HONG KONG / JUDGMENT

HKSAR v. ALEXANDRE CERVEIRA

COURT
Court of First Instance

DECIDED
18 July 2012

CASE / FILE NUMBER
HCMA165/2012

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bjbj HCMA 165/2012 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 165 OF 2012 (ON APPEAL FROM ESV NO. 23 OF 2011)

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BETWEEN HKSAR Respondent and ALEXANDRE CERVEIRA Appellant

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Before : Hon Saw J in Court Date of Hearing : 27 April 2012 Date of Judgment :18 July 2012

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JUDGMENT

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Background

AUTONUMOUT On 31 January 2012 the appellant was convicted after trial of an offence of driving in excess of the speed limit contrary to section 41(1)(a) of the Road Traffic Ordinance Cap 374. He was fined $700 and was ordered to pay the prosecution s costs of the proceedings which were to be taxed in the absence of agreement. AUTONUMOUT The appellant appealed the conviction and the costs order. AUTONUMOUT In the lower court and in his appeal the appellant represented himself. AUTONUMOUT On 27 April 2012 the matter was listed before me. At the conclusion of the appeal and having discussed the matter with the appellant and counsel for respondent I further adjourned the hearing to a date to be fixed. I made an order that the transcript of any enquiry made by the magistrate as to the appellant s ability to comply with the order for costs be prepared and supplied to the parties and that the parties be at liberty to make further submissions upon receipt of that transcript. I indicated that in the event that there were no further submissions within 14 days of the delivery of that transcript I would proceed to judgment. AUTONUMOUT The relevant transcript was prepared and forwarded to the parties on 16 May 2012. There being no further submissions this is my judgment. Conviction AUTONUMOUT The

charge arose out of the appellants driving his motor vehicle on 16 February 2011 on the Island Eastern Corridor. It was the prosecution s case that he was detected to be driving at a speed of 83kph - a speed in excess of the speed limit of 70kph. There was no issue in the trial that the appellant was the driver of his motor vehicle that day. It was the prosecution s case that the speed at which he was driving had been recorded by police officers operating a speed detection instrument called MultaRadar. The only issue in the trial was the accuracy of the MultaRadar reading on that day. AUTONUMOUT The matter first came before the lower court on 15 June 2011. The appellant then indicated his intention to challenge the accuracy of the MultaRadar. The matter was adjourned for hearing to the 1 August 2011 but did not proceed on that date. The hearing commenced on 28 December 2011 and was conducted over several days. It finally concluded on 10 February 2012. AUTONUMOUT Prior to the commencement of the trial there was extensive correspondence between the appellant and the police wherein the appellant made a number of requests that he be provided with technical information in relation to the operation of the MultaRadar. Some of that correspondence from the appellant was acrimonious. AUTONUMOUT In addition to being provided with technical information the appellant was permitted to inspect the site of the operation of the MultaRadar at its location on the Island Eastern Corridor. Eventually the matter proceeded to trial. AUTONUMOUT The prosecution called six witnesses including experts who gave evidence as to the reliability operation and accuracy of the MultaRadar. The magistrate found a case to answer. The appellant did not give evidence or call any witness. AUTONUMOUT The magistrate was satisfied that the prosecution case was proved. He gave detailed reasons for that finding. The appeal AUTONUMOUT The appellant s grounds of appeal can be summarized as follows. Ground 1 AUTONUMOUT He asserted that he was denied the opportunity of obtaining evidence to challenge the accuracy of the MultaRadar system because he was not given access to the site before there had been routine maintenance which had cleared grass, debris overgrown branches and the like. This he said violated his basic rights and should have caused the magistrate to dismiss the charge. AUTONUMOUT This was an issue before the magistrate. Having heard the evidence of the expert witnesses called in the prosecution case and cross examined by the appellant, the magistrate rejected the appellant s contention. He said this: The totality of the testimonies by PW1, PW4 and PW5 rendered the Appellant's allegation of blockage of the system a non-issue :

(i) There was no evidence of any tree branches which blocked the radar housing unit, which was only half the height of the orange camera pole. (ii) The electromagnetic wave generated by the radar could penetrate the tree leaves or branches. (iii) The wave was not generated by the camera unit. The camera only received instruction from the controller in appropriate cases and then took photographs. (iv) Should there be any tree branches or leaves which obstructed the camera lens at about 12:46 pm on 16 February 2011, it would only affect the quality of the photographs taken by the camera (e.g. the tree branch would have been captured in the photographs). The radar would not have been affected,

