

HONG KONG / JUDGMENT

HKSAR v. CHAN KIT YING CHLOE

COURT

Court of First Instance

DECIDED

29 March 2007

CASE / FILE NUMBER

HCMA977/2006

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bjbj p-m@ HCMA977/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.977 OF 2006 (On Appeal From TWCC 527 OF 2006)

BETWEEN HKSAR Respondent and CHAN KIT YING CHLOE (Toit) appellant was convicted after trial of two charges of attempted theft and other charges of theft, related to attempted theft or theft of sums of HK\$20,000 from ATM machines and the last charge was one related to theft of a set of pearl earrings. She was sentenced to a total of 21 months imprisonment, ordered to run partially consecutively to a prison sentence that she was already serving. She now appeals her conviction. AUTONUMOUT The prosecution case against the appellant was that she had on two occasions unsuccessfully attempted to withdraw and on seven occasions withdrew money from PW1 s bank account through ATM machines. The amount involved on each of such occasions was HK\$20,000. It was also contended that the earrings worn by the appellant when she was apprehended were the very same pair of earrings which belonged to and were stolen from PW4. AUTONUMOUT A total of nine prosecution witnesses were called. The appellant elected not to give or call evidence. PW1 was a close friend of the appellant at the material time and PW4, the owner of the earrings, got to know the appellant through PW1. The appellant frequently stayed at PW1 s flat until late hours, and PW1 had the habit of leaving her wallet with her ATM card in the living room. The appellant had access to and from PW1 s flat by a set of duplicate keys given to her. AUTONUMOUT On 9 May 2005, PW1 failed to access her account at the ATM machine using her secret PIN code, she reported to the bank. A new PIN was generated on or about the same day and posted to PW1 s address by ordinary mail, it was never received by PW1. AUTONUMOUT On 15 May 2005, PW4 took her jewellery to her office to show her friends including the appellant and PW1. The appellant had picked up a pair of black pearl earrings and had appraised their beauty. PW4 thought that she had put all her jewellery back into the box and took them home, but five days later she found the black pearl earrings missing. AUTONUMOUT On 18 May 2005, PW1 could not find her ATM card in her wallet. She found her card lying loose in her handbag pursuant to the appellant s suggestion. AUTONUMOUT On or around 23 May 2005, the caretaker at PW1 s building noticed that a friend of PW1, who was a regular visitor, coming in and going out

in a quite unusual erratic manner. AUTONUMOUT On 27 May 2005, PW1 checked her account and found seven withdrawals each of \$20,000 using her ATM card. She never performed these transactions, or did she authorize anyone to. AUTONUMOUT On 29 May 2005, PW1 and the appellant met at PW1 s flat. PW1 was shocked to notice that the appellant had on her a pair of earrings strikingly similar to those of PW4

- s. PW1 left her ATM card in her wallet in the living room and went to her bedroom for a rest. She later found the appellant had left her flat and her ATM card gone missing. A report was made to the police. AUTONUMOUT The appellant was stopped and found to be in possession of PW1 s ATM card, and wearing a pair of black pearl earrings, which were later identified by PW4 as her lost earrings. Grounds of appeal AUTONUMOUT The home-made grounds of appeal are summarized as follows :
- (1) The magistrate erred in finding that she was the person depicted in the photograph using the ATM machines on the 8 May 2005 as the face of that person was not captured therein. Further or in the alternative, the magistrate having specifically found that only PW1 knew the old PIN number to her ATM card, he was wrong to draw the inference that the appellant attempted to steal and had the intention of keeping the money so withdrawn.
 - (2) The magistrate s finding that the appellant had stolen the new PIN of PW1 s ATM card from the mailbox was against the evidence, in particular, the evidence of the caretaker that he did not see anybody walk close to the mailbox at any time. Moreover, there was no evidence that the appellant knew when the new PIN would arrive.
 - (3) PW1 was confused as to the dates that the appellant had eaten and stayed at her flat. The magistrate failed to give any or sufficient weight to PW1 s testimony that on the date of the offence of the 4th charge, she was in possession of her ATM card and was at her office, which would render the allegation against the appellant unsustainable.
 - (4) The magistrate erred in finding that the pair of earrings the appellant had on her arrest was the very pair that belonged to PW4 when what PW4 said was only that they were remarkably similar without particularizing on what basis that she could identify them.
 - (5) The conviction was unsafe and unsatisfactory. Respondent s reply AUTONUMOUT It was submitted by the respondent that :
 - (1) There was more than sufficient evidence for the magistrate to find that the person depicted in the photograph using the ATM machines on the day of Charges 2 and 3 was the appellant (paragraph 7(B), Statement of Findings) and given the admitted facts as they were (paragraph 5-7, appeal bundle page 18), the magistrate was entitled to find it was the appellant who attempted to steal unsuccessfully on the two occasions of the 2nd charges.

