Yu Sze-ming, also filed his own Notice of Application for leave to appeal against both conviction and sentence on 1st February 1991. His appeal was heard on 7th

May 1992 and in a reserved judgment on 15th May the court upheld the appeal against conviction on the second ground of his perfected grounds of appeal, which had been settled by counsel. This in substance alleged:-

> "That the learned judge failed to direct the Jury upon special weaknesses in the identification evidence, namely whether the identifying police officers had 'colluded with each other about the case and about the identifying features and had told lies about so doing'."

On the retrial of Yu Sze-ming ordered by the Court of Appeal, he was acquitted and costs were awarded in his favour.

On 19th May 1992, the appellant wrote to the Registrar of the Court of Appeal applying for leave to appeal against conviction out of time as follows:-

> "The jury, in the Supreme Court on 13 December 1990, returned an unanimous verdict of guilty. As I then had no knowledge of the law, I mistakenly thought that there was no ground for appeal against conviction since the guilty verdict was by an unanimous vote of 7 to 0."

He went on to say that the charge and evidence against him and Yu Sze-ming in the case were the same. He said that he had learnt from the local newspaper, the South China Morning Post, that the third defendant's appeal against conviction had been successful and that he was, therefore, seeking leave to appeal himself against his conviction.

On 11th June 1992 the appellant drafted a ground of appeal against conviction in which he said "I had not committed any robbery" and in his affirmation in support of his application to appeal against conviction out of time he said:-

> "Previously I only appealed against the sentence, but as I had not committed any robbery, I now apply to appeal against conviction out of time."

Perfected grounds of appeal settled by counsel, Mr. Mackenzie-Ross, were served on 10th August 1992 in which the second ground was identical with the same ground in the successful appeal of the third defendant.

The Court of Appeal heard the application for leave to appeal against conviction out of time first on 21st January 1993. The Crown opposed the application and drew attention to the terms of the appellant's original abandoned Notice of Application for leave to appeal against sentence. Counsel for the Crown argued that in any event it could not be said that the conviction of the

appellant was in all the circumstances unsafe and unsatisfactory when in that original application the appellant effectively admitted that he had committed the substantive offences. Alternatively the Crown argued that even if it could be said that there had been a wrong decision on a question of law or a material irregularity in the course of the trial, as had been held in Yu Sze-ming's appeal, nevertheless in the light of the appellant's admission clearly no miscarriage of justice had occurred. The hearing was adjourned to enable the appellant to file an affidavit as to the making of the admission. Nothing was said at this first hearing about the submissions of Mr. Iu, the appellant's counsel, by way of mitigation following the jury's verdict.

On 3rd February 1993 the appellant filed an affidavit in which he said:-

> "The reason why I wrote down some mitigation factors in my said home made grounds of appeal against sentence, was that on 13th December 1990, I was convicted of the offences by the Jury by a unanimous verdict of 7 to 0 so, I thought that there was no grounds for appealing against the conviction, and then during my jail custody at Pik Uk Prison, some of the prisoners told me that I could appeal against the sentence, and they also told me that on my said grounds of appeal against sentence I should show remorse and in order to do so I should admit the said offences, so the judge will take it in consideration to reduce the sentences. That is why I stated the things about the first defendant and being deceived by him into committing the offences."

For the resumed hearing of the appeal on 27th April, Mr. Mackenzie-Ross of counsel prepared a skeleton argument pointing out that the printed form of notice of appeal did explicitly state that if there was an appeal against conviction and sentence at the same time, one would not have any adverse effect against the other. He further argued that the appellant's original Grounds could not be used on the appeal against conviction since they were not evidence in the trial before the jury. As the judgment of the Court of Appeal makes clear, counsel did not deal in his written argument with the mitigation after verdict by Mr. Iu, the appellant's counsel, since up to that point the issue had not been raised.

