

HONG KONG / JUDGMENT

HKSAR v. CHENG HUNG YI

COURT

Court of First Instance

DECIDED

2 January 2007

CASE / FILE NUMBER

HCMA548/2006

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bjbj HCMA548/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.548 OF 2006 (ON APPEAL FROM TWCC 671 OF 2006)

BETWEEN HKSAR Respondent and CHENG HUNG YI (

REASONS FOR JUDGMENT

AUTONUMOUT The appellant was convicted after trial of one charge of indecent assault contrary to section 122(1) of the Crimes Ordinance (Cap.200). He was sentenced to a fine of \$800. He appeals against the conviction. THE CHARGE

2. The charge read Cheng Hung Yi, on 7 March 2006, at No.1 platform, MTR Lai King Station, Kwai Chung, New Territories, in Hong Kong, did indecently assault another person, namely
3. This was Charge
2. In the charge sheet, there was a Charge 1 alleging another platform assault inside Mong Kok Station against the same victim. That charge was found not to have been proved beyond reasonable doubt. THE FACTS
4. The following is a summary of the prosecution case, to be found in the magistrate s written verdict (parts that are relevant) [On] PW1 s evidence the defendant had been in front of her as she boarded the train at Mong Kok, but she had not noticed the defendant before boarding. She said the first contact between the defendant s elbow and her breast (around the nipple area) was caused by the swaying of the defendant s arms whilst they were both boarding. After the defendant had boarded the train, he stood near the door whilst PW1 and PW2 stood near the centre of the carriage by the handrail. (I found from PW1 s evidence that she was not sure in her mind whether the first bump by the defendant on her breast had

been accidental or not. I also later found that I could not draw the irresistible inference from all the evidence that this bumping had been deliberate.). Once in the train PW1 mentioned to PW2 what had happened to her and they then both decided to keep an eye on the defendant. When the train eventually arrived at Lai King station, it was necessary for the parties to alight from the opposite door from which they had entered at Mong Kok. PW1 did not notice the defendant change sides of the train from his original position beside the door, but only noticed him at the time when she was just stepping out onto the platform at Lai King. At that time she noticed him close to her, but by that time the bump on her breast (around the nipple area) had already occurred. She saw that the defendant was slightly in front of her with his right arm by his side and he then carried on walking in front of her until he reached the centre of the station platform. 6. PW2 did not see the first bump, nor did she notice the defendant when they entered the train at the Mong Kok station. She only saw him when she was told about him by PW1. Despite her watching the defendant during the journey, she did not notice the defendant change sides of the train when they arrived at Lai King station. She said that as she was about to alight from the train with PW1, with her placed on the right side of PW1, she noticed the defendant on PW1's left side because she was talking to PW1 at the time. She noticed at that time that the defendant was walking abreast with PW1. She said she saw the defendant lift his forearm to a position that was about parallel to the ground and then he moved his elbow away from his side and backwards into the side of PW1's breast.

5. The appellant did not give evidence, nor call any witness. The defendant's case put forward in cross-examination of the second charge was basically that there had been no second bumping, or if there had, it had been accidental. It was also asserted that the defendant had all times been in front of PW1 and PW2 when preparing to alight and also when alighting at Lai King station. Later when PW1's boyfriend took the matter up with the defendant, the defendant agreed to voluntarily sort the matter out and denied to the boyfriend that he had indecently assaulted PW1. FINDINGS
 6. In the end, the magistrate found PW1 and PW2 both to be honest and reliable witnesses whose evidence he could accept except
 7. There was only one material inconsistency in the prosecution evidence. This was in PW1 and PW2's evidence in relation to the second incident. I therefore considered this inconsistency carefully but I found in the end that I was able to resolve it satisfactorily as follows : - PW1 said that when the second bump took place the defendant had his right arm straight and he was walking slightly in front of her and he had swung this arm backwards onto her breast and the touch lasted 1-2 seconds. However, in cross-examination she said that she had only noticed the defendant after this bump had taken place.
- (b) I found that I believed PW1's answer in cross-examination was correct and that she did not see the defendant until after the bump had occurred and this accounted for her not seeing the defendant's arm bent parallel to the ground, as did PW2. I believed that what had happened was that after the bump on PW1, the defendant had dropped his arm to his side

and this was when PW1 saw him. I further believed PW1 assumed what the defendant had done to cause the bump. I found that I accepted PW2's evidence was the accurate version of what had happened at this time.

