

HONG KONG / JUDGMENT

HKSAR v. CHOW KOON SHING

COURT

Court of First Instance

DECIDED

19 April 2007

CASE / FILE NUMBER

HCMA51/2007

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Before: Hon Beeson J in Court Date of Hearing: 21 March 2007 Date of Judgment Handed Down: 19 April 2007

J U D G M E N T

The Appellant was convicted after trial in the Magistracy of one charge of Misconduct in Public Office, contrary to Common Law and punishable under section 101I(1) of the Criminal Procedure Ordinance, Cap. 221. He was sentenced to 6 months imprisonment. On 19 December 2006, the Appellant appealed against both conviction and sentence. However, on 19 March 2007, he abandoned his appeal against conviction, and appealed against sentence only. There was no dispute at trial that the facts, if proved, amounted to misconduct in public office.

Facts

The Appellant, then aged 48 years, was a serving Senior Police Constable, who had been in the Hong Kong Police Force for 20 years. On 18 July 2006, he was on duty, in uniform, as a Court Officer in Court No. 1 of Tsuen Wan Magistracy. When proceedings in Court No.1 had finished, he left the Court and returned to the cell area. During that time, he encountered the victim (PW1), who was going to the Accounts Office to reclaim bail money on behalf of her sister. PW1 gave evidence that the Appellant had approached her and tried to start a conversation with her. She had not seen him before that time. PW1 asked the Appellant if she could retrieve the bail money at the Accounts Office. He confirmed that she could do so, but that she would need an authorisation. When PW1 asked where she could obtain an authorisation the Appellant said he could assist. Accordingly, he led her downstairs to the Court cell area to complete the necessary forms. They were standing on the staircase which led down to the cell area. The Appellant asked PW1 for her identity card, later he led her to a position (shown in Photo 14) gave her a pen and

told her to turn round to write her address on the back of the bail sheet. PW1 turned round, placed the bail notice against the wall and began to write her address on the reverse side. While doing so she felt something touch her left thigh underneath her skirt. She turned to see the Appellant squatting behind her and withdrawing his hand, which held a mobile telephone, from underneath her skirt. She asked the Appellant what he was doing and why he took a photograph underneath her skirt. The Appellant told her he was sorry, he was just playing a game. PW1 asked to see the phone to check if it held her photograph. The Appellant pressed some buttons on the phone saying the pictures belonged to his wife, but did not show any pictures to PW1 and made as if to leave. At that point, PW1 shouted for help and followed the Appellant who went back upstairs and out to the car park at the rear of the magistracy. PW1 followed him and phoned her brother, who was upstairs in the building, for assistance. She tried to dial 999, but after she had dialled the first 2 digits, the Appellant told her not to dial further, then covered her telephone screen and tried to leave. PW1 was shouting for assistance and complained to a security officer at the exit to the car park about what had happened, but the security officer did not believe her and did not assist her. PW1 went to try to retrieve the photograph from the Appellant, who had left the car park while she was speaking to the security officer. At that stage, she saw the Appellant was coming back towards the car park. He asked her to give him a chance and said that if she reported to the police, his life would be ruined. He told her he had a wife and children. He asked her forgiveness. Eventually PW1's nephew arrived to help her and a report was made to a senior officer by PW1, who was crying and upset. No mobile phone was found on the Appellant who, when first questioned, told his superior officer that he had lost his telephone two days earlier. Later, after a search, the Appellant's telephone was retrieved and a photograph, (Exhibit P13B), showing the upper thighs and underwear of a person, was identified by PW1 as looking like her. The phone was recovered near the entrance of the magistracy car park, close to the area where PW1 had seen the Appellant leave the car park. The phone was placed in a crevice at the base of a white wall, at the end of a storage cubicle by the side of the gutter running along the right hand side of the cubicle. A close-up photograph (Photo 21) of the location showed that it could not have arrived at that position accidentally. The photos had not been deleted. The Magistrate drew the inference that the Appellant had concealed the telephone to avoid detection, with the intention of retrieving it at a later time. The Appellant had denied the offence. He said that no such photograph was taken and all he had done at that time, was to bend down and pick up his nametag, which had fallen from his shirt.

