

HONG KONG / JUDGMENT

HKSAR v. L.F.

[2025] HKCA 804

COURT

Court of Appeal

DECIDED

29 August 2025

CASE / FILE NUMBER

CACC212/2024

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CACC 212/2024, [2025] HKCA 804

On Appeal From [2024] HKDC 1471 and [2024] HKDC 1591

in the high court of the

hong kong special administrative region

court of appeal

criminal appeal no 212 of 2024

(on appeal from dccc NO 140 of 2023)

BETWEEN

HKSAR

Respondent

and

L.F.

Applicant

Before: Hon Macrae VP in Court

Date of Hearing: 29 August 2025

Date of Judgment: 29 August 2025

J U D G M E N T

The applicant faced one charge of indecent assault, contrary to section 122(l) of the Crimes Ordinance, Cap 200; and one charge of criminal intimidation, contrary to sections 24(a)(i) and 27 of the same Ordinance. He pleaded not guilty to the charges and stood trial before HH Judge E 林 (“the judge”). On 4 September 2024, the applicant was convicted after trial and, on 25 September 2024, sentenced to 27 months’ imprisonment.

The applicant now applies for leave to appeal against both conviction and sentence.

The prosecution case

The main prosecution witness, X, was born on 23 June 2010. She was, therefore, 12 years of age at the time of the offences. The marriage of her parents had unfortunately failed and it seems that her mother, Madam Y, was suffering from mental health issues and was unable to care for her daughter. The applicant, who was X’s biological father, was eventually granted custody of his daughter. Nevertheless, X had been placed in a care home for children since 2016. During home leave, she could only visit Y during the day and stayed with the applicant during the night.

On 30 September 2022, having spent the afternoon with Y, X went to stay over at the applicant’s home in Yee Kuk Street, Kowloon where the applicant was living with his girlfriend. After arguing with the applicant in the evening, X took a shower and lay on the upper deck of a bunk bed. The applicant later asked X to sit up and offered to blow dry her hair. While the applicant was drying X’s hair with a hair-dryer, he was standing on the lower deck of the bunk bed, where his girlfriend was. During the process, X was sitting on the upper deck facing the window with her back to the applicant.

Suddenly, X felt the applicant touch her buttocks, then use his hands to caress her back up to her shoulders, before touching her breast area over her garments. Shocked and disgusted, X told the applicant to stop, lay down facing away from the applicant and covered herself with a quilt. The applicant then spanked X once on her buttocks.

Later that evening, while having a heated argument with the applicant over money issues, X threatened to kill herself. Upon hearing this, the applicant pointed a fruit knife at X, asking X to kill herself with the knife, or else he would kill her himself. The applicant then made a thrusting motion with the knife towards X. The knife did not come into contact with X. Nevertheless, X was frightened, fearing that the applicant would actually stab her.

Afterwards, the applicant’s girlfriend took X outside to cool down, during which X boarded a taxi alone and went to Y’s home. While riding the taxi, X called Y and sent her photographs of the taxi she had boarded. She arrived at her mother’s address at about 11 pm on 30 September 2022. In the early hours of 1 October 2022, X complained to her guardian (PW4), who was a staff member of her care home, about the incident using WhatsApp. The incident was reported to the police. Subsequently, on 7 October 2022, the applicant was arrested.

The defence case

The applicant elected not to give evidence or to call witnesses, the defence side of the narrative being set out in the applicant's cautioned statements following his arrest. The gist of the defence was that X had acted in concert with Y to falsely accuse the applicant.

When arrested by a policewoman, the applicant said under caution that he only hit X on the buttocks during the evening of 30 September 2022 because of her misbehaviour. Subsequently on the day of his arrest, namely 7 October 2022, the applicant participated in a video-recorded interview ("VRI"), during which he provided more details of his version of events. In essence, the applicant admitted hitting X's buttocks while she was lying on the upper deck of the bunk bed. He did this after they had argued about money and about Y, resulting in the applicant venting his anger on X by spanking her once and telling her to leave for Y's place, which X had always preferred to the applicant's home. The applicant then went to cut some fruit while X was on the bed having a video call with Y. The call apparently agitated the applicant and he admitted he pointed a fruit knife at X, requesting her to leave, after which the applicant's girlfriend brought X downstairs for a walk and/or to buy something. Eventually, the applicant learned that X had taken a taxi to Y's home. The applicant denied that, on 30 September 2022, he had helped X blow dry her hair; that he had touched her buttocks, back or breast apart save that he had hit her buttocks once; that X had threatened to commit suicide; or that he had threatened to kill X.

Reasons for verdict

The judge acknowledged the clear record of the applicant, the non-existence of physical evidence in favour of the prosecution case, and that "an allegation of indecent assault was easy to make but hard to refute". The only issue in the case was X's credibility. It seems to have been accepted that touching X in the way she described would amount to indecent assault; and that pointing a knife at X while threatening to kill her with it would amount to criminal intimidation.

