

HONG KONG / JUDGMENT

HKSAR v. KIM JONG WOO

[2023] HKCFI 593**COURT**

Court of First Instance

DECIDED

22 February 2023

BEFORE

Hon Campbell-Moffat J in Court

Dates of Hearing: 15 and 22 February 2023

Date of Judgment: 22 February 2023

CASE / FILE NUMBER

HCMA271/2022

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.**Source record****HCMA 271/2022****[2023] HKCFI 593****IN THE HIGH COURT OF THE****HONG KONG SPECIAL ADMINISTRATIVE REGION****COURT OF FIRST INSTANCE****MAGISTRACY APPEAL NO 271 OF 2022****(ON APPEAL FROM KCCC 2422 OF 2021)****BETWEEN****HKSAR****Respondent****and****Kim Jong Woo****Appellant**

Before:

Hon Campbell-Moffat J in Court

Dates of Hearing: 15 and 22 February 2023

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JUDGMENT

Introduction

The appellant was convicted after trial of two counts of indecent assault contrary to S122(1) of the Crimes Ordinance, Cap 200, before Andrew Mok, Magistrate, sitting at the Kowloon City Magistrates Court on 19 July 2022. He was sentenced to 8 weeks' imprisonment. He now seeks leave to appeal both conviction and sentence.

References in this judgment are as to the appeal bundle ("AB") and to the transcript ("T"), which has not been paginated within the appeal bundle.

The Prosecution Case

The appellant was a mature man of 50 who was employed as the Chef de Partie for a well-known western restaurant operating in Hong Kong. PW1 was 24 years of age and employed as a pastry chef within the same restaurant. In September and October 2020, the appellant and PW1 worked within the same kitchen. At the end of October PW1 complained that at some point in September 2020, whilst working within the pastry kitchen, the appellant placed his right arm around her waist over her clothes and then moved the palm of his hand up her right side to under her armpit close to her right breast but not on her right breast. He then used his index finger to press against her armpit area once or twice. This was the subject of Charge 1. Between 19-24 October 2020, whilst in the pastry kitchen area, the appellant walked past PW1 and patted her left buttock once or twice. This was the subject of Charge 3. The appellant was acquitted upon Charge 2.

The Defence Case

The appellant did not give evidence. His case as put, but not accepted by PW1, was that these incidents did not happen. Ms Tsang, appearing here and in the court below, maintains the true thrust of the defence case here and below, hinges upon a material irregularity between the complaint made by PW1 to her employers in November 2020 and her evidence in court. That inconsistency being so material as to render the conviction unsafe and unsatisfactory.

The Grounds of Appeal

In his perfected grounds of appeal, the appellant submits:

Ground 1

The Magistrate erred in his interpretation and analysis of the instantaneous record (D1) written by PW1, which was inconsistent with her evidence in the trial. As a result, he erred in ruling that X had been consistent in her account of events.

Ground 2

The Magistrate failed to resolve satisfactorily, other discrepancies and inconsistencies in the Prosecution's evidence.

Ground 3

The Magistrate did not sufficiently consider the possibility of misunderstanding or mistake.

The Law

Section 122 Indecent assault requires the prosecution to prove:

That the accused intentionally assaulted the victim;

That the assault, or the assault and the surrounding circumstances, are capable of being considered by right minded persons as indecent; and

That the accused intended to commit an indecent assault.

Analysis

The common law allows for the fact that we are all by necessity subject to the normal daily human contact which follows life in the 21st century. Trains and workplaces can be crowded; inadvertent contact takes place without consent. Something more is required to elevate that contact to an indecent assault. An intentional touching between neighbours, friends or colleagues may not be considered an assault yet it may do so between strangers. The touching of a hip or shoulder may be less likely to be considered sexual than the touching of a breast or buttock. Whether an act is a sexual assault very much depends upon the circumstances. In this case, there was no suggestion of consensual or inadvertent contact. The defence case was that it never happened. That being the case the prosecution must prove that the appellant touched the claimant in a manner which right minded people would think indecent in the circumstances and that he did so intentionally. The latter, on the facts of this case, requires the drawing of an inference.

As to Ground 1, this goes to the facts of Charge 1. However, the essence of Ms Tsang's complaint on appeal is that the inconsistency between the account given by PW1 in D1 and PW1's evidence in trial, is so fundamental that she should not be believed at all. Either as to the events under Charge 1 or Charge 3.