Ground of Appeal The sole ground of appeal was that the sentence of 6 months imprisonment imposed on the Appellant was excessive. In support of this contention, Mr. Khosa, of counsel who appeared for the Appellant, referred to various cases with similar features, in an endeavour to show the sentence was excessive. Case 1 was HKSAR v Yeung Chun-sing (HCMA 1029/2004). The appellant travelled on an escalator and took an upskirt photograph. He was convicted of Disorderly Conduct after trial and sentenced to 3 weeks imprisonment. His conviction was later quashed. Case 2 was HKSAR v Nagashima Katsuki (HCMA 691/2005). The appellant used his digital camera to take photographs of female customers in a music store. He had concealed his camera in a black carry bag and pushed it towards the feet of the customers to take photographs. On his conviction on a charge of Disorderly Conduct he was sentenced to 14 days imprisonment, for which, on appeal, a sentence of 120 hours of

Community Service was substituted. Case 3 was HKSAR v Chan Chi-ho (HCMA 288/2006). The appellant travelled on an escalator and put his mobile phone under the female victim's skirt to take photographs; the victim, aged 14 years, was in school uniform. The appellant pleaded guilty to behaving in a disorderly manner in a public place and was sentenced to 2 months imprisonment. On appeal, a starting point of 6 weeks was adopted and the sentence was reduced to 4 weeks imprisonment. Case 4 was HKSAR v Wong Wing-hung (HCMA 307/2006). The appellant travelled on an escalator and took an upskirt photograph of a girl in school uniform. He was charged with behaving in a disorderly manner in a public place and sentenced, after trial, to 12 months Probation. Three further authorities were referred to the Court. In *The Queen v Ip Lung-fai* (Magistracy Appeal No. 716 of 1994), a police constable aged 31 years, was convicted of indecent assault. In the course of taking particulars relating to a traffic offence, the appellant touched the breast of the female victim and arranged a meeting with her, at which he was arrested for the earlier indecent assault. The magistrate imposed a sentence of 2 months imprisonment. On appeal, Litton J considered that the court had not taken sufficient cognizance of the other consequences of the conviction of a police officer, namely, dismissal from the Hong Kong Police Force, loss of police married quarters and loss of 10 years pensionable service. Litton J noted *A.G. v Wai Yang-sung* (1991) 2 HKLR 209, where the Court of Appeal had referred to the clang of the prison gates as the normal sentencing option for indecent assaults committed on the MTR, but stated: This is in my judgment one of those rare cases where, without concluding that the magistrate had either erred in principle or imposed a sentence manifestly excessive - it is nevertheless open to an appellate court to interfere: particularly, where, on the face of the record, the adoption of a fine does not appear to have been considered by the Magistrate as an option. He set aside the sentence of 2 months and substituted for it a fine of \$15,000.00 by way of punishment. Unsurprisingly, Mr. Khosa attached a lot of weight to this case. However this is not a guideline case and Litton J dealt with it without having been apprised of the magistrate's reasons for sentence.. As no appeal against sentence had been lodged, the absence of reasons is unsurprising. Leave to appeal the sentence was granted at the appeal hearing. In *HKSAR v Poon Siu-wai Martin* (HCMA 1012/2001). The appellant, a serving police constable, was convicted of indecent assault of a 14 years old boy and sentenced to 5 months imprisonment. The circumstances as they appeared from the appeal judgment, showed that it was a serious case involving planning and manipulation of the victim. The appeal against conviction was dismissed. It should be noted that there was no appeal against the sentence. *HKSAR v Chau Pak-yuen* (HCMA 124 /2003), was an appeal against conviction only. For his conviction on one count of indecent assault, the appellant had been ordered to complete 180 hours of Community Service. His appeal against conviction was dismissed. This case is of no help to the Appellant, except as an example of the possible use of a Community Service Order as a sentence for an offence of indecent assault. A number of these cases were brought to the attention of the Magistrate at the time of sentencing. He was aware that irrespective of any sentence he imposed, this conviction would have significant adverse consequences for the Appellant, who stood to lose his job, housing allowance and pension entitlement. The Magistrate took those matters into account when assessing the appropriate sentence. [B36] The Magistrate, rightly, considered this offence was serious. He set out the exacerbating features:

