

HONG KONG / JUDGMENT

HKSAR v. CAUILAN, ELENA B

COURT

Court of First Instance

DECIDED

26 October 2007

CASE / FILE NUMBER

HCMA309/2007

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bjbj HCMA309/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 309 OF 2007 (ON APPEAL FROM ESCC 5506 OF 2006)

BETWEEN HKSAR Respondent and CAUILAN, ELENA B Appellant

Before: Deputy High Court Judge Line in Court Date of Hearing: 26 October 2007 Date of Judgment: 26 October 2007

J U D G M E N T

1. This is an appeal against conviction for theft. It was a shoplifting case. A maid, shopping on behalf of her employer, failed to pay for a packet of steak which was in her trolley, amongst a number of other items which she did purchase from the supermarket at the time. She went through the checkout; she did not pay for the steak. The issue in the case was whether the failure to pay for the steak was due to carelessness or whether it was deliberate. The case took a day and a half in the Magistrates Court.
2. It was common ground that in the trolley, there were a number of items which had not come from the supermarket and that the steak was put into the outer part of the trolley. There was never an allegation against the lady that she was seen to do anything that could be described as being deliberately furtive. I should add here that there was an application to stay these proceedings permanently on the basis that some CCTV tape had been destroyed. In the circumstances, it was a complete red herring. It could never have made the case so exceptional there could not have been a fair trial and it could not have helped the magistrate in any significant way as to whether the lady was being careless or dishonest.

3. At the police station, the denials of the appellant were recorded in writing by a police officer with the use of interpreters. There was some issue as to the translation and, in effect, the defence below were claiming that the denials were in rather better form or were stronger than was actually recorded. In fact, the denials are perfectly good, straight-forward and strong ones as they are recorded.
4. For some reason, the appellant's solicitor below asked the magistrate to exclude that record of interview and he acceded to it yet the appellant comes here today complaining of that. I will have some more to say in a moment about how the appellant presented this case but what has occurred in the course of it is that, unopposed by the respondents, I have now received the record of interview in evidence.
5. There is one simple issue - carelessness or dishonesty. Miss Ho, on behalf of the Respondent, says the lady could not have been careless because the steak was the last thing that she had picked up. She should have noticed that the change did not fit the purchase of the steak and that when she had left the checkout and gone to a separate part of the supermarket with its own separate checkout - the bakery - there, when she loaded the bread and all the other items in the trolley into some Ikea bags she should have noticed the steak and remembered that she had not paid for it.
6. It seems to me that it is not uncommon for people to forget things in a context like this, especially where the matters are not of any great immediate importance, and no one is surprised to hear of people who, for instance, forget their change when they tender it at a supermarket till and the like. It is that degree of careless that the respondents have to rule out by the evidence and, on the evidence before me, they have not done that. It may be the lady was dishonest but the facts do not demonstrate that to me for sure.
7. Accordingly, I am going to allow the appeal and quash the conviction. But I want to say something about the way the appeal was presented. The court papers reveal claims that the magistrate who tried the case either did not know or was incapable of applying the burden and standard of proof. It contained invitations for me to retry the issue about permanent stay and the lack of the CCTV tape. There was a closely typewritten skeleton argument from the appellant running to nine pages; there was a statement of findings from the magistrate that ran to 12 pages; there was a 15-page skeleton argument from the respondent which came bundled with copies of 15 authorities. A complaint was made that the magistrate did not admit into evidence the record of interview when the defending solicitor below actually asked that it be excluded; and there were many criticisms of the magistrate's reasoning and claims that he misunderstood basic matters of law and adopted a non judicial approach when he said things below like, "This should be a simple shop-theft case. How you can turn it to a state trial is beyond my comprehension."

8. The irony of the situation is that the misunderstanding of basic matters that has occurred here has been on behalf of the appellant's lawyers. They have come here, despite there being settled authority about the matter, to argue the case on the basis of error by the magistrate, not in coming to the findings of the basic facts of what had happened because, in fact, there was never any real dispute about that, but as to his reasoning as to why he thought the lady could not have been careless and must have been dishonest.
9. Counsel for the appellant stood in front of me within the last year and had the case of Chou Shih Bin Court of Final Appeal No. 11 of 2004 pointed out to him. That says, in terms that are completely clear, at paragraph 19 of the judgment that the nature of these proceedings is a rehearing. So instead of coming here with a very simple point - in effect, "Sorry, we shouldn't have got the record of interview excluded. Can we put that back in and will you please just apply the burden and standard of proof to some very basic simple facts" - which is what the appeal should have been about and how it should have been presented, it has been brought here on the basis of error by the magistrate in his reasoning.
10. I do not know how many times one has to say it, but all I can say to the appellant's counsel if he comes here and does it again, he will meet with the same uncomfortable reaction he has met this time but with perhaps some more sanction to it. And when it comes to sanction in this case, I am going to, of course, deal with the question of costs and I am going to turn to that now. (Discussion re costs)
11. There has been a discussion about the costs of the matter. There is no application for the costs in the court below. That was the sensible concession that was rightly made. As regards the costs of this appeal, I am told that the solicitors are doing it on a complimentary basis and the only costs involved on the appellant's part, funded by her generous employers, are counsel's fees. It was counsel who settled the perfected grounds of appeal and it was counsel who drafted the skeleton argument, and it was the same counsel to whom I have, on previous occasions, pointed out the case of Chou Shih Bin. In those circumstances, where fees and the costs have been run up in misunderstanding the nature of these proceedings and prosecuting the appeal on a completely wrong basis, coming here without making the right application, which I had to prompt to have the right material in front of me, the justice of the matter requires that there be no order for costs in the appellant's favour. That, accordingly, is the order I make.
12. I shall add is this: I cannot make any orders in these proceedings as to what costs should be paid between clients and solicitors but mention they might want to take advice as to how much they should pay in the circumstances of this case for the representation they have had. (Discussion re clarification of sentence order)
13. The conviction is quashed. The sentence is set aside. The fine can be refunded. (P Line)
Deputy High Court Judge Ms Ho May-yu, Lily, Senior Government Counsel, of the Department of Justice, for the Respondent Mr Toby Jenkyn-Jones, instructed by Messrs Haldanes, for the Appellant PAGE - PAGE CRT22/26.10.2007/MMcG HCMA309/2007/Reasons

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