

HONG KONG / JUDGMENT

HKSAR v. CHEUNG YIU KWAN

COURT

Court of First Instance

DECIDED

15 April 2003

CASE / FILE NUMBER

HCMA81/2003

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bjbj HCMA81/2003 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.81 OF 2003 (ON APPEAL FROM KCCC 17635 OF 2002)

BETWEEN HKSAR Respondent and CHEUNG YIU KWAN Appellant

Before : Deputy High Court Judge McMahon in Court Date of Hearing : 4 April 2003 Date of Judgment : 15 April 2003

J U D G M E N T

AUTONUMOUT This is an appeal against both conviction and sentence. AUTONUMOUT The appellant was convicted after trial of an offence of theft, contrary to section 9 of the Theft Ordinance, Cap.210 (being the first charged offence) in respect of which he was sentenced to 12 months imprisonment; and of an offence of common assault, contrary to common law and section 40 of the Offences against the Person Ordinance, Cap.212 (being the second charged offence) in respect of which he was sentenced to three months imprisonment. Both sentences were ordered to run consecutively. AUTONUMOUT Further, in committing these offences, the appellant was found to be in breach of a 12 month probation order made in respect of an earlier offence of theft of a mobile phone to which he had, at the time of sentencing, pleaded guilty. The magistrate imposed a sentence of six months imprisonment in respect of that earlier offence after taking a starting point of nine months imprisonment and ordered it to run consecutively to the sentences imposed in respect of the offences the subject of the present appeal. That resulted in an overall totality of 21 months imprisonment. AUTONUMOUT will deal firstly with the appeals against conviction. AUTONUMOUT As to the first charged offence of theft, the facts of the case as found by the magistrate were that the young female victim of the first charged offence (i.e. the 1st

victim) had been drinking in the M1 Bar in Prat Avenue in Tsimshatsui in the early hours of the charged date and had her handbag, containing the various items particularized in the first charge, hanging over the back of her chair. At some point during that night, precisely when the 1st victim was not sure, the handbag was taken from that chair. AUTONUMOUT Nearby the M1 bar is a rear alley. At about 3:30 a.m. two men were walking past the entrance of the alley. One of them, the eventual victim of the second charged offence (i.e. the 2nd victim), went up to the entrance of the alley and the appellant then rushed out and pushed the 2nd victim aside. That incident formed the basis of the second charged offence. AUTONUMOUT The 2nd victim did not give evidence at the trial of the appellant in respect of these offences. He had apparently gone to the mainland prior to the trial date and the magistrate was at pains during the course of the trial in respect of the offences to not take into account anything that was given in evidence as to what the 2nd victim had said at the time. AUTONUMOUT After the 2nd victim had been pushed by the appellant, the 2nd victim's friend, PW2, then rushed up to where they were and helped subdue the appellant. The police were called. The appellant continued to struggle and when the police arrived, i.e. PW3 and PW4, they saw the appellant struggling with PW2 and the 2nd victim. They then intervened and settled things down and commenced to make enquiries. As a result of what they were told, PW3 then went into the alley and found the 1st victim's handbag. AUTONUMOUT PW3 brought the handbag back to the appellant, PW2, PW4 and the 2nd victim, and the appellant then told PW3 amongst other things that he had been looking after the handbag for his friend in the Hippo Bar. PW3 then took the handbag into the nearby Hippo Bar, and asked about the handbag but no one claimed it. So, PW3 took the handbag into the next door bar which was the M1 Bar. Inside that bar, the 1st victim, who was still there, recognized the handbag as hers. She looked inside it and found all the contents were still there and intact except for some cash of about \$400 missing from her wallet, but she also found another wallet inside the handbag which was not hers. AUTONUMOUT PW3 looked inside this wallet and found from the identification card displayed therein that it appeared to be the appellant

- s. PW3 returned to where the appellant was being held and arrested and cautioned him. The appellant then further said he had simply seen the handbag on the ground and had picked it up to have a look at it. AUTONUMOUT At trial, the appellant's defence was to the effect that he had been very drunk and had no recollection of any of the events of that night including his arrest. He had no idea how his wallet got into the handbag of the 1st victim. PW2, 3 and 4 all said in evidence that the appellant did not appear to be particularly drunk. AUTONUMOUT Accordingly, there were two issues before the magistrate. Firstly, whether on the evidence accepted by him there was sufficient to warrant the inference that the appellant had taken the bag from the 1st victim and secondly whether he had formed the intent required to steal the bag. AUTONUMOUT The appellant before me complained that his convictions were against the weight of the evidence in regard to both these issues. AUTONUMOUT The magistrate had accepted the evidence of PW2, 3 and 4. He regarded them as reliable witnesses. There was nothing to suggest otherwise and he was entitled to do so. The appellant says nevertheless that the magistrate was wrong to infer on their evidence that he, the appellant, had stolen the bag. AUTONUMOUT It is true that no one had seen him

take the bag and no one had seen him in possession of it in the alley way. His taking of the bag was, therefore, wholly a question of inferences. The magistrate said in this regard

