

HONG KONG / JUDGMENT

HKSAR v. LAI AH SING

COURT

Court of First Instance

DECIDED

15 March 2007

CASE / FILE NUMBER

HCMA1112/2006

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bjbj pellant

Coram: Deputy High Court Judge Line in Court Dates of Hearing: 15 March 2007 Date of Judgment: 15 March 2007

J U D G M E N T

1. This is an appeal against conviction and sentence. The Appellant was convicted of one count of behaving in a disorderly manner in a public place, contrary to section 17(b)(2) of the Public Order Ordinance and one count of obstructing a police officer in the due execution of his duty, contrary to section 13(b) of the Offences Against The Persons Ordinance. He was sentenced to 2 months imprisonment on the 1st charge and 9 months imprisonment consecutively on the 2nd, making a total of 11 months.
2. The prosecution s case was that on 1st June of last year two plain-clothes police officers on duty outside Causeway Place saw the Appellant acting suspiciously, paying attention to girls in short skirts, and kept him under observation. A young lady, who was PW5 at the trial and who was wearing a short skirt, came by. She entered Causeway Place and the officer said the Appellant followed her. She took the escalator up from the ground floor and the officer said that the Applicant stood behind her and he had his mobile telephone in his hand and that he placed it underneath her short skirt, in a position where he could take a photograph.
3. It was the second prosecution witness who saw this, because he was on the escalator, and he related what he had seen, he said, to his colleague on his radio. PW2 followed and intercepted the young lady in question and took her details. PW1 followed and then eventually intercepted the Appellant. He looked at the Appellant s mobile telephone and found that it had a camera and that it had under-skirt photographs on it. The Appellant was arrested.

4. The mobile telephone was passed from PW1 to PW2 and PW2, about an hour and a half later, tracked down PW5, because he had her particulars, she had gone off for an appointment, and he showed her the pictures on the telephone. She confirmed at the trial that what that officer showed her on the telephone were pictures taken up her skirt. She was able to identify that it was her by reference to certain special designs on the skirt and the fact that it matched her umbrella and top and the like. No suggestion was made to that witness that she was untruthful or inaccurate as to seeing her image on the telephone the policeman showed her.
5. Taking up the story of what happened, the Appellant was taken to Wanchai Police Station and he was handed over to PW4 who was going to interview him. PW4 was given the mobile telephone in question and his evidence was that in the presence of the Appellant, he had downloaded the photographs stored on the mini SD card that the telephone took onto his own notebook computer. I mention that that mini SD card showed up-skirt photographs not just of PW5 but of many other young ladies in short skirts.
6. In the interview room PW4 used the mobile telephone to show the Applicant the photographs stored upon it. He testified that the Appellant then snatched the mobile phone from him and removed the mini SD card containing the under-skirt photographs. Access to that SD card is obtained by just lifting a flap on the side of the telephone.
7. PW4 said that the Applicant then chewed and swallowed that mini SD card. There was a struggle, the Appellant was subdued, and it was then that PW4 found on the floor another mini SD card whose existence had been previously unknown to him. This mini SD card contained family photographs of the Appellant. The SD card which the police officer said the Appellant swallowed, of course, was never recovered but copies of them existed, so the officer said, on his own computer.
8. The Defendant did not give evidence. It is also the fact that he could point to no explanation under caution or the like. The suggestion his counsel made over the five days this trial took in the Magistrates Court was that he had never followed the young lady in question and that he had never taken, chewed or swallowed the mini SD card. Those suggestions remain suggestions. There was no evidence to support them.
9. The main attack on the prosecution case, which Miss Munira Moosdeen argues contains the seeds of its own destruction, relies on, first of all, two main matters. Firstly, she says, the evidence revealed - and this is accurate - that there had been a proper strip-search of the Appellant when he first went to the police station, which had not turned up anything significant and obviously a second mini SD card would have been significant. Her argument is thus that there was only at the material time one SD card and that was the one with the innocent family photographs on it and that came from the mobile telephone. It is a powerful point because she can say how can the prosecution explain how it got there? The Magistrate dealt with the point by saying, well, the SD card is a relatively small object and it could have been missed in the search.