Nevertheless at the resumed hearing of the application counsel for the Crown did not then rely upon the alleged admissions in the Grounds of Appeal against sentence. Instead, he concentrated his attack upon the admissions allegedly made by Mr. Iu in his mitigation. In its judgment, which was handed down on 1st July 1993, the Court of Appeal said:-

> "Mr. Saw relied upon these matters [the plea in mitigation] rather than upon the admission made in the application for leave to appeal against sentence, the truth of which the applicant had, as has been outlined above, denied. The applicant has, however, never denied that his Counsel made the admissions to which Mr. Saw referred or suggested that he was not authorised so to do."

However no enquiry had been or was made of Mr. Iu, nor of the appellant himself, as to what had happened.

In the event, the Court of Appeal refused to grant leave to appeal out of time, saying:-

> "We are satisfied that the applicant admitted, through his counsel, that he had committed the offence and that we are entitled to take that admission into account when considering whether there has been any miscarriage of justice. We are satisfied that, *although the point raised in his appeal might have been decided in his favour*, no miscarriage of justice has occurred. In the circumstances, we are satisfied that the proper course is to refuse the application for leave to appeal against conviction out of time." [italics added].

The appellant's appeal was put forward on his behalf under section 83(1)(a) of the Criminal Procedure Ordinance and based on the contention that in all the circumstances of the case his conviction was unsafe and unsatisfactory because of the judge's failure to direct the jury about the possibility of collusion among the police officers who had given evidence of identification. Their Lordships remind themselves that in the case of the appellant's co-defendant, Yu Sze-ming, save for the alleged admissions in mitigation by counsel, the facts and circumstances were substantially the same as in the case of the appellant, and that not only did an appeal succeed but also on a re-trial Yu Sze-ming was acquitted by the second jury. Further, their Lordships consider it to be implicit in the judgment of the Court of Appeal now appealed from that in all probability, but for the alleged admissions by counsel, the appellant's appeal would also have been allowed as had that of his co-defendant.

Although at various stages of the appeal process the Crown had relied upon other alleged admissions by or on behalf of the appellant, in the result the only ones relied on at the substantive hearing of the application for leave were those allegedly made on the appellant's behalf by his counsel when mitigating after verdict. Further it was these alleged admissions to which the Court of Appeal referred when deciding that there had been no miscarriage of justice. In these circumstances their Lordships do

not think it necessary for them to consider any other alleged admissions than those which ultimately took centre stage.

Further, although on strict analysis the Court of Appeal dismissed the appellant's application in reliance on the terms of the proviso to section 83(1) of the Ordinance, their Lordships do not think it necessary to discuss the many authorities that there are on the meaning and effect of the proviso to which they were very helpfully referred by counsel. However if that which was said in mitigation by Mr. Iu on the appellant's behalf when he was brought up for sentence is to be held against the appellant to the extent contended for and indeed upheld by the Court of Appeal, then defendants and their counsel mitigating on their behalf after a jury's verdict are in a difficulty.

The inherent difficulty is however avoided if one considers what the real position is. Generally speaking, at the time counsel mitigates, there has been a trial at the start of which the accused has pleaded "not guilty", of itself inconsistent with any subsequent alleged admission of guilt. Then after a guilty verdict and against that background counsel has to try to persuade the trial judge to pass as lenient a sentence as possible. Counsel has to do so in the knowledge that notwithstanding his client's original plea of "not guilty" the jury have taken a different view of the case. It would frequently be unrealistic for counsel, when mitigating, to reiterate in strong terms his client's innocence and yet in the same breath to ask for leniency. In their Lordships' view, at least in the present case, one must ask how one should realistically interpret counsel's remarks in mitigation. Was he intending to gainsay and set at naught his client's original plea? Or was he bound in the circumstances to accept the jury's verdict and do what he could from that starting point to mitigate the consequences. In their Lordships' view, in this case at least, the latter is the realistic approach and it would be unjust to attribute to the appellant from counsel's mitigation an admission that he had in fact committed the offence which he had only very recently been contending against.

In the result the Board is respectfully of the view that the Court of Appeal were wrong to dismiss the appellant's application for the reason that they gave for doing so. Their Lordships will humbly advise Her Majesty that this appeal should be allowed, that leave to appeal out of time should be granted and that the case should be remitted to the Court of Appeal of Hong Kong for further consideration in the light of their Lordships' judgment.