

HONG KONG / JUDGMENT

HKSAR v. CHAN CHEUK HEI

[2022] HKCFI 3584

COURT

Court of First Instance

DECIDED

7 December 2022

CASE / FILE NUMBER

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HCMA 507/2021

[2022] HKCFI 3584

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO 507 OF 2021

(ON APPEAL FROM KCCC 2845/2020)

BETWEEN

HKSAR

Respondent

and

CHAN CHEUK HEI

Appellant

Before: Deputy High Court Judge Woodcock in Court

Date of Hearing: 27 October 2022

Date of Judgment: 7 December 2022

J U D G M E N T

The applicant was charged and pleaded not guilty to one count of indecent assault and an alternative count of common assault. At the conclusion of the trial, the learned deputy magistrate acquitted the appellant of indecent assault but convicted him of common assault. He imposed a probation order of 12 months on the appellant.

The appellant now appeals against his conviction.

The Prosecution's case

Both the appellant and PW1, the victim were 2 of 4 part-time staff assigned to work inside a supermarket on 2 September 2020. The prosecution's case is that the appellant indecently touched PW1 on 4 separate occasions during the course of that day; referred to as 4 touches.

At 1:15 PM whilst they were working, the appellant used both hands to tap on PW1's shoulders; the 1st touch.

Later on, at around 6 PM whilst PW 1 was stacking goods next to the display racks or shelves, the appellant swiped her lower abdomen from left to right with his left hand: the 2nd touch.

5 minutes later he swiped her waist from right to left from behind; the 3rd touch.

At about 7:10 PM, the appellant grabbed her right hand with his right hand from behind; the 4th and last touch.

This last touch was witnessed by her boyfriend who she had contacted after the 3rd touch. He then came to the store. The prosecution called PW1, her boyfriend PW2 and lastly, the arresting officer PW3.

The appellant was not arrested at the supermarket but on 10 September 2020. That evening on 2 September 2020, PW1's boyfriend, PW2, contacted the appellant through WhatsApp about his physically touching his girlfriend. It was after messages with him that they decided to report the matter to the police. After the defendant's arrest, he did say under caution and in an interview that he remembered tapping PW1 on the shoulder, brushing her stomach and grabbing her hand but he did not remember any other physical contact, that is the 3rd touch alleged.

The defendant's case

The appellant gave evidence and called an expert witness, a psychiatrist, Dr Tsang Fan Kwong. At the time of the trial, the appellant was 22 years old and had a clear record.

The appellant does not dispute the 1st touch on PW1's shoulder. They were told to go to lunch and he tapped her on the shoulder when he saw her to ask if she wanted to have lunch with the other part-time workers. She turned around and said okay. At lunch, they even exchanged phone numbers.

The appellant does not dispute that at the end the day, he did use his right hand to grab her hand to tell her that the goods she was holding were to be stacked behind her; not in the direction she was walking. Neither the 1st or 4th touch were indecent nor were they intentional or reckless assaults.

As for the 2nd touch, he was stacking shelves with goods taken from a box on the ground in front of him with PW1 working next to him on his left. He took a box of goods from the ground and put it on the shelf in front of PW1. It was at this time that the back of his hand touched her waist area. They were both in a confined area working. It was not an indecent assault or a common assault.

As for the 3rd touch, his evidence was that he did not recollect or remember there being such an incident or touch on her back.

The psychiatrist's evidence was that the defendant had from a young age been diagnosed with ADHD. A report was submitted and admitted as Exhibit D1. The psychiatrist gave evidence that those diagnosed with ADHD were easily distracted, not comfortable or proficient at communicating using language which meant often they would rely more on body language to attract attention such as tapping someone's shoulder or touching someone's hand.

Reasons for verdict

The magistrate accepted the evidence of all the prosecution witnesses. He accepted the evidence of the defence expert witness in its entirety. He rejected the appellant's evidence.

The magistrate was not satisfied that any of the 4 separate touches were indecent. He then went on to consider the alternative count of common assault.

The magistrate proceeded on the basis that the offence was committed by way of assault. He applied the following test to the evidence and said "common assault is an act which a person intentionally or recklessly causes another to apprehend immediate and unlawful personal violence. The act must be accompanied by a hostile intent calculated to cause apprehension in the mind of the victim.", para 81 of his statement of findings. He did not consider this as a common assault by way of battery.

As a result of the psychiatrist's evidence, he found that the 1st and 4th touch were for the purposes of getting PW1's attention or communicating with her and therefore these 2 touches were not assaults.

The magistrate accepted the evidence of PW1 relating to the 2nd and 3rd touch. He found on the evidence that “the only irresistible inference is that the defendant did such touches recklessly without consideration as to whether PW1 would apprehend immediate and unlawful violence”, para 84 of statement of findings. The appellant was convicted of the alternative count of common assault because of the 2nd and 3rd touches only.

Grounds of appeal

Ground 1

The magistrate had treated the case as a common assault by an assault and had said at paragraph 81 “the act must be accompanied by a hostile intent calculated to cause apprehension in the mind of the victim.”. He did go on to say he believed that PW1 became scared and fearful. Paragraph 1 of Ground 1 was that the magistrate erred in law in a failure to consider the fact there was no evidence of hostility nor did he set out any evidence of hostility. This ground of appeal was withdrawn at the hearing. It was conceded that despite the Magistrate’s definition, this was not an element that the law required to prove in an assault by way of battery.