- (c) I found that this inconsistency was not one involving deliberate lying by PW1 and I found it did not cause me to doubt the honesty and reliability of PW1 and PW2's evidence.
- 7. There was also a PW3, a policewoman attending scene
- 8. I was impressed by PW3 as an honest and reliable witness and I accepted her evidence was the truth. I found that PW1 had told PW3 that she thought the first occasion was accidental as I found that PW1 had this thought in her mind until she reviewed both incidents together.
- 8. In any event
- 13. I found at the end of the day that the prosecution had satisfied me beyond reasonable doubt that the defendant had, with hostile intent, deliberately assaulted PW1 by deliberately raising his right elbow up to a point parallel to the ground and then deliberately moving it out of from his body and backwards into the nipple area of PW1's left breast. I further found that this assault had been accompanied with indecency according to right-minded members of society, as I found that to deliberately elbow a woman stranger in her breast, in public, was obviously indecent. I further found that by the deliberate lifting and backwards movement of the elbow into the breast that the defendant had intended for it to be such. I did not believe that the action of the defendant whilst walking out of the train near PW1 was an accidental bumping. THIS APPEAL Ground 1
- 9. This ground reads The magistrate erred in failing to consider that the effect of the discrepancies, inconsistencies and irregularities in the evidence of PW1 which collectively should give rise to reasonable doubt as to her veracity and/or reliability and more importantly as to the appellant's guilt. Of particular importance are the following :
 - (a) Notwithstanding that PW1 was not sure in her mind whether the first bump by the appellant on her breast had been accidental or not, a fact rightly found by the magistrate that led to the acquittal of Charge 1, she nevertheless insisted in her oral testimony in court that it was not an accidental bump.
 - (b) Although PW1 claimed that she was keeping an eye on the appellant after the first contact which had allegedly made her very frightened, what she did was chatting with PW2 and did not pay attention to the whereabouts of the appellant, in particular when the train was approaching Lai King Station.
 - (c) In examination-in-chief, PW1 claimed she saw that the appellant walked near her and then his right arm, straight at that time, swung back as a result of which the elbow area bumped against her left breast. Under cross-examination, PW1 said she only looked to the appellant's direction after he had already bumped against her breast.

10. I am satisfied that there is nothing to this ground.
11. PW1 admitted thinking that the first bump was an accident, at least initially (p.39S of bundle). She told PW3 so in Lai King Station. But the magistrate was not wrong to attribute her changed conclusion to a reviewing of the first and second incidents together (para.8 of his verdict). It was a natural conclusion for someone in PW1 s position. The magistrate was entitled not to treat it as a dent to her credibility. He acquitted the appellant of Charge 1 out of caution, not because he disbelieved PW1.
12. I make nothing of the conversation between PW1 and PW2. It was a long journey between Mong Kok and Lai King. It is unrealistic to expect the women to just stare at the appellant. Moreover, the chatting took place while PW1 and PW2 were alighting and it was about the present incident (p.37S).
13. I have read PW1 s examination-in-chief (pp.33
- 34) and I have read her cross-examination (pp.37 38). I find the magistrate s treatment of how PW1 described the second assault and whether she actually saw what happened both reasonable and adequate (para.7 of his verdict). It is one based on common sense and inferences. It is not speculative. That is my judgment. Ground 2
14. Ground 2 reads The reasons upon which the magistrate resolved the material inconsistencies in the evidence of PW1 and PW2 regarding the second incident are erroneous for the following reasons :
 - (a) The descriptions of the second assault given by PW1 and PW2 were entirely different.
 - (b) His finding that PW1 did not see the appellant until after the second incident was directly contradictory to her own testimony given in chief.
 - (c) Such inconsistency among PW1 s own evidence was not explained and/or capable of being justified by any or any valid grounds on evidence available.
 - (d) The magistrate further erred in allowing himself to speculate the reason behind the inconsistency and to simply exclude the possibility of PW1 lying about the entire second incident or any part of it.
15. This is a re-run of Ground 1(c) with PW2 s evidence thrown in for good measure.
16. But it really makes no difference.
17. Since everything was in motion, a small time gap would mean a big difference in what one person saw and not the other. If the reasoning the magistrate gave is good enough to resolve the internal inconsistency in PW1 s evidence (whether she actually witnessed the assault), it is good enough to resolve the external one between hers and PW2 s evidence (how in fact the assault was perpetrated).

18. In the course of oral submissions, counsel sought to rely on another discrepancy between PW1 and PW2 re the location of the second assault. Having read the transcripts (pp.33P-34G, 35C-E, 37K-38J, 43M-44P, 47E-S), I am satisfied that there is nothing at all to it. What both women clearly meant is that as they were stepping out of the train, the appellant overtook them and put his elbow into PW1 s chest. Ground 3
19. Ground 3 reads The magistrate erred in failing to take into account the height of PW1, who was around 5 , in that the descriptions of the second assault, according to either PW1 or PW2, were such that it was physically impossible for the appellant, who was 6 , to have committed it.
20. There was, in the trial, no evidence about PW1 s height. The reference to the appellant s height was by way of a question not specifically answered. The measurements quoted here are all based on instructions . I am surprised that this ground should have been filed at all. Ground 4
21. It reads The magistrate erred in failing to consider all the evidence in excluding the possibility of accidental contact in respect of the second incident.
22. The short answer to that is that the magistrate believed PW2. Her evidence is that the defendant lifted his forearm to a position parallel to the ground, and then moved his elbow away from his side and backwards into PW1 s breast. One can hardly find anything less deliberate and this against the context that only PW1, PW2 and the appellant were getting off the train. (See PW1 s uncontested evidence at p.34D-F and pp.37T-38C.) Ground 5
23. This is a wrap-up ground that says the conviction is unsafe and unsatisfactory in all the circumstances. I disagree.

JUDGMENT

24. There is no merit in this appeal. It is dismissed. (D. Pang) Deputy High Court Judge Mr Chiu Wai Tin, GC of Department of Justice, for HKSAR Ms Gekko S.Y. Lan, instructed by Messrs V. Hau & Chow, 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 &`#\$&`#\$"@AB m_IP m_IP m_IP m_IP m_IP m_IP &&n* &" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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