

HONG KONG / JUDGMENT

HKSAR v. CHU MAN KIT GARY

COURT

Court of First Instance

DECIDED

7 December 2007

CASE / FILE NUMBER

HCMA584/2007

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Before: Hon Beeson J in Court Date of Hearing: 28 November 2007 Date of Judgment: 28 November 2007 Date of Reasons for Judgment: 7 December 2007

REASONS FOR JUDGMENT

The Appellant was charged with Indecent Assault contrary to section 122(1) of the Crimes Ordinance, (Cap. 200) and was convicted after trial in the Magistracy by Mr Stephen Smout. He was sentenced to five months imprisonment. He appealed against his conviction. On 28 November 2007, I allowed the appeal against conviction and refused the Respondent's application for a re-trial. I gave brief reasons for refusing the application for re-trial and advised that I would hand down written reasons for allowing the appeal against conviction and for refusing the application for re-trial at a later date. My reasons follow. The Appellant and the female victim were colleagues who attended another colleague's birthday celebration and afterwards went home together in a taxi at about 5:00 a.m. The taxi-driver was told to go to the Appellant's residence, although the victim lived in another estate in the same area. Both parties had consumed alcohol, although there was no evidence they were drunk. During the taxi journey, the Appellant used his hand to stroke the breasts and private parts of the victim, but the victim did not complain to the Appellant, or to the taxi-driver, of these intimacies. On arriving at the Appellant's building, he invited the victim to spend the night at his residence saying he would send her to her home the next day. Eventually, they went up to the Appellant's flat. During the journey in the lift, the Appellant and the victim indulged in consensual kissing. Once inside the flat, the Appellant undressed himself to his underwear and led PW1 into his bedroom. They lay down on his bed. Subsequently, the Appellant undressed the victim. The victim assisted him by raising her arms to let him remove her clothing, he continued to kiss her and stroke her breasts and private parts. Further touching, caressing and kissing took place; the victim's evidence was

that she tried to move away and indicated her lack of consent, but to no avail. The events which took place in the flat were the subject of the actual charge. At no time was any force used, or threats made by the Appellant and it was agreed that the door to the premises was not locked. The upshot of the evening was that the Appellant fell asleep by the side of the victim who by this stage, was entirely naked except for a pair of briefs half way up one leg, this being the result of an unsuccessful attempt by the Appellant to put the victim's briefs back on. The victim slept in bed with the Appellant in this condition until 8:00a.m. approximately when she left the flat by herself. The victim's evidence was that she had many times asked to leave and the Appellant had squashed the suggestion and suggested that she stay the night, so he could take her back home in the morning. Later a Record of Interview was produced, after the matter had been reported to the police. The Appellant made certain admissions as to indecent touching of the victim. At trial the issue was whether the victim had actually consented to the intimate acts and if not, whether the Appellant knew at the time that she did not consent, or whether he was reckless as to whether or not she consented. The victim gave evidence at the trial. The Appellant's statement also comprised evidence and the Appellant gave evidence to the effect he believed that the victim had consented to the intimacies he engaged in; in particular her behaviour in the taxi and the lift led him to believe she was agreeing to his activities. Two grounds of appeal were advanced. The first was that the Magistrate had erred in concluding that the victim had not consented to the acts of intimacy, because he failed to give sufficient regard to various matters:

- (1) The victim had not protested about the intimacies that took place in the taxi with the Appellant. She had gone voluntarily into the building with the Appellant. She had not resisted the Appellant kissing her during the journey in the lift to the flat. She had not objected to his removing her clothes. She had spent the night in the flat naked, in the Appellant's bed and left only in the morning. The basis of the first ground, was the odd behaviour of the victim in apparently acquiescing in and even assisting the Appellant's activity, without making any attempt to leave, to resist, or to complain. The Magistrate made reference in his Statement of Findings to the surprising features of her evidence, because she had not verbally protested or physically resisted, either in the taxi or in the lift. The Appellant admitted various intimacies in his cautioned statement and explained them as being carried out in the belief the victim had agreed to consensual touching, although that was not the case with all the matters referred to by the Appellant. The second ground of appeal was that there had been material nondisclosure by the prosecution of CCTV footage showing the Appellant and the victim kissing inside the lift. This tape had never been disclosed to the defence and it was not received by the defence counsel until one week after the Appellant had been sentenced for the offence of indecent assault. Counsel for the Appellant submitted that this nondisclosure was a material irregularity and that the tape was of particular importance because the Magistrate had remarked I find it strange that he made no mention of that consensual kissing during the interview when giving his description of events, and I do not believe that PW1 was a willing participant in kissing the defendant. It appears the victim had made no reference to the kissing in the lift in her evidence either. It is clear that although the events which took place in the taxi or in the lift, were not the