D1 was a handwritten note compiled by PW1 for her own use as an initial draught when she finally told her boyfriend in late October 2020, about the incidents. It referred to events over a two-month period, some of which PW1 took offence at and some of which she did not. When matters escalated to a complaint being made to her employer, she provided that personal note to them. She did not intend for it to be used for any other purpose. Once the police became involved, the note was passed on to them by her employer. Thereafter, and contemporaneous with D1, PW1 made the first of 3 statements to the police, about which the defence do not allege

any inconsistency.

D1 was almost entirely redacted before the court save for one line which amounted to “He even tried to touch the area at my armpit, near the side of my breast”. The court has not had the benefit of knowing the content of the remainder of the document to set it in context. Both counsel inform the court it is irrelevant. The defence case was and is, that the line should be construed as he ‘attempted or tried’ to touch her breast but did not do so. Defence Counsel suggested that it meant that the appellant never actually touched the area of her armpit near the side of her breast. The complainant denied this. She said: “But the defendant did touch the side of my underarm. I am not quite sure whether this part can be constituted as the side of my breast”. That was the top and bottom of cross-examination on this point on inconsistency, which Counsel submits is the main thrust of her appeal.

This was a private initial draught by a young lady with no legal training that we know of. It was not written in anticipation of court proceedings and was supplied to her employer, presumably in confidence. Contemporaneously with that note, she made 3 police statements. No issue was taken as to consistency between her oral evidence and with either the remainder of D1 or with the three police statements. From that it can be inferred that the contents of the remainder of the documents are not alleged to be inconsistent with her oral testimony.

The greatest weight can and should be given to a witness who gives evidence on oath before a tribunal of events they were personally connected with. What they saw or heard or what they did. This is because the witness subjects themselves to cross-examination and their evidence can be tested. That is the best evidence in this case on these facts. The learned magistrate had the opportunity to see at first hand the manner in which that evidence was given and the witness’s reaction to the appellant’s case. On the other hand, D1 is documentary hearsay. Although it goes to PW1’s state of mind at the time she made it (which was not contemporaneous with events), it was not before the court as evidence of recent complaint. It was before the court as evidence of a prior inconsistent statement. The best evidence of PW1’s state of mind at the relevant time is from the witness herself. In this instance the complainant was the author of D1 and was in the best place to explain in court what she intended by the words upon it. In cross-examination she explained what she meant by them. She was not undermined. There is no evidence to the contrary. As for the submission by counsel in trial as to the construction to be placed upon the sentence relied upon, the learned magistrate below was far better placed than I, given it was in Chinese. In the event, he appears to have accepted that the Chinese characters translate to “tried to or want to”. He took the view: “... the term ‘tried to’ or ‘want to’ when used by one person describing the acts of another, often means something has already been done.”. Accordingly he found no inconsistency between PW1’s written account within D1 and her oral account in court.

PW1’s oral evidence was clear, unambiguous and fair throughout. She maintained the appellant placed his hand on her waist, slid his palm up the right side of her body and into a position near to her breast and under her armpit. He then pressed against her body with his finger. The appellant, through counsel said it never happened. The complainant disagreed. There was no suggestion by Counsel that the appellant could have accidentally or inadvertently touched the

complainant in a manner which could be construed as sexual but in fact was not. That leaves a tribunal of fact with a simple but stark choice. Do I believe the evidence of the complainant or not? Am I sure this incident occurred in the manner described? Or, is there a possibility that the appellant was not there, did not touch her at all and that therefore the complainant is lying? The learned magistrate clearly accepted the evidence of PW1 and in so doing, rejected the defence as put by counsel. Having read that evidence I can see nothing which suggests that the view he took was plainly wrong.

As to Ground 2, the only incident relied upon by Ms Tsang to support this ground of appeal relates to events which post-date the charges before the court and which did not form part of any charge. It relates to an event in late October which took place around 8:00 pm and about which PW1 stated in chief, "... so it would be around last orders, around 8:30 pm, to 9:30 pm or to 10:00 pm, around that period". Under cross-examination, Ms Tsang suggested this was 26 October, which PW1 accepted and said "... it was one or two hours before the last order point arrived". PW1 stated she remained in the kitchen after the incident for 2-2.5 hours. When shown that she clocked off at 20:06, PW1 said "but I could not confirm whether I left right after or whether I stayed further at this company". When it was suggested that she did leave the premises at 20:06, PW1 was unsure when she left. When Counsel then suggested the incident never happened, she disagreed. Ms Tsang submits this is a discrepancy or inconsistency which the learned magistrate had a duty to resolve. There is no merit in this argument. These were uncharged acts which post-dated the offences before the court and which went to credibility alone. Ms Tsang was allowed to explore this collateral issue but received what amounted to a fair concession from the witness. It was wholly proper for the learned magistrate not to rely upon it and there is in any event no obvious material inconsistency. A witness is not a computer. Timings and dates may become confused. The incident in question is said to have taken place around 8:00 pm. PW1 and the appellant were on shift and working in the same kitchen at the time when the incident is said to have taken place. What PW1 did thereafter is irrelevant. It refers to an uncharged act and, in any event, under cross examination the witness accepted she could not now say how long she stayed at work after clocking off, during which time she does not allege anything occurred.