(v) Similarly, any existence of tree branches or leaves blocking the flash box, the only consequence would be that the quality of the photographs would be affected. (vi) Having examined the violating photographs in question (Exhibit P8), there was no evidence to indicate that there was any obstruction of the system (e.g. camera unit) by tree branches or leave. AUTONUMOUT I am also satisfied that the appellant s assertion is without foundation. The matters he now raise were addressed by the magistrate. There can be no valid criticisms of those findings. There is no merit in this complaint. Ground 2 AUTONUMOUT In this ground, the appellant complained of delays in the production to him of documents he had requested from the police, he said: I believe it constituted a violation of my rights and a cause of unnecessary distress and anxiety on the defendant. AUTONUMOUT Standing alone this is not a ground of appeal. Nevertheless, there is no merit in this complaint. The magistrate was satisfied that the allegations made by the appellant in the course of the trial of non-disclosure and deliberate delay in the provision of material were unfounded. Ground 3 AUTONUMOUT Finally the appellant complained that the denial of his request to conduct a separate additional visit to the site of the MultaRadar rendered inadmissible the evidence of one of the prosecutions witnesses. AUTONUMOUT The magistrate dealt with this at paragraph 14-16 of his reasons for verdict he said this:

14. Regarding the Appellant's request for a 2nd site visit, police had referred the matter to the Department of Justice (DOJ) for legal advice. Whilst awaiting the DOJ's instruction, in light of the Appellant's allegations of decaying condition of the MultaRadar system at the Island Eastern Corridor (Eastbound) near Hong Kong Museum of Coastal Defence ("the system"), PW6 visited the site with PW5 and PW4 on 19 September 2011. This inspection aimed at ensuring that the system was suitable to continue to detect speed violation.

15. After the above inspection, police received DOJ's advice of 26 September 2011. Police were instructed to accede to Appellant's request. Since the system was a highly sensitive equipment, the Appellant was required to be accompanied by an qualified expert for inspection of the system.

16. Appellant was so informed. He however failed to provide details of such an expert. AUTONUMOUT There was no merit in this ground of appeal.

Conclusion

AUTONUMOUT It suffices for me to say that nothing in the reasons for verdict or the appellant s grounds of appeal and submissions before me caused me to doubt the magistrate s conclusion. The appeal against conviction is therefore dismissed. The Costs Order AUTONUMOUT The reason I called for the preparation of the transcript of that part of the proceeding which concerned the order for the payment by the appellant of the Respondent s costs requires explanation. The relevant provision which empowers a magistrate to make an order for costs is contained in the Costs in Criminal Cases Ordinance s.11, Cap 492. The provision provide:

(1) Where-

(a) a defendant is convicted by a magistrate or a magistrate makes an order on complaint in respect of a defendant under the Magistrates Ordinance (Cap 227); or

(b) a magistrate, under section 104 of that Ordinance, on the application of the defendant reviews and subsequently confirms his decision to convict a defendant or to make an order on complaint in respect of a defendant, the magistrate may order that costs be awarded to the prosecutor.

(2) An order for costs under subsection (1) shall not exceed $30,000, unless-

(a) the defendant and the prosecutor have agreed upon the terms of any order to be made by the magistrate for costs exceeding that sum; or

