

HONG KONG / JUDGMENT

HKSAR v. HO CHUN BONG

COURT

Court of First Instance

DECIDED

13 May 2002

CASE / FILE NUMBER

HCMA205/2002

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bjbj HCMA205/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.205 OF 2002 (ON APPEAL FROM WSCC 10905 OF 2001)

BETWEEN HKSAR Respondent and HO CHUN BONG Appellant

Before : Deputy High Court Judge McMahon in Court Date of Hearing : 7 May 2002 Date of Judgment : 13 May 2002

J U D G M E N T

AUTONUMOUT This is an appeal against conviction only. The appellant was convicted of five offences of making persistent telephone calls, contrary to section 20(c) of the Summary Offences Ordinance, Cap.228 (the Ordinance). That section is in the following terms Any person who

- (a) sends any message by telegraph, telephone, wireless telegraphy or wireless telephony which is grossly offensive or of an indecent, obscene or menacing character; or
- (b) sends by any such means any message, which he knows to be false, for the purpose of causing annoyance, inconvenience or needless anxiety to any other person; or
- (c) persistently makes telephone calls without reasonable cause and for any such purpose as aforesaid, shall be liable to a fine of \$1,000 and to imprisonment for 2 months.

AUTONUMOUT The appellant advances a number of grounds against his conviction. They can perhaps be conveniently summarised as follows. He says that :

- (1) The magistrate erred in finding that the appellant had no reasonable cause to make the said telephone calls.

- (2) The magistrate may have reversed the onus of proof by not holding that the prosecution had to disprove the appellant had reasonable cause to make the telephone calls.
- (3) The magistrate wrongly took into account evidence of phone calls made to the complainant after the last charged date.
- (4) The magistrate failed to properly consider certain evidence. AUTONUMOUT The facts of the case, as accepted by the magistrate, were that from about 1998 the appellant and the complainant had commenced a relationship which over the following few years had various ups and downs, so much so that in December 2000 the appellant married someone else. But the relationship between the appellant and the complainant did not completely end until about March 2001, following which the complainant left Hong Kong for a holiday overseas. AUTONUMOUT When she returned, the appellant rang the complainant and was told by her she did not want to talk to him and that their relationship was over. AUTONUMOUT Following upon that, on the days of 1 and 3 April (being charged offences 1 and 3), the appellant rang the complainant very many times during the course of each day. There then followed a gap of two weeks and then over 16, 17 and 18 April (being charged offences 4, 5 and 6), the appellant resumed his continuous telephoning of the complainant. AUTONUMOUT On 1 April, the appellant rang the complainant some 30 times commencing at about 3:20 a.m. and concluding at about 11 p.m. on that day. On 3 April, the appellant rang the complainant some 157 times from about 10 a.m. and concluding at some time after 9 p.m. On 16 April, the appellant rang the complainant some 30 times between noon and midnight. On 17 April, the appellant rang the complainant some 60 times between 9 a.m. and 11:30 p.m. Finally on 18 April, the appellant rang the complainant some 60 times between 1:30 a.m. and midnight. AUTONUMOUT It is true that many of these calls were of no significant duration being immediately transferred to the complainant's answering service, with no message being left, or were otherwise of very short duration being rapidly terminated. But the volume of calls is quite simply staggering and the persistence of the phone calls was never in issue before the magistrate so far as the days relating to the offences are concerned, nor was it argued otherwise before me. Suffice it to say, the magistrate was satisfied as to the telephone calls persistence on the days of the offences of which the appellant was convicted. AUTONUMOUT What was in issue was whether the calls had been made by the appellant for the purpose of annoying the complainant and whether it had been proven he had no reasonable cause to do so. AUTONUMOUT So far as the first ground of appeal is concerned, i.e. that the magistrate erred in finding the appellant had no reasonable cause in making the telephone calls, it is obvious that the starting point of the magistrate's deliberations was the sheer volume of calls the appellant had made to the complainant's telephone. He said this The defendant does not deny making the calls. He does not dispute that they were persistent. He says that they were made for a reasonable cause and that is to contact Miss Cheung for a proper reason and that, in any event, their purpose was not to cause annoyance. I realise of course that the defendant does not have to prove anything. He has a clear record and I remind myself of the significance of that. But the only inferences that can be properly drawn from the evidence from the very large number