- (2) There was ample evidence for the magistrate to find that it was the appellant who had taken PW1's new PIN from the mailbox (paragraph 7(D), Statement of Findings). The caretaker's evidence that he did not see the appellant walk near to the mailbox did not affect the inference to be drawn one way or another. The allegation that the appellant had no idea when the bank would send the new PIN to PW1 was unsupported by any evidence from the appellant.
- (3) The magistrate was fully aware of PW1's confusion about dates in her evidence and found that such did not in any way undermine her credibility.
- (4) The magistrate accepted the evidence that PW4 had five years working experience in jewellery and her black pearl earrings were of such uniqueness that she could identify them.
- (5) There is nothing unsafe or unsatisfactory in the conviction. My judgment
AUTONUMOUT
The evidence in this case against the appellant was purely circumstantial. AUTONUMOUT In this case, the appellant was found to be in possession of PW1's ATM card and a pair of earrings identified to belong to PW4. The facts cry out for an explanation. AUTONUMOUT It was held in the case of R. v. Tan Siew Gim [1995] 1 HKLR Where the inference of guilt is available to the tribunal of facts and no explanation is given, it is not open to complain on appeal that another inference was available to be drawn, particularly when the facts cry out for an explanation. AUTONUMOUT In Bruce and McCoy Criminal Evidence in Hong Kong, it is said that There are circumstances in which a court may more readily draw an inference adverse to the accused from evidence in the absence of testimony from the accused. and If it were the law that a man may not be found guilty whenever it is possible to place an innocent explanation on his actions by assuming the existence of a state of mind or an explanation that is incompatible with guilt, then the law would in the absence of a credible explanation leading to a different conclusion, to convict the accused on the basis of that inference. AUTONUMOUT In R. v. Cunningham, HCMA341/1992, Fuad VP said An accused person should not be surprised if an inference which can legitimately be drawn is more readily drawn when the accused elects not to give evidence. AUTONUMOUT do not wish to reiterate what I said in HKSAR v. Chan Hung Kwan, HCMA667/2006, suffice it to say that with the appellant electing not to give evidence, the magistrate was correct to point out that, her silence left me without any explanation from her to undermine, contradict or explain the prosecution evidence against her AUTONUMOUT The magistrate has gone to great length to explain his analysis of the evidence. Charges 2 and 3 are charges of attempted theft, and the allegation was that the appellant intended to steal and did acts more than mere preparatory for committing such. The magistrate has fully explained how he reached his findings that the person depicted in the photograph was the appellant, and in the absence of any credible explanation from the appellant, he was fully entitled to infer that had it not been for a repeated wrong secret password input, the appellant would steal and keep the money so withdrawn. It was precisely because the appellant did not know the old PIN number that no successful withdrawal could be made on those occasions. Ground 1 was misconceived. AUTONUMOUT There was ample evidence to support the finding that the appellant had

stolen PW1 s new PIN from her mailbox (paragraph 7(B) and (D), Statement of Findings). The evidence of the caretaker was not of such a nature as would lead to a different conclusion. Having rejected what the appellant said in her record of interview and in the absence of evidence from the appellant, there was simply no evidence before the magistrate whether she had any idea when the bank would send the new PIN to PW1. It was not the magistrate s task to imagine possible defence of which there was no evidence in support. Ground 2 fails. AUTONUMOUT The magistrate was mindful of the inconsistencies in the dates that PW1 said the appellant had dined and stayed at her place. He found that as PW1 did not keep any record of the evenings when the defendant had stayed at her flat, and she had been trying when making her police statement to recollect the situation in hindsight (paragraph 6(f), Statement of Findings). He also found that PW1 had made an honest mistake which had no effect on her credibility when she testified that she was in possession of her ATM card at her office on the date of the offence of the 4th charge (paragraph 6(s) & (t), Statement of Findings). Ground 3 fails. AUTONUMOUT The magistrate found the pearl earrings belonged to PW4. He placed full weight on PW4 s evidence that those were extremely similar to hers and he trusted that such unique Tahiti pearls could be readily identifiable by their unique shape, size and lustre by a person with PW4 s experience in the jewellery field (paragraph 6(ff) and (hh), Statement of Findings). AUTONUMOUT This is not a case where the prosecution case alone contained the seeds of their own destruction. AUTONUMOUT The magistrate was entitled to make the findings he did and there was ample evidence to support a conviction. The appeal is dismissed and I affirm the conviction. (M. Poon) Deputy High Court Judge Mr Hau Wai Chuen, Stewart, SGC of the Department of Justice for HKSAR A 1udk 1udk (#p# & `#\$ XoOe&t\ XoOe&t\ XoOe&t\ XoOe&t\ XoOe&t\ XoOe&t\ #V\$z @W 5 [-<. o2O` n h>h @W 5 @W 5 W~rh & 6" HCMA.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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