

HONG KONG / JUDGMENT

HKSAR v. KONG PAK WAH

COURT

Court of First Instance

DECIDED

23 December 2003

CASE / FILE NUMBER

HCMA689/2003

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bjbj HCMA689/2003 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.689 OF 2003 (ON APPEAL FROM ESCC528 OF 2003)

BETWEEN HKSAR Respondent and KONG PAK WAH Appellant

Before : Deputy Judge M. Poon in Court Date of Hearing : 23 December 2003 Date of Judgment : 23 December 2003

J U D G M E N T

AUTONUMOUT The appellant was convicted of two charges of obtaining a pecuniary advantage by deception, contrary to section 18(1) of the Theft Ordinance, Cap.210. He was sentenced to 12 months imprisonment on each charge to run concurrently. He originally appeals both his conviction and sentence but has indicated through his counsel that he is now abandoning his appeal against sentence. AUTONUMOUT The prosecution case was that PW1, an insurance agent, was approached by the appellant on a day in June

2000. She was complimented for her working ability and was then told that he was interested in taking out an insurance policy. She was given a name card of an insurance agent from AIA whom, the appellant alleged, he had previous dealings with. At the back of that card was written three Chinese characters, Ng Ching Ming, and the appellant told PW1 that was his name. A few days later they arranged to meet. He provided his particulars to her on a piece of paper, and she copied such onto the Accident Insurance Application Form. She witnessed the appellant signing the form. The appellant also claimed that he would like to take out one such policy with his wife and asked if he could sign on his wife's behalf. PW1 told him that such was not acceptable, but nonetheless gave him a blank form to take

home. A few days later, they met again. The appellant returned that form to PW1 with a signature that he claimed to have been signed by his wife, Li Yin. He also provided her with a piece of paper with his wife's particulars and she copied such onto an application form. He also handed two income proofs to her issued by a Man Wah Company.

AUTONUMOUT PW3 was the proprietor of a company which provided secretarial services to a Man Wah Company in 2000. She testified that the Man Wah Company was opened by a person who claimed to be a Mr Po. She could vaguely say that the appellant resembled Mr Po. She also said that a lady who claimed to be the secretary went up to collect mail from time to time. AUTONUMOUT The admitted facts showed that Man Wah Company no longer existed in 2000. AUTONUMOUT Later on that month, unknown to PW1, two accident claims were made by Ng and Li under the above policies. She only came to know about such later. The accident claimed money in relation to one of the policies was paid into an account opened by PW2 for the use of his wife Wong Ling who used to be an agent with the AIA. AUTONUMOUT PW4, from the AIA, testified as to the normal procedure to be followed by insurance agent, in particular, that the application forms should be signed in front of them instead of having it signed and returned later. AUTONUMOUT The appellant elected to give evidence, he said that he had known PW1 long before June

2000. He said he had refused to purchase insurance policy from her but, instead, introduced some of his relatives to her. He said on a number of occasions in 1999 PW1 had asked him to lend money to her. AUTONUMOUT Two witnesses were called by the appellant, they testified to the effect that the appellant did know PW1 as early as 1999 and that PW1 was seen asking for a loan from the appellant which the appellant refused. AUTONUMOUT The appellant has, through his counsel, advanced a total of 16 grounds of appeal. From those grounds, I can discern two broad categories. In saying that, I have confirmation from counsel for the appellant that he is not relying on the ground that the learned magistrate had wrongly permitted prosecution to cross examine and reveal previous convictions of the appellant. The two broad categories are as follows :