subject of the charge, that they did show behaviour which, if found to have occurred, may have influenced the Magistrate's view of the victim's credibility and the reliability of her evidence. In particular, the question of whether the Appellant had cause to believe, prior to his arriving inside the flat, that the victim was consenting and willing to participate in the activities in which he proposed to engage, and indeed had engaged, was one which had to be decided by the Magistrate. It was not disputed that the victim had been subjected to various intimacies during the taxi journey and also inside the lift. The Respondent agreed that the events leading to the alleged indecent acts inside the flat itself were relevant and material matters to be considered by the Magistrate, in particular because as the Magistrate had noted, there were surprising features to her evidence. In his Statement of Findings, the Magistrate, pages 55 and 57 of the Appeal Bundle, commented: The defendant testified that PW1 had voluntarily engaged in consensual kissing with him in the lift and the flat, which led him, along with her non-protestation to the earlier intimacy in the taxi, to believe she was willing. I find it strange that he made no mention of that consensual kissing during the interview when giving his description of the events, and I do not believe that PW1 was a willing participant in kissing the defendant. [B 55] I have no doubt that PW1 did not consent to the acts of intimacy with her breasts and private parts in the flat. I am further sure that the defendant had no honest belief that she had given her consent. These acts of intimacy, namely squeezing of her bare breasts and finger penetration of her vagina, were undoubtedly indecent and without her consent, amount to an assault upon her person. I find the charge proven beyond a reasonable doubt, and the defendant is convicted of it. [B 57] The Respondent confirmed that the CCTV footage was seized by the police on 14 March 2007, soon after the event took place. However for reasons which were not explained, the existence of this tape was not made known to the prosecutor who conducted the trial, or to the defence at any stage during the trial. It was not until 4 June 2007 that a copy of the tape was served on the defence. The Respondent having viewed the CCTV tape agreed that it captured relevant material which: might be relevant, or possibly relevant, to an issue in the case; might raise, or possibly raise, a new issue whose existence was not apparent from the evidence the prosecution proposed to use; might hold out a real prospect of providing a lead on the evidence which went to (a) or (b) or; might undermine the prosecution case or advance the defence case. In particular the CCTV tape, if disclosed, might have created a doubt in the Magistrate's mind as to whether the victim consented to the acts. Because it was not disclosed, it was not possible to be sure whether the Magistrate would have reached the same decision, if he had seen the tape. Having considered the account of the night's events and the evidence, in particular the evidence of the victim, I am also of the view that the features which the Magistrate described as surprising were so unusual, as to cause me some disquiet as to the general reliability of the victim's account of events. Be that as it may, I note the Respondent's very proper concession that there was a material non-disclosure of relevant evidence and, on the basis of the concession, I allow the appeal against conviction. Accordingly the conviction is set aside and the sentence imposed on the Appellant is quashed. Application for Re-trial The Respondent applied for a retrial of the case and that application was opposed by Mr Cheng Huan, SC, who, with Mr Paul Leung who had been

counsel at trial, represented the Appellant. Counsel referred to *Au Pui Kuen v Attorney General* [1979] HKLR 16, where considerations relevant to ordering a new trial were examined by the Court of Appeal. That case related to the Court of Appeal's jurisdiction to order a retrial pursuant to section 83E of the Criminal Procedure Ordinance, Cap. 221, but the principles are similar. The discretion to exercise the power to order a new trial judicially may involve the court in considering and balancing a number of factors some of which may weigh in favour of the new trial and some may weigh against it. The court declined in *Au Pui Kuen* to set out a catalogue of the various factors that should be taken into consideration, nor did it suggest the relative weight to be apportioned to each of the factors. Such factors might vary greatly between one case and another. They are matters which in any case call for the exercise of the court's collective sense of justice and common sense. The fact that an offender has already undergone one trial, is a factor that has to be given the greatest weight (see Lord Woolf NPJ in *Ting James Henry v HKSAR FACC 4/2007*). Counsel for the Appellant also submitted other factors which were relevant to the present case. They were that:

- (a) The prosecution case was undermined by the CCTV tape and other surprising features of the evidence.
- (b) The tape contents provided strong evidence that the victim consented to various intimate acts in the lift. The case was based on one person's word against another's. The Appellant had already spent two weeks in custody. Substantial costs had been incurred by the Appellant for the 4 day trial and for this appeal. If the prosecution had made proper and timely disclosure this situation would not have arisen. If a retrial was ordered the victim would have to give evidence again. (I note however, that the victim had already notified the police that she would be willing to give evidence again.) The Appellant effectively, was a man of clear record prior to the trial. I have considered the facts of the case and the Magistrate's Statement of Findings. I also considered the principles relevant to the question of retrial. Having done so, I am of the view that the interests of justice would not be served by my ordering a re-trial in this case. In making that decision I bear in mind the cumulative effect of the factors outlined earlier, in particular, the strange nature of the victim's evidence and features of her admitted behaviour. The content of the CCTV tape, which was played in court at the appeal hearing, is such that if it had been produced the Magistrate might well have reached a different conclusion about the credibility of the victim. I note that the Appellant has had the anxiety of the case hanging over him for a lengthy period and has already served 2 weeks in prison. For all these reasons, I decline to order a re-trial. I would recommend, if such has not already been done, that a proper investigation be instigated as to the reason the police did not make the CCTV tape available to the prosecutor and did not disclose it to the defence at the proper time. In any event the existence of the tape should have been made known to any advising counsel so that a proper assessment of the strength of the evidence could be made before charging. The resurrection of the tape one month after the alleged offence and one week after sentence was passed, has occasioned a serious waste of court time and costs. (C-M Beeson) Judge of the Court of First Instance Ms Agnes Chan, Senior Government Counsel of Department of Justice, for the Respondent Mr Cheng Huan, SC & Mr

Paul Leung, instructed by Tam & Partners, for the Appellant PAGE - 1udk 1udk _'! Z:uB\ gHG\ u^x\ _'! Z:uB L ~Z Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 27 October 2026 · Esheria