27. It seems to me that I first need to determine whether the inferences for which the prosecution contend can properly be drawn, i.e. the fact that the defendant was seen initially coming from the alley where the bag was found and the fact that his wallet was in it can lead to the conclusion that he had interfered with the bag. AUTONUMOUT The magistrate then considered the appellant's case which was that, although the appellant could not remember these events, there may have been another reasonable explanation for his wallet being found in the 1st victim's bag in the alley way. His counsel on his behalf at trial suggested that a third person may in some unknown way and for some unknown reason have put the appellant's wallet in the 1st victim's handbag. The magistrate dismissed the appellant's case in this regard, and concluded that the only reasonable possibility was that the appellant had himself taken that bag. In this regard, the magistrate said
28. I find such possibilities to be entirely fanciful. I have no doubt that the only stress only proper inference to draw from all the circumstances the defendant's admitted presence in the bar, his presence near to the bag in the alley, the presence of his wallet in the bag and the presence of the cash from the bag in his wallet is that he took the bag there, he took the money out of PW1's wallet and he put it in his own and he put the wallet in the bag. Whether because he was disturbed by Mr Li [i.e. the 1st victim] or not is neither here nor there. In my judgment, no other possibilities can be said to exist on the facts as I find them to be. The drawing by the magistrate of the inference which he did draw in that regard is completely proper. AUTONUMOUT The magistrate then turned to the final issue in respect of the first charged offence which he expressed as follows
26. So, if, so far as this theft charge is concerned, if the defendant was or might have been so drunk that he could not form the necessary intent, then he cannot be guilty of theft because theft is a wilful, deliberate and dishonest act. It is an offence of what we call specific intent; and I am not going to go through it all here, but I direct myself in the appropriate terms. The magistrate then examined the evidence of the prosecution witnesses as to the state of sobriety of the appellant and concluded as follows 31. I am willing to accept that the defendant had been drinking but not that he was drunk and certainly not that he was incapable of forming the necessary intent.
32. And, furthermore, it should be noted that the defendant was capable of rational conversation with the officers, even if he was agitated. It was not drink that was making him agitated; it was the circumstances in which he had been apprehended.
33. I have no shadow of doubt in my mind that he was not drunk and was not incapable of forming the necessary intent to steal. Again, the magistrate's approach to the evidence and his conclusion in this regard cannot be criticized. Indeed, it led properly and inevitably to his final conclusion so far as the first charged offence was concerned to the effect that

34. There is only one inference to draw from the facts in this case. He took the bag from the back of PW1 s [i.e. the 1st victim] chair and he rifled it. He must have been interrupted. Most of the property was still in the bag and it was lying on the ground.
35. The defendant was in full command of his faculties. He was acting dishonestly and with the requisite intention and theft is proved. AUTONUMOUT So far as the offence of assault was concerned that also followed on from the magistrate s acceptance of the evidence of PW2, the friend of the victim of that charged offence. AUTONUMOUT The magistrate accepted the direct evidence of PW2 that the appellant had rushed out of the alley and pushed the victim deliberately. He found PW2 to be a passer-by without, in this respect, any axe to grind, and a notably balanced and sensible witness . The magistrate s finding in this regard was based on the direct evidence of a reliable witness and cannot be criticized. AUTONUMOUT The appellant s appeals against his convictions are dismissed. AUTONUMOUT turn now to the appellant s appeals against sentence. He says that the sentences imposed by the magistrate were too severe, both individually and in their totality. In my view, no complaint can be made of the sentences imposed on the appellant in respect of the two theft offences for which he was sentenced, i.e. the present offence and the offence the subject of the probation order which the appellant breached by committing the present offence. AUTONUMOUT The magistrate observed that both offences were sneak thefts and that so far as the offences were concerned that the appellant was a persistent offender. He had apparently committed four previous such theft offences. AUTONUMOUT In imposing a sentence of 12 months imprisonment on the appellant in respect of the present theft offence, the magistrate observed that the theft of the contents of the handbag was the sort of theft which causes great inconvenience to the victim. With that, I agree. Given the circumstances of the present offence and the background of the offender relating to his persistent property offences which the magistrate properly took as an aggravating factor, I do not think the 12 months sentence imposed in respect of the present theft offence can be said to be excessive. Nor do I think, for the same reasons, that the nine months starting point of sentence imposed in respect of the theft of the mobile phone, subsequently reduced to six months imprisonment to reflect the appellant s plea of guilty in that case, could be said to be excessive. AUTONUMOUT It should be added further that the appellant showed a calculated disregard for the law in committing the present offence whilst on probation. He had been placed on probation only a short time prior to the commission of the present offence. AUTONUMOUT So far as the offence of common assault is concerned, the facts accepted by the magistrate seem to be that the appellant simply pushed the victim. There was no injury, or no significant injury, sustained by the victim as a result of that push. In my view, the sentence of three months imprisonment on that basis is excessive. I think that such a simple, albeit violent, push warrants, where a custodial sentence is required as in this case, a sentence of one month s imprisonment. Further in my judgment, the imposition of three consecutive sentences in this case is too severe. AUTONUMOUT Accordingly, I order that the sentence in respect of the second charged offence be set aside and be replaced with a sentence of one month s imprisonment, to be served consecutively to both other sentences and that the

sentence of six months imprisonment imposed in respect of the appellant s earlier theft offence in respect of which he breached his probation be served, as to three months, concurrently with the sentence of 12 months imprisonment imposed in respect of the first charged theft offence. That is a totality of 16 months imprisonment. (M.A. McMahon) Deputy High Court Judge Mr Chiu Wai Tin, GC of the Dep 1udk 1udk P Q R S T U V & `#\$ & 6" CACV Jeannie MY MokSo ABC.dot setup Microsoft Word 9.0 Judiciary CACV Title Microsoft Word Document MSWordDoc Word.Document.8

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