of telephone calls is that there was no reasonable excuse for the defendant to make these calls and that his purpose was to annoy Miss Cheung. AUTONUMOUT The magistrate also took into account the reasons proffered by the appellant during the course of evidence. Those reasons centered primarily around the appellant's case that he wanted to ascertain the state of his and the complainant's relationship. Other reasons given for the telephone calls were also that he wanted to organise the return of the complainant's clothes and, at one time, ask why the complainant was diverting his calls to his wife. AUTONUMOUT The magistrate said generally in respect of the reasons advanced by the appellant for making these telephone calls The defendant also explained that the purpose of these numerous telephone calls after 1 April was because he was uncertain as to the state of their relationship and, in any case, wanted to bring it to an end. But that, if I may say so, is nonsensical. AUTONUMOUT It is plain that the magistrate was entitled to take into account both the volume of calls in ascertaining whether there was reasonable cause for their persistence, as well as the nonsensical nature of the appellant's proffered explanations. But Mr Mullick for the appellant urged upon me during the course of this appeal that the magistrate should have considered whether the test for whether there may have been a reasonable cause was subjective rather than objective. Mr Mullick suggested that the magistrate, by the terms of his findings, wrongly regarded it as an objective test. AUTONUMOUT In my view, it is an objective test which should be applied to the question of whether a defendant had reasonable cause to make persistent and annoying telephone calls in breach of the provisions of section 20(c) of the Ordinance. AUTONUMOUT The purpose of the legislation is to protect the public from crank calls . It seems to me that in matters of offences designed to protect the public and public services from abuse, an objective test is often more appropriate than a subjective test. The legislation would in part be rendered nugatory if crank callers or persons of that ilk could rely upon their own, perhaps badly mistaken, beliefs to make such calls with impunity. AUTONUMOUT In *A v. Police* [1999] 2 NZLR 501, Baragwanath J said accordingly reject the argument that the term reasonable excuse means reasonable only in the subjective perception of the defendant. Such construction would allow the insensitive defendant to engage in violence without sanction. Reasonable has been adopted by the law in a range of contexts as imposing an objective standard as a societal norm. In this context I consider it to mean an excuse which an ordinary New Zealander would consider to be reasonable in all the circumstances. And then later Whether there is an excuse from the conduct will turn on whether it was objectionably reasonable for the defendant to engage in it . In my view, so far as this particular consideration is concerned, reasonable cause can be acquainted with reasonable excuse, so far as any consideration of law is concerned. AUTONUMOUT Also, in *Rema Industries and Services Pty Ltd v. Coad* (1992) 107 ALR 374, Lockhart J said in respect of the phrase reasonable cause in the context of a commercial regulatory offence The test of reasonable cause in the context in which the expression appears imports an objective standard, but it must be applied to the facts and circumstances known to the defendant and facts and circumstances which, by reason of the defendant's duties as a director or officer of the company, ought to have been known to him. Whilst not particularly factually in point, again

the objective test applied by Lockhart J in the circumstances of that case was applied in terms of considerations of the protection of the public and of rendering effective the protective legislation. In my view, the same considerations apply in the present case. AUTONUMOUT Further, if in the drafting of section 20(c), our legislature had intended to make a defendant's own subjective belief determinative of whether his acts were with reasonable cause then the provision could simply have referred to a requirement that a defendant be without belief he had reasonable cause. The legislature did not so do. In my view, the magistrate was right to approach this element of the present offence on an objective basis. AUTONUMOUT Before I leave this, there is one practical matter. The magistrate inferred from the objective fact of the volume of telephone calls made that the appellant both had no reasonable cause to make these telephone calls and that the reason he made the calls was to annoy the complainant. AUTONUMOUT It seems to me in the vast majority of cases prosecuted under section 20(c) of the Ordinance that given the fact that the purpose of such telephone calls was to cause annoyance to the recipient, then it would follow that there was, in many cases, no reasonable cause for the making of the calls. In other words, it is difficult though perhaps not impossible to envisage cases where a defendant makes persistent telephone calls purposely to cause annoyance, but claims to have a reasonable cause to do so. AUTONUMOUT It seems to me that this case was no exception to the typical position I have referred to. Nevertheless, each element must be considered separately and on its own merits. But as I say, in very many cases, the evidence which goes to establishing that the purpose of the telephone calls made by a defendant was to cause annoyance would also be relevant evidence to considerations as to whether the defendant had a reasonable cause to make those same telephone calls. That was the position in the present case. Here, a vast number of telephone calls formed the facts which led the magistrate to infer, as the only reasonable inferences, that the calls were made for the purpose of annoying the complainant and were also made without reasonable cause. The magistrate was entitled to draw these inferences from the volume of telephone calls alone. There were no other reasonable inferences to draw. AUTONUMOUT There is nothing in the first ground of appeal. AUTONUMOUT turn to the second ground of appeal, i.e. that the magistrate may have reversed the onus as to proof of the element of the appellant being shown to have made the telephone calls without reasonable cause. AUTONUMOUT It is, in my view, quite plain that he did not do so. The magistrate says this at the very beginning of his Reasons for Verdict The prosecution have to prove three matters in respect of each of these six charges. They have to prove that the defendant persistently made the telephone calls in question, that these calls were made without reasonable excuse or cause, and that their purpose was to cause annoyance to Miss Cheung. Mr Mullick who appeared for the defendant, accepts that in general the calls were persistent. What the magistrate said in that regard is quite plain. There was nothing in the balance of his Reasons for Verdict which in any way suggested that he overlooked that the prosecution had to prove the calls were made without reasonable cause. AUTONUMOUT There is no merit in this ground of appeal. AUTONUMOUT The third ground of appeal is that the magistrate wrongly took into account evidence of persistent telephone calls made after the last charged date. These telephone

