

CACC 231/2021
[2022] HKCA 1470

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

CRIMINAL APPEAL NO 231 OF 2021
(ON APPEAL FROM HCCC NO 197 OF 2020)

BETWEEN

HKSAR

Respondent

and

TUNG PAK FAI

Applicant

Before: Hon M Poon JA in Court

Date of Hearing: 14 September 2022

Date of Judgment: 14 September 2022

Date of Reasons for Judgment: 6 October 2022

REASONS FOR JUDGMENT

Introduction

1. The applicant pleaded guilty to one count of wounding with intent, contrary to s.17(a) of the Offences against the Person Ordinance

(Cap. 212) (Count 2)¹, and a count of wounding, contrary to s.19 of the Offences against the Person Ordinance (Cap. 212) (Count 3) before Toh J (“the Judge”). He was sentenced to 9 years and 27 months respectively, and the sentences were ordered to run concurrently. The applicant’s application for leave to appeal against the sentence in respect of Count 2 was refused and I now state my reasons.

*Summary of Facts*²

2. This was an attack on a politician, PW1, which took place at an election campaign booth on the pavement in a public area at rush hour on 6 November 2019.

3. PW1 was distributing leaflets to passers-by when approached by the applicant. The applicant presented PW1 with a bunch of flowers and told PW1 that he was an avid supporter. He asked to take a photograph with PW1, and on the pretext of getting his camera, he took out a knife from his bag and swiftly stabbed at the chest of PW1 causing him to bleed. PW2, the bodyguard to PW1, tried to subdue the applicant. In the course of doing so, the applicant held on to the knife and caused injuries to PW2 in his chest and the left forearm. All these were recorded on video.

4. The knife used in the stabbing of PW1 was 33-centimetre in length with a 20-centimetre blade. After the applicant was arrested, another 28-centimetre knife with a 15-centimetre blade was found in his shoulder bag.

¹ As an alternative count to attempted murder (Count 1)

² Appeal Bundle, pp.10-15

5. Police investigation revealed that prior to that day, the applicant had gone to the scene on a number of occasions and was captured by CCTV to have lingered in the vicinity of that election booth on 4 and 5 November 2019. On 4 November 2019, the applicant was seen taking photographs of the victim's election campaign activities and had approached the booth with some flowers asking whether PW1 would appear. In the morning of the incident, he went to a flower shop to get the flower about 6 minutes prior to the attack.

The Injuries of PW1 and PW2

6. PW1 had laceration at the lower sternal area, hematoma at the left parasternal region or at the mid sternal body with an oblique wound. There was a contrast pooling in the portovenous phase inside the chest wall hematoma, which was suggestive of active bleeding. Adjacent to the hematoma, there was a mild breakage of anterior bony cortex at the mid-sternal body, which can represent fracture line related to recent injury. His laceration was repaired and he stayed in hospital for two days and was discharged.

7. PW2 sustained a laceration wound over the left subcostal region and a 2-centimetre abrasion wound over his left forearm. His laceration wound was sutured and he was discharged on the same day.

Victim Impact report

8. The clinical psychologist pointed out that the impact of the incident on the victim was, fortuitously, limited due to his psychological resilience. In the month that followed, some fear and worry was suffered

A
B by PW1 which he was eventually able to overcome although he remains
C hyper vigilant and more alert when he was out in public.

D *Mitigation*³

E 9. The applicant, a 31 year-old at the time of his sentence,
F educated up to university level, was of a clear record. He was unemployed
G at the time. He suffered from mood disorder in the past.

H 10. It was submitted on his behalf that given the minor actual
I injury and limited psychological impact on PW1, this case does not warrant
J a starting point at the upper range. Counsel submitted a Reasons for
K Sentence in Court of First Instance: *HKSAR v Liu Guosheng*⁴ (a s.17
L wounding case with political motivation) to the Judge for reference.

M *Reasons for sentence*

N 11. In relation to Count 2, the Judge observed that it was “a
O senseless and most horrific attack on a citizen going about his legitimate
P business on the streets of Hong Kong”.⁵ The following aggravating
Q features were noted by the judge:

- R (1) the applicant acted alone with a lot of premeditation and the
S case took meticulous planning;⁶
T (2) there was no provocation whatsoever from the victim⁷;

U
V

³ Sentencing transcript, Appeal Bundle: p.18C-Q; Mitigation transcript, Appeal Bundle: pp21O-24E

⁴ [2021] HKCFI 2101

⁵ Sentencing transcript, Appeal Bundle p.17T-U

⁶ Sentencing transcript, Appeal Bundle p.19G-K

⁷ Ditto

(3) the applicant brought two knives to the scene with him⁸.

