

HONG KONG / JUDGMENT

HKSAR v. CARMEN C. RIVERA

COURT

Court of First Instance

DECIDED

18 September 2007

CASE / FILE NUMBER

HCMA1226/2006

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bjbj% HCMA1226/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.1226 OF 2006 (ON APPEAL FROM ESCC 4157 OF 2006)

BETWEEN HKSAR Respondent and CARMEN C. RIVERA Appellant

Before : Hon Nguyen J in Court Date of Hearing : 18 September 2007 Date of Judgment : 18 September 2007

JUDGMENT

AUTONUMOUT The appellant was convicted of one count of theft by Mr Winston Leung sitting at Eastern Magistrates Court on 21 November 2006. The particulars of the charge are that on 31 May 2006 the appellant stole a plastic bag containing a Hong Kong ID card, a mobile phone, a waist bag, a T-Shirt, an umbrella and cash \$2,700, the property of another person. AUTONUMOUT The prosecution s case, in a nutshell, was that at about 4 a.m. on the day in question, the owner of the property, Nora, who was a Filipino maid, was walking along Stubbs Road together with a friend and she, Nora, was pushing a trolley which had on it newspapers and a plastic shopping bag containing her belongings. They had walked from the Adventist Hospital and when they got to the bus stop near Tung Shan Terrace, Nora noticed that the plastic bag containing her personal belongings was no longer on the trolley. Unbeknown to Nora, the appellant and another Filipino maid, Merly, were also walking down Stubbs Road to Wanchai. They left Victoria Heights, walked past Evergreen Villa and came to a place near the Adventist Hospital. At this point Merly discovered Nora s plastic bag on the road. AUTONUMOUT According to the magistrate s Statement of Findings, Merly then picked up the bag and having checked the identity card in it, found that it belonged to Nora. She gave the plastic bag to the appellant to return to Nora, but the

appellant hid it in her own bag hanging on her shoulder. They continued their journey and met Nora and the other person at the bus stop. AUTONUMOUT Nora felt panic at the bus stop and was frenetic in looking for her lost plastic bag. According to Nora, the appellant and Merly should have known what she was doing but they remained silent. Merly testified that the appellant told her not to say anything to Nora about the plastic bag and she remained silent at the bus stop in order not to upset or cause embarrassment to the appellant. AUTONUMOUT It was apparently about two months later that Merly, for the first time, disclosed to her sister what had happened to Nora's plastic bag. Nora then made another report to the police and the appellant was arrested on 9 September 2006. In the interview that the appellant gave to the police under caution, the appellant said that her day off was on Friday and that she never went out on the day in question. That was all the evidence that was adduced against the appellant. AUTONUMOUT The appellant did not give evidence nor call any evidence. The only witness who gave any evidence incriminating the appellant was PW2, Merly. The credibility of Merly as an honest and reliable witness was therefore of the utmost importance. AUTONUMOUT The magistrate, having heard all the evidence, reserved judgment for six days, and on the day of the verdict gave detailed reasons for his verdict which for all intent and purpose are more or less in the same terms as the Statement of Findings. AUTONUMOUT Two criticisms have been made of the Statement of Findings by Mr Choy appearing for the appellant. In dealing with the defence case as it was put by the solicitor representing the appellant at the trial, the magistrate said this ... Mr Morley also put the defence case on the following two bases: first, Merly framed up the defendant out of grudge; and secondly, it was Merly who stole Nora's plastic bag and its contents. ... let me deal with the second basis immediately. ... since defendant is pleading alibi, ... and elects not to give evidence herself or by witness, I find no justification for this basis. Mr Choy complains that this was a misunderstanding of the evidence by the magistrate. AUTONUMOUT The defence at the trial was never one of alibi. Alibi was only mentioned by the appellant in her caution statement. At the trial, it was never denied on her behalf that she was present with Merly when the two of them met up with Nora and her friend. The appellant's caution statement was put in by the prosecution merely to show her reaction when first confronted by the police and possibly for use in cross examination. AUTONUMOUT The second complaint by Mr Choy of the Statement of Findings is that when dealing with Merly's evidence, the magistrate pointed out three discrepancies between her evidence in court and her statement to the police. The second discrepancy was that she had said in her statement that she saw a woman drop something on the floor whereas in court she said that she did not see that and she only saw the bag on the road. The magistrate said that this mistake was corrected immediately in the same statement. In fact, it was not and it was only in her second statement to the police that she corrected it. The second statement was made some three months after the first. AUTONUMOUT In reviewing the evidence adduced before the magistrate, I am conscious of the fact that the magistrate had heard the two witnesses and observed the demeanour when they gave evidence. The magistrate found Nora and Merly to be honest witnesses. AUTONUMOUT The defence that was run on behalf of the appellant was that in fact Merly had framed up the appellant and that it was Merly who had stolen Nora's bag. The magistrate rejected this claim of a frame up and this was what he said As I pointed out earlier, Merly's version of the events is too sophisticated for a frame up. There was

two parts of it, which must dovetail with each other. First, Nora walking in front must lose her plastic bag containing her personal belongings. Secondly, D with Merly, walking behind, picked up and kept the bag. Then there was a meeting at bus stop down the road. The fact that Nora lost her property is beyond doubt and this could only be a chance event. It would be sophisticated to base a frame up on a chance event and the frame up would become even more sophisticated when it was sought to connect an absent victim to it. I reject the claim of a frame AUTONUMOUT In assessing the evidence adduced before the magistrate, I take into account the decision of the Court of Final Appeal in Chou Shih Bin [2005] 1 HKLRD