(b) the magistrate, in the absence of any such agreement, orders that those costs be taxed. AUTONUMOUT The magistrate chose not to fix the amount of the costs order, he could have up to the sum of $30,000. Instead he made the order he did. Discussion AUTONUMOUT During the course of the prosecution s submission on its application that the appellant pay the prosecutions cost of the trial, it was indicated to the magistrate that taxed costs would be in excess of $284,000. To be fair to the prosecutor he did not seek an order for taxed costs. He said this: Sir I m not asking for a court order for the defendant to pay at the costs of the prosecution, that would be unrealistic. I m simply respectfully asking your worship to consider awarding costs to the prosecution. The amount would be entirely in your hands Sir. AUTONUMOUT The magistrate did not adopt that suggestion. The magistrate concluded that the appellant had conducted his case frivolously and irresponsibly and therefore made the order he did. I was advised in the course of the appeal that an order for taxed costs would in all probability exceed the original estimate of $284,000. AUTONUMOUT This matter can be disposed of succinctly CHAN CJHC (as he then was) in HKSAR v Chan Kwok-wah [1995-2000] HKCLRT 203, 208 with reference to the making of an order that an accused pay the costs of the prosecution said this: The magistrate also has to consider the defendant s financial condition before deciding to order the defendant to pay costs of the prosecution. AUTONUMOUT Having examined the transcript of the proceeding it is clear in the instant case that the magistrate made no enquiry of the appellant s ability to comply with an order for taxed costs in the amounts estimated. The magistrate when imposing the fine of $700 said: COURT: What is your monthly income? DEFENDANT: Two salaries: 13,000; and another one 6,500, I believe. COURT: Do you have any financial difficulties and financial burden? DEFENDANT: No. COURT: Do you have any special illness or any member of your family has any special illness? DEFENDANT: My daughter has asthma, I believe that's all. COURT: Any other hardship? DEFENDANT: Not that I am aware of. COURT: I order a fine of $700. When will you pay the fine? DEFENDANT: (No audible answer) COURT: When will you pay the fine? DEFENDANT: I can pay today. COURT: By half-past-four today. Remember to pay the fine by half-past-four today, otherwise we will call you back. AUTONUMOUT That is the extent of his investigation into the appellant s means. AUTONUMOUT For this reason alone the order for costs must be set aside in its present form. AUTONUMOUT When making the order for costs the magistrate said this:

4. The Reasons for the Costs Order are as following :-

1. As Her Ladyship Deputy High Court Judge Madam Carlye Chu (as she then was) states in HKSAR v. Chan Hoi Ying, HCMA 912/1999 :- It must be stressed that litigants in person are not entitled to unlimited use of the limited resources of judicial as well as prosecution time and resources. Where they have conducted their case frivolously and irresponsibly, they are not to be exempted from a costs order simply because they are acting in person and do not have the benefit of legal advice.

2. On the plea day of 15th June, 2012, Appellant submitted to the Court that he was going to challenge the accuracy of the radar system. The Appellant didn't testify or call any expert witness to challenge either PW4 or PW5 or the accuracy or reliability of the radar system.

3. The Appellant had requested numerous documents from the Prosecution but has only made a short reference to PW5 s report. The Appellant only mentioned the name of a few of the documents and did not refer to any part of them for cross-examination.

4. One of the main allegations of the Defence was the trees and branches which might have affected the functioning of the radar system. PW5 s second report had clearly ruled out such possibility. And this report has been severed to the Appellant well before 3rd October, 2012. During trial, the Appellant didn t testify or call any expert witness to challenge this part of the Prosecution evidence in order to attack PW5 s evidence or the accuracy or reliability of the radar system.

5. The Appellant had put no defence evidence before the Court. Despite submitting to the Court that he was going to challenge the accuracy of the radar system and the Prosecution, because of this, had prepared a huge volume of extra documents, including PW4 and PW5 s reports. The Appellant didn t make use of most of them as stated above. AUTONUMOUT Based on this he determined that the appellant s conduct of his defence was frivolous and irresponsible. With respect of the magistrate I do not consider his behaviour to be frivolous or irresponsible. He was entitled to challenge the accuracy of the MultaRadar. It may be that because of this the proceedings were prolonged. It could well be said that his defence was with the benefit of hindsight doomed to fail. Nevertheless he should not be punished for this. He was in effect exercising his rigid to put the prosecution to strict proof of its case. AUTONUMOUT Nevertheless an order for costs was appropriate. I have considered the appellant s means and ability to pay and in all of the circumstances I fix the order for costs at $10,000. AUTONUMOUT The appeal is allowed to that extent. (Darryl Saw) Judge of the Court of First Instance, High Court Ms Rosa Lo, Public Prosecutor of the Department of Justice, for the Respondent The Appellant appeared in person PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V h]Rq hmq# gd0w {t{tp gd\A gd{T hhxo hhxo hXiA hX'Z hX'Z hhxo hXiA hhxo hhxo h_u< hhxo hXiA hXiA h_u< h_u< h:sp hgJe h:sp gd3h gd3h gd3h gd3h hW[a hW[a h:sp h:sp gdbY gd&{ h " hgJe gd7Sf gdcZ gdbY gdbY h7Sf h7Sf h7Sf h7Sf hK|0 hgJe hgJe hK|0 hK|0 &`#$ gd7F gdR<) ohaZ h " &`#$

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