calls were not traceable to the appellant. AUTONUMOUT The only reference to post 18 April 2001 telephone calls, i.e. telephone calls made after the last charged date, came from the complainant herself. That evidence came about in the course of her explaining why she had not reported the matter until some weeks after the date of the last charged offence, i.e. April 2001. The evidence she gave in that regard was that persistent phone calls continued until she finally could take no more and reported the matter to the police. The maker of the phone calls after 18 April could never be identified. AUTONUMOUT There is nothing whatsoever in the magistrate's Reasons for Verdict to suggest that in any way he assumed that the appellant made these telephone calls. The evidence was relevant only to the credibility of the complainant. It was admissible on that basis only. The magistrate made no other use of it. He most certainly does not appear to have used that evidence as support for the prosecution's case against the appellant. AUTONUMOUT There is no merit in this ground of appeal. AUTONUMOUT Finally, Mr Mullick complains that the magistrate failed to properly consider certain evidence. There were two main areas of evidence which are the subject of his complaint in this regard. AUTONUMOUT The first area of evidence that the appellant says was wrongly considered related to the appellant and the complainant spending some time together in the Gold Coast Hotel. The appellant alleged this hotel stay was in March 2001 and demonstrated that even after his marriage, his relationship with the complainant continued and gave him cause to continue to telephone her in April 2001 (over the days of the charged offences) so as to ascertain the status of their relationship. The complainant said she did not think she and the appellant stayed together at that hotel in March 2001 but did so at a much earlier date. AUTONUMOUT The magistrate, in his findings, found the complainant's evidence in this regard may have been mistaken. AUTONUMOUT Mullick argues that the magistrate failed to take this aspect of the evidence into account in assessing the complainant's credibility. AUTONUMOUT The magistrate, in his Reasons for Verdict, spent some time setting out and summarising the evidence and issues in this aspect of the case. He concluded by saying this But does any of this matter? It does not shed any light on the telephone calls that were made in April except that it shows that the defendant and Miss Cheung were enjoying intimate relations rather later than Miss Cheung accepts. It also goes to the question of her credibility. AUTONUMOUT It is plain from that that the magistrate was aware that the matter went to the credibility of the complainant as well as to the general issue. He dismissed it as having any real bearing on either. He was entitled to do so. In this regard, he goes on to say But even if she is mistaken about the date of the visit to the Gold Coast, it does not, in my view, assist the defendant. Even if the defendant and Miss Cheung continued a relationship until later than Miss Cheung accepts, the plain fact is that it was over by the time Miss Cheung departed for a holiday later in March 2001 and as I have already said, the defendant knew this namely, that the relationship is over at the latest by the date of her return to Hong Kong on 1 April

2001. The making of this vast number of telephone calls that he made to her was unnecessary, unjustified, without reasonable cause and were calculated to annoy Miss Cheung. AUTONUMOUT It is plain the magistrate took this aspect of the case into account and

concluded that it did not assist the appellant's case so far as him possibly having reasonable cause to make the offending telephone calls, because there were simply too many such calls and that, on the evidence of the complainant as a whole, when the phone calls were made the appellant must have realised his relationship with the complainant was over, and he had no good reason to make this volume of telephone calls to her in those circumstances. In my view, the magistrate dealt with this aspect of the evidence quite properly. AUTONUMOUT Another aspect of the evidence complained of as not being properly considered by the magistrate relates to the fact that on 17 April, it was alleged various phone calls made to the complainant were apparently diverted to the appellant's wife in some way. AUTONUMOUT The appellant suggests that then explained, in some way, why he had reasonable cause to continue to telephone the complainant on 17 and 18 April so as to find out why the complainant was doing so and why she apparently wanted to keep contacting the appellant's wife in this way. AUTONUMOUT Generally, the magistrate had described the appellant's stated reasons for telephoning the complainant as lacking sense. He said this The defendant also explained that the purpose of these numerous telephone calls after 1 April was because he was uncertain as to the state of their relationship and, in any case, wanted to bring it to an end. But that, if I may say so, is nonsensical. AUTONUMOUT The appellant's evidence that he continued to telephone the complainant to find out why she was diverting his calls to his wife could be comfortably accommodated within the magistrate's general description of the appellant's reasons for phoning the complainant as nonsensical AUTONUMOUT In short, the magistrate had taken the complained of aspects of the evidence into account properly and in my view had arrived at what, on the evidence, were his inevitable conclusions that the persistent telephone calls made by the appellant were without reasonable cause and were for the purpose of annoying, at least, the complainant. AUTONUMOUT The appeal is dismissed. (M.A. McMahon) Deputy High Court Judge Mr E.J. Brook, SGC of the Department of Justice, for the Respondent Mr John Mullick, instructed by Messrs Y.S. Lau & Partners, for the Appellant - PAGE - "@AB "@AB "@AB bff.*ff & 6" Alice Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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