In coming to his decision to convict the applicant, the judge found that not only was X unshaken in cross-examination, but she was also supported by corroborating evidence such as (i) the emotional voice messages she sent to PW4 from about midnight on 1 October 2022, and (ii) Y's evidence. Although there was a discrepancy between the evidence of X and Y as to who paid for the taxi fare, the other parts of the evidence were so consistent that such discrepancy became insignificant.

As the applicant, who had a right of silence and was to be presumed innocent, chose not to testify or call any defence witness (such as his girlfriend), the judge found that there was no evidential basis to support the applicant's contentions, to contradict X's account or to help the court interpret the facts in a different way. Having stated that he had looked at the prosecution case in the most favourable light for the defence, the judge ruled that the prosecution had proved the applicant guilty of indecent assault and criminal intimidation beyond reasonable doubt.

The sentence

Prior to sentencing the applicant, reports from a psychologist and a probation officer were prepared on X and the applicant respectively. X's report suggested that the incident had had a significant impact on her, and that she still suffered from post-traumatic stress disorder some 2 years after the event. Further, X's symptoms of complicated trauma and pre-existing adjustment issues had worsened as a result of the incident. On the other hand, the applicant maintained his innocence when interviewed by the probation officer.

The judge noted that the maximum sentence for indecent assault was 10 years' imprisonment. In *Attorney General v Lee Kwai Man*, it had been reiterated by the Court of Appeal that sentences for such an offence should provide an effective deterrent in order to protect young people and reflect the public's abhorrence of such behaviour.

The judge found that the applicant was in serious breach of trust and, also, a court order. Being the biological father, the applicant was granted by the court the custody of X, who essentially had nowhere else to go as her mother Y was considered unfit by the authorities to care for her.

Having considered these factors, including the psychological impact on X, who was a child of 12 years of age, the judge adopted a starting point of 24 months' imprisonment for the indecent assault charge.

In respect of the criminal intimidation charge, the judge was concerned that X was already emotionally distressed with suicidal ideation before the applicant threatened to kill her with a knife. Instead of defusing the situation, the applicant had chosen to aggravate it. For this, the judge sentenced the applicant to 3 months' imprisonment, to be served consecutively to the term for indecent assault.

Since there was no mitigation to reduce the otherwise appropriate sentence, the applicant was sentenced to 27 months' imprisonment in total.

Grounds of appeal

In his Form XI Notice and two handwritten letters, the applicant has advanced several grounds of appeal against conviction, which may be categorised as follows:

The state of prosecution evidence: the applicant complains that the prosecution failed to provide fingerprint and/or DNA analysis on X's clothing, or to obtain car camera footage in the taxi to prove that the taxi fare was paid by Y. Further, one of the prosecution witnesses, a social worker, testified that X told her she was only hit by the applicant once that night.

The doubts surrounding the prosecution case: the applicant questions why he was only arrested 7 days after the event; he points out the impossibility for him to have touched X in the way she described, given his height (1.63 m); and asks how X could be sure it was the applicant who touched her, when she was facing away from him. He suggests that X could have been coached by others to make false allegations against him and claims that X and Y were known to be capable of lying.

Reiteration of the defence case: the applicant insists that he was only disciplining X by lightly patting her on the bottom once. The whole incident was witnessed by his girlfriend, who has made a witness statement.

In respect of his sentence, the applicant has not provided any grounds of appeal.

The respondent's submission on conviction

In response to the applicant's grounds in relation to conviction, Ms  Angel Yuen, for the respondent, submits that the main issue in the case was X's credibility. The judge was aware of the absence of fingerprint and DNA analysis. However, this was unimportant since the judge found X reliable, given the consistency of her account with other evidence. The exception was the conflict between X and Y as to who paid the taxi fare. The judge considered this matter to be insignificant and chose X's version over Y's. Accordingly, the lack of CCTV footage from the taxi had no bearing on the conviction.

In relation to the social worker's evidence at trial, the respondent disagrees with the applicant's interpretation of such evidence. What X told the "social worker", presumably the guardian PW4, conveyed the message that she was touched by the applicant and was too scared to stay at the home of the applicant, which was consistent with X's version of events. Further, the respondent submits that whatever X told her guardian or social worker was nevertheless hearsay evidence, which could only be used to assess X's credibility.

As to the doubt the applicant now casts upon his conviction, the respondent argues that there is nothing to suggest that the judge had failed properly to consider X's credibility. In particular, when giving evidence-in-chief, X had shown her ability to understand the difference between truth and lies. She was found to be unshaken and was supported by other consistent evidence. Regarding the applicant's theory that he was too short to reach X, who was sitting on the upper deck of the bunk bed, the respondent points out that there was no such evidence of impossibility. In any event, the applicant was standing on the lower deck of the bunk bed.

In response to the applicant's challenge to the identification issue, namely, that X was facing away from him and thus could not be sure that it was he who touched her, Mr Yuen argues that X would have had no difficulty seeing and recognising the applicant's hand when he reached over her shoulder and touched her breast area.