10. The Magistrate dealt very convincingly with why someone who was minded to take under-skirt photographs would have two mini SD cards available to him, making the obvious point that he would want to keep the two categories of photographs, family and under skirt, very separate from each other. There was nothing in the papers to reveal and the evidence - I have a full transcript - was silent as to whether or not the full search had included opening the back of the mobile telephone. It was silent as to what had happened to the mobile telephone once it was snatched by the Appellant and what happened to it in the ensuing struggle.
11. There was evidence that the telephone could only accommodate one mini SD card and that is right in the sense that the slot designed for its reception and use would only accommodate one such card.
12. In court today, helpfully, has been produced to me an identical telephone. I have been able to remove the back cover, take a second mini SD card, place it under the cover and replace the cover. The back cover is a thin piece of plastic. You have to push down fairly hard on it to achieve that end and, accordingly, it is under some pressure on its locating parts.
13. I mention all this because it seems to me a ready explanation as to how the innocent mini SD card ended up on the floor, could be that if it had been carried in the back of the telephone and if the telephone had fallen to the ground and the back had sprung off, it being under pressure, it would spill the card contained behind it. I can see that it might be objected that this is doing too much amateur detective work in court but, in fact, all I point to is the fact that there is another explanation available, other than the one the Magistrate gave, to explain how the second card did not come to light until the moment PW4 described.
14. The second main point taken by the Appellant was this: that the up-skirt photographs were arranged in folios on the mini SD card. This was known because PW4 had copied from the SD card to his own computer. The folio number was not just the photograph number because it is apparent from the print out of the exhibits, which I have, that the folios tended to contain four separate photographs. The relevant numbers of the folios were 45 and 46 for the pictures that PW5 identified as being of her. Folios 48, 49 and 50 were also found to contain up-skirt photographs of different women. The point Miss Moosdeen makes is this: that cross-examination of the police officers revealed that there was not time after he had stood behind PW5 on the escalator for him to take those photographs before he was arrested. The Magistrate dealt with this by saying there was no evidence at the trial as to how folio numbers were attributed to different sets of photographs.
16. In argument today it has been accepted that the standard or the expected way of it occurring would be that the folios would have consecutive numbers that reflected the passage of time. It was also accepted that devices like this have the ability to delete earlier taken photographs and to rename and assign, in effect, to different folio numbers photographs taken later. That accords, in my judgment, with common sense and the common experience of those who own such mobile telephones. So the point is there to be made and the explanation is, or it

must be, that for reasons which we may not understand or be clear to us, the Appellant, if the prosecution had a good case below, had chosen to put these photographs of PW5 into an earlier vacated folio.