As to Ground 3, this is not available to the appellant to argue. At no stage in the trial below was it ever suggested that an incident had in fact occurred but that it was inadvertent or unintentional touching and that PW1 had misunderstood it as touching of a sexualised nature. The Rule in *Browne v Dunn* (1893) 6 R 67, H.L. is a strict one and if that was the appellant's case, it should have been put to PW1. The appellant never accepted through counsel that he was in close proximity to PW1 during the alleged incidents save to accept that he was working in the kitchen that day. It was never suggested for example, that he was merely passing her in a tight work space or leaning over her to pick up equipment. Nothing of the sort was suggested to explain the touching. It is not the job of the tribunal of fact to consider defences not raised by counsel and to speculate where there are no proven facts before the court which would support such a theory. Whilst the appellant has every right to remain silent and require the prosecution to prove their case against him, he cannot complain if there is no evidence from which the court can properly consider his case as put through counsel but not accepted. In this instance it was not put at all.

Appeal v Sentence

No doubt, the reality of the situation in this small, congested and very busy kitchen, is that all employees, no matter what their status, regularly came into very close contact with one another and worked as part of a team. I am sure that it is at times a stressful environment with tempers flaring or joy at a job well done. Indeed, PW1 fairly accepted there was certain general behaviour, including the brushing of hands over her back, hugging, and kissing her cheek above her mask, which she put down to a cultural issue and about which she did not make any complaint. Whilst it is correct to say that the appellant and PW1 were colleagues and in the position of senior to junior, they were not strangers and would have been regularly working side by side in close confines. They would also have been wearing the appropriate fire proof chef's work clothes. In other words, PW1's upper garments would have been loose fitting and not flimsy. They would have fallen below her hips over her chef's trousers. There would have been no possibility of skin to skin contact and her breast was not, in fact, touched. Whatever touching there was, was of normal firmness neither a glancing touch or with any pressure. Nevertheless, it was unwanted, uncalled for and made her uncomfortable. The unwarranted sliding of a palm over the waist and back of a much younger colleague would have been considered indecent even if it had not slid all the way up to the armpit to her breast. It is an invasion of privacy, it is the manner and circumstance for the act which makes it so. There was no reason for the appellant to carry out that act in that manner at that time. Equally, it can never be acceptable for the appellant to pat the buttock of any colleague in any circumstances. To touch someone's buttocks is a clearly sexualised act.

Having said that, and in no way seeking to undermine the need to protect people from unwarranted sexualised touching, this was not the worst case of its kind. I take into consideration the feelings of the complainant but I also take into account that the consequences for the appellant were significant. This sort of behaviour is wholly unacceptable but it calls for a short sharp shock. For him and for those who believe this sort of behaviour is acceptable in the workplace. It is not but nothing is gained from a lengthier sentence of imprisonment for a mature man of heretofore good character, who has lost his job and will never again come before the courts for behaviour of this kind. Taking into consideration all that has been said, and the fact that this was a continuing course of events in a working environment in which there was some consensual proximity, I would reduce the overall sentence to one of 6 weeks reflecting the learned magistrate's original sentence of 6 weeks' imprisonment on Charge 1 and 6 weeks' imprisonment upon Charge 3. The imprisonment for Charge 3 to run wholly concurrently with that on Charge 1.

Conclusion

This appeal against conviction is dismissed. The sentence of the Magistrate stands save that it will be reduced to a total sentence imprisonment of 6 weeks. Costs of this appeal will be to the respondent to be taxed if not agreed.

(A P Campbell-Moffat)

Judge of the Court of First Instance

High Court

Mr Douglas Lau, PP, of the Department of Justice, for the respondent

Ms Olivia Tsang, instructed by Ivan Tang & Co, for the appellant

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