Finally, the applicant's version of events was given in his cautioned statements. Although he asserted that the events were witnessed by his girlfriend, neither he nor his girlfriend gave evidence at trial. The respondent submits that the judge was entitled to assign little weight to the applicant's exculpatory statements, which had not been tested in cross-examination.

The respondent's submission on sentence

The respondent contends that the sentences in respect of both charges were appropriate. In identifying the sentence for indecent assault, the judge had rightly considered relevant factors in the case. Such approach was consistent with the factors suggested by the Court of Appeal when sentencing for sexual offences involving young children in *HKSAR v Lee Kwok Wai*. As for the charge of criminal intimidation, given the seriousness of the situation, the sentence of 3 months' imprisonment could not be said to be manifestly excessive. Having considered totality, the judge was also entitled to order the two sentences to run wholly consecutively, since the two offences were entirely separate incidents.

Consideration

Ms Yuen has characterised certain evidence as "consistent" with X's account. In fact, however, the judge used the words "corroboration" and "corroborate", explaining that "the old and now archaic rule" was that cases of this kind required corroboration, before going on to find that:

"Although the rule no longer applies, in this case, there is corroborating evidence."

As to what this corroborating evidence was, the judge later explained:

"The victim was otherwise unshaken in cross-examination. Her words were corroborated by audio messages that she gave to her guardian, one Auntie Fromy. From around midnight, she gave a couple of messages to Auntie Fromy to the effect that she was touched by her father and she could not stay at her father's home, she was scared. The audio messages were played in court. It was clear from the sound of her voice that she was emotional in distress."

The victim's version was also corroborated by that of her mother. All the evidence was so consistent with the victim's account that I found the inconsistencies over who paid for the taxi fare insignificant; I chose to believe in the version of the victim, as it was consistent with her sending pictures of the taxi to her mother so that the latter could go down from her home to pay for the taxi and take her up to her mother's place."

I am a bit troubled by the judge's reference to there being "corroborating evidence" even though the old corroboration rules no longer applied, because the examples the judge gave could not, with respect, amount to corroboration as it was traditionally understood and applied. Neither the recent complaint to Auntie Fromy, nor the mother's evidence amounted to corroboration in its strict legal sense: *R v Evans*. Distress might have been corroborative under the old rules provided it was independent evidence given by another witness as to the complainant's distressed condition: *R v Redpath*. It may be that the judge meant that all of this evidence was no more than

“supportive”; however, recent complaint evidence is technically only evidence of consistency, while I cannot see much “supportive”, let alone “corroborative”, value in the mother’s evidence.

It is true, as Ms Yuen points out, that the judge did use the word “consistent” in relation to the mother’s evidence as well. And the judge’s reasons will need to be looked at as a whole in order to decide precisely what he meant.

One other matter which slightly concerns me is that if the old rules of corroboration no longer apply and a judge now has a discretion, in accordance with such cases as *R v Makanjuola*, as to whether, and if so in what terms, he warns a hypothetical jury of the dangers inherent in a complainant’s evidence, there does not seem to be any self-warning about the circumstances here. Yet the indecent assault came about in the context of a domestic dispute and situation, which plainly warranted careful examination.

I am also concerned with the evidence relating to the charge of criminal intimidation. Given the heated dispute which led to the offence, was this a deliberate attempt to intimidate X calculated and intended to cause fear and likely to have that effect, or was it the result of “an instinctive outburst of spleen”: see *Lo Tong-kai v R*? There does not seem to have been any separate analysis of the elements or quality of the offence by the judge; but that may be because the defence accepted that such conduct, if proved, would amount to the offence of criminal intimidation. Since this can be a difficult area of law, it was still incumbent on the judge to examine the circumstances carefully in determining whether they amounted to the offence in law.

Given the way the judge has expressed himself, I consider that this matter should be examined more closely by counsel and am satisfied that there are reasonably arguable grounds of appeal in respect of both charges (as explained above). I do not find any of the applicant’s homemade grounds of appeal reasonably arguable in themselves but counsel may no doubt see fit to refer to some of these matters as part of his presentation of the appeal in due course.

As for sentence, the judge has unfortunately misunderstood the effect of the judgment in *Lee Kui Man*, on which he relied. The starting point of 18 months’ imprisonment appropriate in that case was in relation to an offence of unlawful wounding, contrary to section 19 of the Offences against the Person Ordinance, Cap 212, and not indecent assault. The sentences on the two offences of indecent assault on two different schoolgirls, which were adopted by the Court, were 3 months’ imprisonment each. I suspect the judge has relied on the Appendix to Sentencing in Hong Kong (11th Edition) where the summary of the effect of *Lee Kui Man* is incorrectly stated.

I will give leave to appeal and grant the applicant an appeal aid certificate in relation to both his appeals against conviction and sentence. I am very grateful for Ms Yuen for her assistance in this matter.

(Andrew Macrae)

Vice President

Ms Angel Yuen SPP, of the Department of Justice, for the Respondent

The Applicant appeared in person

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