17. It is an obvious point to make that the Magistrate had the advantage of seeing and hearing the police officers in question, which is of particular benefit in a case like this which must, unless the Appellant is guilty, involve bad faith on their part. If the Respondent's case is not to be believed, it has to be that either a police officer took the photos of PW5 or someone else did and then a police officer then got hold of the mini SD card that recorded those photos; this coincided with the Appellant and PW5 being at the same place at the same time; that the police then decided to use those photographs, theirs or someone else's, and falsely attribute their possession to the Appellant, so being able to show on the telephone in question the relevant photographs to PW5 one and a half hours later.
18. I would not want it to be thought that I regard misbehaviour or bad faith by police officers as something that could never happen or is even unlikely to happen. Police officers are human beings and human beings are prone to weakness, but why on earth they would act in that way, I cannot think. The fact is there is not a shred of direct evidence to suggest that they did. When I do the balancing act and put those two main points in the scales against their evidence, and consider what must be involved if it is not true evidence, those scales come down firmly on the side of the Respondent.
19. The folio numbers and the appearance of the second mini SD card are unusual features but they can be explained in a way that is rational. The opposite is true, in my judgment, of seeking to put any other explanation on the undoubted facts that could not really have been in issue, namely, the fact that the telephone did have recordings of PW5 and that she confirmed it an hour and a half later.
20. I have described the two points as the main points. There were a number of other points taken based on inconsistencies and matters like that, such as the telephone was not put in a tamper-proof bag quickly enough or that the tiny fragments, and they are very tiny that were recovered from the edge of the mouth of the Appellant by PW4 after he chewed the card, were not sent for DNA analysis and that there is no evidence of the Appellant having his stomach pumped or X-rays and the like even though the Appellant went to hospital.
21. All the points are very clearly set out in the skeleton arguments of the Appellant and I am not going to repeat them all. The Magistrate was aware of them, as am I, and I share his view that they create no reasonable doubt about the guilt of the Appellant on both of the charges. The evidence satisfied the Magistrate for good and cogent reasons that he gave and it satisfies me that the prosecution was a good and true one.
22. During the course of the trial in the Magistrates Court counsel for the Appellant made an application for a stay on the basis that there had not been either full or timely disclosure. The Magistrate offered adjournments and indulgence as to time, ensuring that the Appellant was subject to no disadvantage thereby. Accordingly, it was impossible for the Appellant's

counsel to argue that a fair trial was not possible - it clearly was. So he put his stay on the basis of bad faith by the lady inspector who ran the team in question and bad faith by her officers, saying that the default had been deliberate and that it would therefore be an affront to justice and the public for the trial to continue.

23. The Magistrate rejected the claim of bad faith. He found that the inspector had erred in her judgment of what was relevant and should be disclosed but I share his view that that was very far away from a case of bad faith justifying stopping an otherwise good prosecution. Miss Moosdeen today does not invite me to, in effect, reverse that and grant a stay and really seeks to use the fact that things were not disclosed when they should have been to say that that is consistent with the officers who were acting in bad faith and that they were deliberately dragging their heels over disclosure making life difficult for the defence, short of an act of bad faith. I have borne that argument in mind on the general issue and, taken with all the other matters, it still raises no doubt in my mind as to the correctness of the conviction. Accordingly, the appeal against the conviction is dismissed.
24. As regards the sentence, the Appellant had previous convictions. He had been convicted of loitering in 1997. That case took place in a female public toilet. In 2002 he was convicted of an indecent assault, the victim was described as a secondary school child, though the conduct cannot have been too grave as he received 4 weeks imprisonment.
25. On the same day as the Appellant was convicted in this case, he appeared before a different Magistrate, having pleaded guilty to an indecent assault committed whilst on bail for this offence. That resulted in a sentence of 2 months imprisonment, which was consecutive to the 11 months we are dealing with.
26. Miss Moosdeen, realistically, does not seek to quarrel with the sentence of 2 months for the disorderly conduct. She argues that the 9 month sentence for the obstruction was too long. The point she makes is that the obstruction would have been the graver if the crime under investigation had been the graver, but since it was not a particularly grave crime that was under investigation it should have been less than the 9 months.
27. The Magistrate, in his Reasons for Sentence, clearly demonstrates attention to all the relevant matters and he had the benefit, as I do, of looking at psychiatric reports. Bearing in mind all of the facts, which include the Appellant's record, he judged 11 months to be the right total. I agree with him. I do not consider a 9 month starting point for obstruction in these circumstances where important evidence was sought to be destroyed in an attempt to damage or stop a proper prosecution for an offence that causes real anxiety to its victims, to be too long. Accordingly, the appeal against the sentence is also dismissed. (P Line) Deputy High Court Judge Representation: Mr Michael Wong, Government Counsel, of the Department of Justice, for the Respondent Miss Munira Moosdeen, instructed by Messrs Chan & Tsu, assigned by Director of Legal Aid, for the Appellant PAGE PAGE CRT35/15.3.2007/DB HCMA1112/2006/Reasons for Judgment 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

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