The judge remarked that it was only fortuitous that the injuries were not fatal and the attack left not very much serious psychological impact on the victim.⁹ The Judge was of the view that a major deterrent sentence is called for.¹⁰

12. Bearing in mind the usual range of sentence for this type of offence is between 3 to 12 years' imprisonment, the Judge adopted a starting point of 12 years' imprisonment and afforded a one-fourth discount for his guilty plea entered after the prosecution added the alternative count and sentenced him to 9 years' imprisonment.

13. In relation to Count 3, a starting point of 3 years' imprisonment was adopted, reducing to 27 months' imprisonment after a one-fourth discount for his guilty plea.

14. As both counts arose in one incident, the sentences were ordered to run concurrently. The applicant was sentenced to a total term of 9 years' imprisonment.

Grounds of Appeal and the applicant's submission

15. The sole ground of appeal advanced by Mr David Ma of counsel is that the starting point of 12 years' imprisonment for Count 2 is manifestly excessive.

⁸ Sentencing transcript, Appeal Bundle pp.17B,17L, 19L

⁹ Sentencing transcript, Appeal Bundle p.19R

¹⁰ Sentencing transcript, Appeal Bundle p.17U

16. It is submitted that the gravamen of a wounding with intent charge is the injury to the victim and a sentencing court should give due consideration to the degree of actual injuries and its impact in arriving at an appropriate sentence. The trial judge erred in failing to give sufficient weight on the low degree of injury inflicted and the minimal psychological impact on the victim. It is contended that the judge should not have adopted a starting point at the top end of the usual scale¹¹ as such should be reserved for cases involving really serious injuries and long-term or sustaining impact done to the victim: *The Queen v Nguyen Van Duong*¹² and *HKSAR v Lee Ching-yee*¹³.

Respondent's submissions

17. The respondent opposes the application for leave. It is submitted by the respondent that the gravamen of the offence of wounding with intent lies in the assailant's intention to cause the victim really serious bodily harm. Whether the victim in fact suffered from really serious bodily harm is of secondary significance (at paragraph 8, *HKSAR v Nguyen Van-Phuong*¹⁴; at paragraph 48, *HKSAR v Chan Chun Tat*¹⁵).¹⁶

18. The respondent submits that the Judge had correctly identified the relevant factors as stated in paragraph 49 in *Chan Chun Tat*.¹⁷ It is further submitted that adopting 12 years' imprisonment as the starting point for Count 2 is neither manifestly excessive nor wrong in principle.

¹¹ Applicant's submissions, [14], [21]-[23], [25]

¹² CACC 208/1989

¹³ HCCC 349/2012

¹⁴ CACC 341/2005

¹⁵ [2013] 6 HKC 225

¹⁶ Respondent's submissions, [28]-[33]

¹⁷ Respondent's submissions, [41]

Analysis

19. The offence of Wounding with intent carries with it a maximum term of life imprisonment. The gravamen of the offence has been set out succinctly in the judgment of McWalters J (as McWalters JA then was) in *HKSAR v Chan Chun Tat*:

“46. ...It must be remembered that an intent to inflict this level of harm will have the consequence, should the victim die from the assault, of rendering the assailant liable to conviction for murder. ...the Court of Final Appeal in *Lau Cheong & Anor v HKSAR* [2002] 3 HKC 146, (2000) 5 HKCFAR 415 made the important point that an assailant intending to inflict this level of harm may not be able to control the consequences to the victim. At p 437 C-D it said:

‘A person may not subjectively intend or even foresee that he will cause death. He may desire to limit the consequence of his actions to the infliction of grievous bodily injury. However, as a matter of commonsense it is impossible to predict that the consequences of an intentional infliction of really serious bodily harm will necessarily be successfully limited and will not prove to be life threatening.’

...

48. Thus in determining the gravity of the offence, *the factor of primary importance is the intent of the assailant to cause the victim really serious bodily harm*. Whether that intent was fully realised in the injuries sought to be inflicted has been said to be of ‘secondary significance’. That must be so for, as the Court of Final Appeal pointed out in the *Lau Cheong* case, the consequences to the victim may not be as the assailant intended. Tragically, they may be worse, but *even when they are not or they are not as bad as the assailant hoped to achieve that may not lessen the gravity of the offence*. For the failure of the offender to achieve the level of harm he intended may be due to resistance by the victim, the intervention of others, speedy medical attention or purely unanticipated fortuitous circumstances. That is why, even though the consequences to the victim will always be an important factor, the gravity of the offence lies in the deliberate resort to violence with the intent by the offender to inflict by such violence really serious harm on the victim.”

