

HONG KONG / JUDGMENT

# HKSAR v. KO SAU KUEN

## COURT

Court of First Instance

## DECIDED

15 February 2007

## CASE / FILE NUMBER

HCMA743/2006

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bjbj HCMA 743/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 743 OF 2006 (ON APPEAL FROM ESCC 980/2006)

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BETWEEN HKSAR Respondent and KO SAU KUEN Appellant

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Before: Deputy High Court Judge E Toh in Court Date of Hearing: 15 February 2007 Date of Judgment: 15 February 2007

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J U D G M E N T

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The appellant was charged with one charge of theft, and after trial was convicted. She now appeals against the conviction. The facts in this case is actually quite simple. PW1 was a security guard at the Marks & Spencer Department Store and she gave evidence that she observed the appellant at a jewellery rack, who took a necklace (exhibit P1). After looking at it for a few seconds, the appellant had put the necklace into her fist, and then she took another necklace which was of the same style as exhibit P1, looked at it for a moment and then put the second necklace back to the rack while the first necklace was still in her hand. The security guard followed the appellant and kept her under observation, and, observed that the appellant left the jewellery rack and then put her right hand into the front pocket of her blazer. After that, she took the escalator downstairs to lower floor, then she returned upstairs and left the store without making payment. PW1 then followed the appellant and then stopped her 30 feet away from the store. The learned Magistrate in his Statement of Findings had this to say at page 188 of the court s record: PW1 tailed the defendant, and intercepted her on the street about 30 feet away from the store. (PW1) told her that she had not made payment. The defendant at first said she had replaced the necklace on the rack. But PW1 said the first necklace had not been put back to the rack. Then

the defendant, at once, took out exhibit P1 from the right front pocket of her blazer, and said, m sorry. I ll pay for it now. The evidence that Mr Cheng who represents the appellant today, has directed me to is the evidence of PW1, at page 94 of the Appeal Bundle, where the PW1 in chief had said: After she had been intercepted, I revealed my identity. I said, am a security guard of the Marks and Spencer. Just now you have taken a necklace at our Marks and Spencer necklace of the Marks and Spencer and put it in the right front side pocket of your blazer . Then she said then from the right blazer pocket she took out the necklace and gave it to me. She said, Sorry, I will pay for it now And then, under cross-examination at page 107, she was asked whether she remembered that the appellant had told her that she had remembered that she had put the necklace back on the rack. And she agreed and that she had forgotten to say this in chief. What concerns me is that, the learned Magistrate s words in his Statement of Findings does lead one, without the aid of the transcript, to assume or infer that, first of all, when the appellant was first told that she had not made payment, the appellant had tried to deceive the witness by saying she had placed the necklace on the rack. And then when told that she had not done so, then the appellant at once took out the relevant necklace from her blazer pocket, thus the implication being that the appellant had not forgotten about the necklace at all, and knew all along that the necklace was in the right front pocket of her blazer. This is important because the defence is that she had forgotten. Obviously, the learned Magistrate could after he had properly considered the evidence, at the end of the day, considered that despite the fact that the security guard reminded her, that from all of the evidence it does not support the fact that she had forgotten the necklace, but he would have to have explained that logically from the evidence. But I am concerned that the learned Magistrate put the words at once in his sentence where he said that the defendant took out the exhibit P1 from her right front blazer pocket. It implies that the learned Magistrate was stressing the point that the appellant had not forgotten at all, because she at once took it out of her pocket. This is important in this type of case. Basically, the mental condition or intent of the appellant when first tasked with the fact that she had taken or stolen something from the shop without payment is important, because at the end of the day it is evidence from which the learned Magistrate can infer her intent, and added onto that I will only deal very briefly with his analysis of the doctors evidence because I consider that the above mentioned error in his Statement of Findings is fatal to the conviction but very briefly, the learned Magistrate had also made the observation that he considered that the two doctors called by the defence had contradicted each other. Basically, the learned Magistrate was not impressed with either of them. At page 190 of the court s record, the learned Magistrate said this: In Dr. s report, he said the defendant very likely did not know what she was doing at the material time, but Dr. Mak, in court, said the defendant should know As Mr Cheng has very correctly pointed out, in fact, what Dr. Mak said was in answer to a question, at page 171: Q. If so, in her daily life in general, she would know what she is doing? A. (She) should know that, but she may not be able to stay focused, sometimes she may experience palpitation and would be easily frightened, etc. So the question asked of Dr. Mak was in her daily life in general , he was not specifically pointing to the day in question, whereas Dr s evidence was that in his opinion, on that day in question, she did not know what she was doing. And in fact, Dr. Mak, I am told by Mr Cheng, had not been specifically asked in his opinion about the material day. Another point also very briefly is the fact

that the learned Magistrate had criticised the defence. In his Statement of Findings at page 194 of the Appeal Bundle, the learned Magistrate said this: Finally, this court could not agree that well educated people would not commit crimes as submitted by the defence. The court has witnessed many great bankers, senior employees in big organizations, doctors and lawyers committing various crimes. If one looks at defence counsel s submission at the trial at page 180 of the Appeal Bundle, the defence counsel was talking about the personality of the appellant and he was saying that the idle rich may commit a crime on a moment s excitement and then Counsel refers to a famous case about a defendant, from a famous banker family. Finally defence counsel was saying that if you look at the appellant s background, her willpower, and her working hard at her position, her personality would not indicate that she would be like the idle rich who would commit an offence for pure excitement alone. So it is clear that counsel for the defence had never submitted that educated people would not commit such an offence and the learned Magistrate was therefore wrong again in his understanding of counsel s submission. The conviction therefore at the end of the day does leave a lurking doubt, and it is unsafe and unsatisfactory for the reasons I have given above. The defence was not properly understood in view of the errors the learned Magistrate made in his understanding of the actual evidence before him. The appeal is allowed. The conviction is set aside. The fine paid should be returned to the appellant. (E Toh) Deputy High Court Judge Ms Polly Wan, Ag. SADPP, for the Respondent Mr Cheng Huan, SC leading Mr Bernard Chow, instructed by Messrs Or, Ng & Chan, for the Appellant. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk HCMA.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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