The second part to this Ground 1 was that there was no evidence of any action capable of establishing recklessness. In short, the magistrate should not have found the appellant reckless.

Grounds 2-5

A reading of Grounds 2 to 5 and the submissions relating to those grounds in essence all advanced the same ground and that is the magistrate should not have found the appellant reckless; in this case his finding that the appellant was reckless in causing the victim to apprehend immediate unlawful personal violence which is the test the magistrate considered.

Ground 6

The magistrate failed to give a proper direction: failed to give himself the good character direction after noting the appellant had a clear record. The magistrate failed to give the proper direction for both credibility and propensity.

Discussion

A magistracy appeal is a rehearing on the papers. I have considered the evidence as summarised in the statement of findings and as referred to by counsel in their closing addresses attached to the appeal bundle. On a rehearing, this court is required to assess the evidence and come to its own conclusions as to whether the evidence proves the essential elements of the offence to the required or requisite standard.

The central issue of the trial and of the appeal is whether the mens rea of the charge of common assault has been proved by the prosecution.

The prosecution concedes that the magistrate did apply the wrong test in that the magistrate treated the offence as a single offence which can be committed by way of assault rather than a single offence which was committed by way of battery.

The respondent argues that this appeal is a rehearing and on the evidence as summarised in the appeal bundle the offence of common assault by way of battery is still made out and proved. It is made out in the context of battery and that is defined as any conduct by which the defendant intentionally or recklessly inflicts unlawful personal violence upon a complainant. The mental element to be proved is an intention to apply force to the body of PW1 or recklessness as to whether such force is applied.

That recklessness is subjective. The appellant must actually have foreseen the risk of causing the application of immediate unlawful violence upon PW1 and gone on unjustifiably to take that risk.

The respondent submits that battery requires unlawful force or violence which may simply be understood to be physical contact. It is unlawful if inflicted without consent or it is beyond the generally acceptable standard of physical contact in daily life.

The respondent referred to *Collins v Wilcock* (1984) 79 Cr. App. R. 229. In that authority, reasonable physical contact such as patting on someone's shoulder lightly for the purpose of engaging his attention would generally not be considered unlawful force or violence but the fundamental principle, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery since every man's person is sacred and no other person has a right to meddle with it in any manner.

The respondent submits that the 2nd and 3rd touches amounted to a battery, a common assault by way of a battery because those touches clearly went beyond the generally acceptable standards of conduct.

The respondent says despite the magistrate's faulty categorisation of the offence and test applied to the evidence, if this court finds battery proved then as this appeal is a rehearing, the appeal should be dismissed.

However, having considered the evidence presented as well as the defence put forward, the error in applying the wrong test here must make the conviction unsafe. After all, the magistrate may have reached a different finding or conclusion if he had considered the need to prove subjective recklessness of an assault by battery.

I also find issue with the categorisation of 4 touches by the appellant and how they were individually considered. The 1st and 4th touches were not considered indecent or an assault because the psychiatrist's evidence was accepted in its entirety. The appellant was not recklessly inflicting unlawful personal violence because of his ADHD.

I find it hard to reconcile that finding that the 1st and 4th touches were not recklessly inflicting unlawful personal violence with the finding that the magistrate was able to draw the only irresistible inference that the 2nd and 3rd touches were “recklessly inflicted without consideration as to whether PW1 would apprehend immediate and unlawful violence”.

Were they, the 2nd and 3rd touches common assault by way of battery? The respondent submits it all comes down to a question of fact. The Respondent points out the inconsistencies of the appellant’s evidence is highlighted by the prosecution in its closing submissions at trial. However, a reading of the statement of finding shows there are material discrepancies in the victim’s own evidence.

PW1 gave evidence in the witness box about the defendant whispering in her ear a desire to massage her before the 1st touch and made a gesture to her to sit on his knee before the 2nd touch. Facts that were not mentioned to the police nor in her witness statement. The magistrate noted PW1 was unable to give any “sensible, satisfactory or credible answer” as to why she told the police the defendant had said nothing at the time he touched her shoulders but in the witness box said that he whispered a desire to massage her. Nevertheless, they were not treated as material omissions or discrepancies that may have affected her credibility. With respect, they are discrepancies which if true would have gone some way to indicate an intention to indecently assault her and can be described as material.

I must say I would have come to a different view as to whether the prosecution’s evidence could prove the guilt of the appellant beyond a reasonable doubt on even the alternative charge. By way of rehearing, I am left with a doubt whether the appellant intentionally or recklessly inflicted unlawful personal violence upon PW1.

On the last ground of appeal, I would have reached the conclusion that the conviction was unsafe. The defence submits that there was no good character direction. The respondent suggests otherwise. The respondent suggests that the magistrate was well aware of the necessity of the direction and caution. Being a professional magistrate, he did not need to set out the direction for both limbs in full; that is credibility and propensity.

However, to only say at Para 52 of the statement of findings that “When considering the evidence, I should give benefits to the defendant because of his clear record” is not enough to show that the magistrate was directing himself both on credibility and propensity. I am sure he was fully alive to the issue and a full direction is not necessary but the bare reference to the appellant’s good character and “benefits” is not enough.

For the reasons above, I allow the appeal and set aside the appellant’s conviction.

(Amanda Woodcock)

Deputy High Court Judge

Mr Lui Ming Chun, Pierre, Senior Public Prosecutor and Ms Kathy Sum, Public Prosecutor, of Department of Justice, for the Respondent

Mr McGuinniety, Edward L, instructed by Messrs. Fongs, for the Appellant

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