- (1) the offence involved a serious breach of trust and was an abuse by the Appellant of his position as a police officer;
- (2) the Appellant had continued to deny taking the photograph;
- (3) the female victim, who was aged 18, was subjected to degrading and demeaning treatment by the Appellant and was upset and agitated at the gross invasion of her privacy;
- (4) the Appellant tried to avoid detection by concealing his telephone and, later, lying about his possession of it;
- (5) because of the Appellant's plea of not guilty, PW1 was required to give evidence about an embarrassing and upsetting experience, as well as facing the further indignity of having an intimate picture of herself handed round the court for examination.
- (6) the Appellant placed the camera so as to retrieve it at a later time. The Magistrate noted the comments of Nguyen J in *HKSAR v Yu King-man* (HCMA 808/2004) referring to the difficulties some victims experience as a result of this type of offence. In his view it was a repulsive, repugnant offence which called for strong sentences to deter other people of like mind from committing such offences. The Magistrate agreed, noting that the distressing features were worse when the perpetrator of the offence was a police officer. He rejected suggestions by counsel that this was an offence which took place in a moment of madness, or a moment of aberration. The Appellant deliberately approached the victim and took her downstairs to put her in a position where he could photograph her. After taking the photograph, he deliberately concealed the camera without deleting the image. The Magistrate considered that to ensure public confidence in law enforcement officers was maintained, the courts must take a serious view of police officers who abused their positions. The Appellant, a formerly upstanding officer, had had a significant fall from grace. There was evidence of his good character before the court, but as the Appellant was a police officer that was neither surprising, nor of much mitigatory weight. A custodial sentence was inevitable. After taking likely financial disadvantages into account, the Magistrate decided that 6 months imprisonment was the appropriate term. I share the view of the Magistrate that this was a serious offence; the Appellant abused his position as a police officer and committed the offence on magistracy premises. The cases referred to by Mr. Khosa have no real significance in light of the different charges therein laid. This was a case of Misconduct in Public Office and thus more complex sentencing factors fell to be considered. A member of the public who seeks the assistance of a police officer, is entitled to expect professional help and protection, and should be able to rely on the integrity of that officer. Those legitimate expectations were denied to the victim. Further, she was not helped by the security officer in the car park, who adopted the view that police officers would not do such things, and merely pointed her towards the police office area in the building from which PW1 had fled. Later, PW1 suffered the ignominy and embarrassment of having to appear as a witness. The wilful misconduct in this case was serious, not trivial, having regard to the responsibilities of the office and the office holder, the importance of the public

objects which they served and the nature and extent of the departure from those responsibilities. (Sin Kam-Wah & Another and HKSAR [2005]2 HKLRD 375) The youthful victim, understandably, was ignorant of court procedures and sought help from a uniformed officer who exploited his position. His subsequent behaviour in caching the telephone with a view to later retrieval, his lying to his superior officer about losing his telephone and his failure to plead, thus ensuring the victim s inevitable embarrassment, do not indicate any remorse. The effects of his misbehaviour are two-fold. First there is an abuse of trust vis- -vis the victim. Secondly, his behaviour brings the police force into disrepute and, to the extent that the offence was carried out in the magistracy building, could affect also the public perception of the judicial system. The Magistrate when sentencing, would have been well aware of the range of sentences for Indecent Assault and for those various offences which involve the taking of up-skirt photographs such cases are commonly dealt with by Magistrates. An offence of Misconduct in Public Office demands a different perspective and a sentencing range which ensures that perpetrators of such offences are punished in a manner that the public understands and expects. Such sentences should also serve as a warning to others who are tempted to misconduct themselves in a similar fashion. The Magistrate understood the serious nature of this offence and dealt with it correctly. He took into account what mitigation existed and imposed a sentence that was neither excessive nor wrong in principle. This appeal against sentence is dismissed. (C-M Beeson) Judge of the Court of First Instance High Court Mr Joseph Wong, SGC, Department of Justice, for the Respondent Mr David Khosa, instructed by Messrs Francis Kong & Co, for the Appellant

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