838. Bokhary PJ, delivering the judgment, said this on page An appeal under s.113 of the Magistrates Ordinance is by way of rehearing on the evidence before the trial court supplemented by such further evidence as the intermediate appellate court may admit under its statutory power to do so. He continued as follows Where the facts are concerned, the appellate tribunal will recognise that it does not enjoy the advantage of having received the evidence at first hand which the magistrate enjoyed. Even so, it will not fail to quash a conviction that it considers unsafe. Bokhary PJ continued to say that the appellate judge in that case ... was entitled, indeed bound, to come to his own conclusion about the appellant's knowledge of the existence of the gun ... AUTONUMOUT There are a few matters about Merly's evidence which trouble me. As I pointed out to Mr Leung appearing for the respondent, I find it bizarre that a person intending to steal another's property would not try and bring into the theft the person who witnesses the theft. AUTONUMOUT According to Merly, the appellant hid Nora's bag and told Merly not to mention that to anyone. What guarantee did the appellant have that Merly would not disclose the theft to another person? One would have thought that if she was minded to steal the contents of the bag, she would bring Merly into the theft so as to ensure complete silence. I also find it bizarre that at the bus stop Merly, not being a party to the theft, remained absolutely silent and did not tell Nora what had happened because, as she put it, she did not want to upset nor cause embarrassment to the appellant. AUTONUMOUT But that is not the end of the problems for the prosecution. As I pointed out earlier on, in her caution statement to the police, Merly said she saw a woman drop something on the floor, that is corrected in the second statement when she said she only saw a bag on the road. But during the second statement, there was a Tagalog interpreter. In both statements she said that after she picked up Nora's bag she handed it over to the appellant. This was in stark contradiction to her evidence in court when she said that after she opened the bag and saw the identity card of Nora inside it, the appellant immediately got the handbag from her. To my mind this was a matter of the utmost importance. Unfortunately this contradiction was not drawn to the attention of the magistrate and hence the magistrate did not refer to it in his Statement of Findings. AUTONUMOUT In neither statement did Merly mention the meeting which occurred a short time later between the appellant and herself and Nora and Nora's friend. Not only that but in her first statement Merly initially said that she told the appellant to return the bag to Nora but the appellant said no and kept the bag. Then we separated and I saw the defendant return to her home. That last sentence was deleted and in its place was the following

sentence And she said You don t tell anybody. Then I saw the defendant take Nora s bag and returned to her home. That, again, is quite different from her evidence in court that there was the subsequent meeting between herself and the appellant and Nora and Nora s friend. AUTONUMOUT Another matter in Merly s evidence was that Nora had given evidence that the cash, \$2,700, was placed in the wallet next to her identity card. In her evidence in court, Merly never mentioned seeing any cash in the wallet. She said that when she opened the bag she only saw the identity card of Nora inside. It is true that Nora did make a report to the police on the same day reporting the loss of all the matters mentioned, but whether there was a meeting that day at the bus stop near Tung Shan Terrace involving these four persons, to my mind, has a lot of doubts surrounding it in view of the matters that I have mentioned. AUTONUMOUT The appellant had a clear record. She did not give evidence at the trial which she was entitled to do, but there was produced as an exhibit at the trial a glowing report on her by her present employer who wrote that the appellant had worked for her for 21 years and is now in her 8th contract. The employer is obviously an affluent person occupying two flats in Victoria Heights in Stubbs Road. The employer and her husband often travel out of Hong Kong. She has never had any problems with anything going missing from her flats. According to her the appellant has ailing parents and a cancer-suffering brother in the Philippines, her husband does not work because of heart problems. The appellant remits \$2,000 per month to her parents and \$850 per month to her brother. AUTONUMOUT The magistrate did consider that report by the employer and did consider the fact that the appellant has a clear criminal record. He very properly treated the appellant as a person with low propensity to commit crimes. AUTONUMOUT The upshot of everything is I am most uncomfortable with this conviction. There is a lurking doubt in my mind about the safety of this conviction, so the appeal against conviction is allowed. The conviction is quashed and the fine of \$3,000 and the compensation order of \$4,000 to the owner is set aside. These sums, if they have been paid, are to be refunded to the appellant. (Peter Nguyen) Judge of the Court of First Instance, High Court Mr David Leung, SGC of the Department of Justice, for HKSAR Mr Edwin Choy, instructed by Messrs Haldanes assigned by DLA, for the Appellant (re. appeal again 1udk 1udk O P Q R S T U V &`#\$ eH[: eH[: & 6" English.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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