20. The above passage renders the endeavour of Mr Ma to argue that the actual injuries and impact do not play an insignificant factor no matter how grave the other aggravating factors futile. As the judge pointed out, the fact that the victim of the 2nd count did not sustain more serious injuries was purely fortuitous because the victim dodged, when otherwise could easily had been fatal.¹⁸ Mr Ma, who also represented the applicant in the court below, also conceded that “had it not been the fortunate situation that Mr Ho was able to dodge and respond quickly, much more serious injury could have been inflicted.”¹⁹ The minimal psychological impact to the victim is due to his resilience, optimism and seeing negative events as challenges.²⁰ The intent and determination to do serious injuries to the victim was manifested in his repeated utterance after he was subdued.

21. The relevant factors relevant to sentencing in wounding with intent cases were set out in *HKSAR v Chan Chun Tat* and endorsed in *HKSAR v Jatinder Singh*^{21, 22} These include the extent to which the assault was premeditated, the reasons or motivation underlying the assault upon the victim, the mental or emotional state of the assailant at the time of the assault, whether alcohol or drugs contributed to the actions of the assailant, whether the assault was committed by the assailant alone or as part of a group, the type of weapons employed, and the level of force or aggression and the persistence with which the assault was pressed home, the injuries caused to the victim and the effect of the assault upon the victim and those close to him or her (at paragraph 49, *Chan Chun Tat*).²³ The list is not

¹⁸ Appeal Bundle p.17M-N, p.18 I, p.19Q-R

¹⁹ Appeal Bundle p.23 I-K

²⁰ Appeal Bundle p.18J-M

²¹ [2019] 2 HKLRD 130

²² Sentencing transcript, Appeal Bundle pp.18U-19F, 19M-Q

²³ Respondent’s submissions, [34]-[36]

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

meant to be exhaustive but it purely demonstrates that the culpability of an offender of a wounding with intent charge will relate to the type of harm intended to be inflicted, the means by which that harm was inflicted and the circumstances generally surrounding the assault. Given the many imponderables as to why an assailant failed to achieve the injuries intended by him, the actual injuries caused is only one of the myriad of factors to be taken into account. The gravamen of the offence is in the intent to inflict really serious injuries, which is the same intent as that required for murder. The lack of serious injuries does not necessarily reduce the gravity of the offence or offset the other aggravating factors.

22. In the present case the judge rightly identified the following aggravating factors:

- (i) That it was not a spur of the moment attack but longstanding intention to harm PW1;
- (ii) There was careful planning prior to the actual attack with premeditation and a deliberate distraction of PW1 from vigilance;
- (iii) the stabbing aimed at PW1's chest and could cause fatal repercussions and consequence;
- (iv) apart from the knife used in the stabbing the applicant carried with him another knife;
- (v) there was a high level of persistence when the applicant was subdued, he held on to the knife and injured PW2.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

23. It is incorrect to say that the upper range of the usual sentence only reserved for cases involving very serious injuries and long-term or sustaining impact done to the victim:

“44. ...This court has said on innumerable occasions that the sentences for this offence are very much case and fact specific and hence the wide range of 3-12 years for the usual type of wounding with intent. Of course there will always be cases which, for one reason or another, require a starting point beyond this range. Likewise, although cases attracting a starting point towards the top of this range will often be cases involving severe injuries and/or severe residual disabilities it cannot be said that only cases with these features are appropriate candidates for such a high starting point.”²⁴

24. Cases of extreme magnitude can warrant a starting point well above that of the upper range of the 3-12 years range: *HKSAR v Yip Kim Wah and Anor*²⁵.

25. Every case has to be directed on its own fact and the practice of comparing other cases are of little assistance for the purpose of sentencing. The two sentencing cases submitted by the applicant are on completely different factual matrix: the attack in *Lee Ching-yee* took place in domestic context and lacks a longstanding intention to harm. In *Liu Guosheng*, a Court of First Instance Reasons for sentence, the degree of premeditation is much lower as the assailant did not carry out any recce before the attack.²⁶

26. The appeal against sentence is not reasonably arguable and I refused to grant leave.

²⁴ paragraph 44, *Chan Chun Tat*

²⁵ CACC 307/2015

²⁶ Respondent’s submissions, [37]-[40]

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

27. The applicant is reminded of his right to renew his application for leave to the Court of Appeal may attract a consequence of a direction for loss of time spent in custody pending his appeal, should the Court come to the view that there is no justification for the renewal of his application.

(Maggie Poon)
Justice of Appeal

Ms Crystal Chan, SPP(Ag.) of the Department of Justice, for the respondent

Mr David Ma, instructed by Ho Tse Wai & Partners, for the applicant