- (1) the learned Magistrate's revocation of bail during the course of the trial without affording a chance to the appellant or his counsel to be heard was an indication of bias on her part and thus deprived the appellant of a chance of a fair trial; and
- (2) the learned Magistrate had wrongly rejected the evidence of the appellant and his witnesses and found the evidence of PW1 reliable. AUTONUMOUT I shall first turn to the issue of revocation of bail. There was a complaint by two prosecution witnesses that they had received telephone calls of a threatening nature, telling them not to testify in this case. These matters were brought to the attention of the Magistrate by counsel for the prosecution first thing in the morning on the third day of trial. The Magistrate revoked bail and indicated that she would hear evidence from PW3 in relation to these calls. In so doing, she had heard the concern raised by counsel for the appellant but had indicated that this was not a final decision but rather a protective measure. She made it plain to counsel that he could make an application at a later stage. This could be seen in Appeal Bundle, page 328J N. PW3 then

testified to the effect that she had received a total of four phone calls but she was not in a position to identify the maker of those calls. At the close of the day, the Magistrate re-granted bail to the appellant. AUTONUMOUT In my view, given the reluctance of PW3 to testify and the contents of those threatening calls, the revocation of bail was appropriate and indeed necessary to ensure the smooth completion of her testimony. The Magistrate in no way exhibited any bias or prejudice against the appellant. In fact she had pointed out in her Statement of Findings that she excluded this complaint of interference of witnesses from her considerations as there was no evidence to suggest that the appellant was involved in the approach. There is no merit in this criticism of the Magistrate in this regard.

AUTONUMOUT In respect of the second area, the appellant's counsel is in effect asking this court to revisit the factual issues which had already been dealt with and decided by the Magistrate. AUTONUMOUT As Keith J (as he then was) said in *R. v. Hui Kee Fung*, HCMA No.196 of 1994 Appeals from decisions of magistrates on questions of fact should not be regarded by litigants as simply another opportunity to re-try the facts. An appeal to the High Court is not a rehearing of the case. The mere desire to obtain another finding on the facts is not sufficient to justify the invocation of an appellate process which treats the findings of fact by a court of first instance as so sacrosanct as our system of criminal justice does.

AUTONUMOUT The Magistrate was alive to the criticism by defence counsel as to PW1's evidence. She was aware that PW1 gave an air of evasiveness in her evidence chief. That is manifested by the transcript of proceedings that the Magistrate had on a number of occasions asked PW1 to focus on the questions and not to repeat herself. She also noted what PW4 said and concluded that PW1's practice as an insurance agent left much room to be desired. Counsel for the appellant submitted that the Magistrate erred in not rejecting PW1's evidence right away but, instead, resorted to an artificial, illogical and erroneous approach of seeking assistance from the documentary evidence and the admitted facts, and finding assistance by rejecting the appellant's evidence, and then come to the conclusion that PW1 was honest, truthful and credible. (Paragraph 16, Skeleton Submission)

AUTONUMOUT A magistrate is entitled to look at all the evidence including documentary evidence when assessing credibility. Nowhere in her oral reasons or Statement of Findings did she place any burden on the appellant. In fact, she said this in her Statement of Findings : In determining the facts of the case I bore in mind that the burden was on the prosecution at all stages to prove each charge separately against the Appellant, beyond all reasonable doubt and so that I was sure. . The Appellant elected to give evidence and he called witnesses on his own behalf. I bore in mind that there was no burden on the Appellant to prove anything. The Magistrate was fully aware that rejection of the defence case did not amount to prosecution proving the charges. She was well aware that the prosecution case must be able to stand on its own beyond reasonable doubt. The complaint by counsel for the appellant in this regard is misconceived. AUTONUMOUT Now having accepted PW1's evidence together with the admitted facts, in particular, that the ID card numbers given by the appellant for the two applications belonged to persons other than Ng and Li, the Magistrate is entitled to come to the conclusion that the appellant did make a representation to obtain pecuniary advantage and the misrepresentation was made

dishonestly. There is nothing perverse or unreasonable in her findings. AUTONUMOUT
Accordingly, I see no reason to interfere with the conviction at all. The appeal against
conviction is dismissed and I confirm the order made by the Magistrate. AUTONUMOUT As
the appellant has formally abandoned his appeal against sentence, that is formally
dismissed. (M. Poon) Deputy High Court Judge Mr Cheung Wai Sun, DPGC of the
Department for Justice, for HKSAR Mr Bernard Yuen, instructed by Messrs Chan, Wong &
Lam, for the Appellant PAGE - PAGE 1udk 1udk t"("# t"("# &`#\$ & 6" CACV Jeannie MY
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