

HONG KONG / JUDGMENT

HKSAR v. ANDREW HUANG HSU

COURT

Court of First Instance

DECIDED

11 September 2007

CASE / FILE NUMBER

HCMA1153/2006

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bjbj HCMA1153/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.1153 OF 2006 (ON APPEAL FROM ESCC 3090 OF 2006)

BETWEEN HKSAR Respondent and ANDREW HUANG HSU Appellant

Before : Hon Nguyen J in Court Date of Hearing : 11 September 2007 Date of Judgment : 11 September 2007

J U D G M E N T

AUTONUMOUT The appellant was convicted by Mr William Lam sitting in the Eastern Magistrates Court on 1 December 2006 of the offence of theft which alleged that inside the Louis Vuitton shop in Central he had stolen two shirts costing a total of \$8,300. He was remanded in custody for a background report. On 14 December 2006 he was sentenced to nine weeks imprisonment. He now appeals against both conviction and sentence. AUTONUMOUT Cheng Huan, SC appearing with Mr Bernard Chow for the appellant has today advanced five grounds of appeal against conviction. AUTONUMOUT The 1st ground is that the magistrate erred in law in convicting the appellant when earlier on, on 27 November 2006 he had stated that he could not be certain about the appellant's mens rea. Ground 1 can be conveniently taken with Ground 5 which states that there were a number of aspects of the trial which demonstrated that it was unfair and/or that justice was not seen to have been done to the appellant. Six matters are stated which, it is contended, support their proposition, including the appellant having been remanded in custody for two weeks on 27 November 2006 for a psychiatric report. Two days later that order was revoked and the appellant was granted bail pending verdict. On 1 December 2006 when a verdict was returned, the magistrate said that he had no doubt about the mens rea of the appellant

despite there being no new evidence to support such a finding. It is also contended that the evidence of the defence psychologist, Dr Chan, should not have been rejected without cogent reasons being given. AUTONUMOUT What happened was that after the evidence was concluded on 27 November 2006 the magistrate said this Chan, the psychologist, did not say why the defendant fitted into the McNaughten rules as we know them, due to what medications, because [Dr Chan] did not know how much, if any, medicines the defendant had taken the day before. In the circumstances, therefor, I am not in a position yet to say although the defendant had committed the act complained of, I cannot be certain at this stage whether to convict him or not, or acquit him on the grounds of insanity. The appellant was then remanded for 14 days for a psychiatric report to be obtained. AUTONUMOUT That order was, as I mentioned earlier, revoked two days later on 29 November 2006 when Mr Cheng appeared to ask the magistrate for a review of that order. Mr Cheng's main contention in respect of these grounds is that when that order for a psychiatric report was revoked on 29 November 2006 until the day of verdict on 1 December 2006, there was no new evidence placed before the magistrate which could have enabled the magistrate to have found on 1 December 2006 that he had no doubt whatsoever that the appellant had the necessary mens rea in that he found that the appellant had the dishonest intention to permanently deprive the owner of the two shirts. AUTONUMOUT Miss Chan, for the respondent, replies that the magistrate was troubled on 27 November 2006 with the question of insanity of the appellant but she submits that that concern was removed on 29 November 2006 when Mr Cheng appeared to ask for a review of the order. She relies on what Mr Cheng said to the magistrate on 29 November 2006. One of the things he said was this I don't think in the defence it was suggested he was insane, but he was momentary did not have the mental capacity or he was momentary mentally incapacitated. And also he said that [the appellant] never pleaded insanity. Mr Cheng, to be fair, did say to the magistrate that if there was no sufficient evidence of mens rea the appellant must be acquitted. AUTONUMOUT Miss Chan contends that in view of what Mr Cheng said to the magistrate, that removed the question of possible insanity and therefore the magistrate was in a position to consider the evidence and to arrive at the verdict which he did on 1 December 2006. AUTONUMOUT In his oral reasons for the verdict, it is right to point out that he never mentioned insanity again but he did specifically mention mens rea and found that the appellant had the dishonest intention to permanently deprive the owner of the two shirts. AUTONUMOUT When Mr Cheng mitigated on behalf of the appellant, he said to the magistrate that he thought the magistrate had had some doubts about the mens rea of the appellant, and the magistrate said For the court record, I did not have any doubt. The magistrate reiterated that on the question of mens rea as he had indicated in court he had never had any doubt. AUTONUMOUT In my view, the magistrate was entitled to make the findings of fact that he did on the question of mens rea and he was not in any way bound by what he said on 27 November 2006 when he sought a psychiatric report. These two grounds therefore must fail. AUTONUMOUT The other three grounds relied upon by Mr Cheng, Grounds 2, 3 and 4, concern the alleged non-disclosure to the defence that PW2, the security officer, had a criminal conviction for robbery. These grounds I can dispose of very quickly because it now transpires that in fact counsel for the defence was told orally by the prosecutor that PW2 had a conviction for assault with intent to rob, and this was put to the witness by the prosecutor. The answer by the witness was, in reply to the question if he had a

conviction for robbery, , he did not have such a conviction. AUTONUMOUT The magistrate was aware of this conviction because he was referred to it by defence counsel in his final address. In any case, my view is that the defence was informed of this conviction and secondly, the evidence of PW2 was not of such moment that it could have affected his credibility to the extent that it could have influenced the magistrate's findings of fact. His evidence in so far as it was challenged was only in relation to the chain of evidence of the two shirts which the magistrate correctly, in my view, held was not a material consideration. AUTONUMOUT The appeal against conviction is therefore dismissed. AUTONUMOUT In relation to the appeal against sentence, Mr Cheng quite properly relies on the Court of Appeal case of Secretary for Justice v. Tse Sheung Kai & Others [2001] 3 HKLRD 487 where on an application for a review of a sentence by a magistrate of a defendant convicted of shoplifting theft, the Court of Appeal said this at page Theft by shoplifting is an offence which will generally call for a sentence which has regard to the circumstances of the offence and of the offender. Usually, no doubt, a first offender will receive a financial penalty although, where organised and professional shoplifting is concerned, a custodial sentence might well be appropriate. In relation to deterrence, Stuart Moore CJHC (as he then was) said on the same page The deterrence we have in mind is not merely in regard to the offender in question but to others who may be inclined to steal in the same way. AUTONUMOUT This case was not mentioned by the magistrate in his Reasons for Sentence. On the other hand, the magistrate mentioned three magistrates appeals where judgments were given in the year 2001 but all before the date of the Court of Appeal judgment in Tse Sheung Kai. AUTONUMOUT The appellant in this case had a clear record, he was not acting as a member of a syndicate and there were no statistics provided to the magistrate which showed that this offence was or was not prevalent in Central or in that particular shop, Louis Vuitton. In addition, the appellant already served a total of six days in custody : two days when the magistrate remanded him in custody to obtain a psychiatric report which order was revoked two days later) and four days on 1 December 2006 after he was found guilty by the magistrate and was remanded 14 days in custody for background report. On 5 December 2006 the appellant was granted bail by the High Court pending appeal. In my view, the sentence of nine weeks imprisonment on the appellant is manifestly excessive, and in the circumstances the appeal against sentence is allowed. In lieu of the sentence passed by the magistrate, I impose upon the appellant a monetary penalty of a fine of \$10,000. AUTONUMOUT The appeal against conviction is dismissed and the conviction against sentence is allowed to the extent that the term of imprisonment is quashed and is substituted by a fine of \$10,000, which by consent is to be taken out of the bail money. (Peter Nguyen) Judge of the Court of First Instance High Court Miss Agnes Chan, Ag SADPP of Department of Justice, for HKSAR Mr Cheng Huan, SC leading Mr Bernard Chow, instructed by Messrs Henry H.C. Wong & Co., for the Appellant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V t"("# t"(&`#\$ "@AB & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 30 October 2026 · Esheria