

HONG KONG / JUDGMENT

HKSAR v. LAM CHI KIT

COURT

Court of First Instance

DECIDED

10 October 2003

CASE / FILE NUMBER

HCMA503/2003

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bjbj HCMA 503/2003 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 503 OF 2003 (ON APPEAL FROM TWCC 264 OF 2003)

BETWEEN HKSAR Respondent and LAM CHI KIT Appellant

Before: Hon Beeson J in Court Date of Hearing: 26 September 2003 Date of Judgment: 26 September 2003 Date of Handing Down Reasons for Judgment: 10 October 2003

REASONS FOR JUDGMENT

The Appellant appeared in the Magistracy and pleaded guilty to a single charge of Common Assault ; he was unrepresented at that time. The Magistrate considered a number of reports and eventually sentenced him to a period in a Rehabilitation Centre. The Appellant appeals against that sentence. At the first hearing, the Appellant, agreed the facts and was convicted on the basis of those facts. The Magistrate requested Probation and Community Service Order reports and the Appellant remained on bail. At the next hearing, the court was told by the Prosecution that there had been a misunderstanding about some of the facts and they did not reflect the true position. The amended facts were read and explained to the Appellant who agreed they were correct. The conviction was confirmed. The Magistrate considered the facts indicated a custodial sentence.

Facts Relating to Charge The amended Brief Facts described what had happened. A female and her boy friend, the victim, were approached by others outside a karaoke establishment and a dispute arose about earlier events in a karaoke room. The victim and the female made a report to police who accompanied them to a karaoke room to intercept an alleged assailant. The victim at that time was surrounded by a group believed to be friends of the other party to the dispute. This Appellant was included in that group. An attempt at mediation was unsuccessful and someone

pulled the victim of the common assault to the ground and hit him on his back, while this Appellant kicked at the victim's head. The assault took place in front of the police officers called to deal with the dispute. The victim sustained no injury from the assault. The Magistrate noted that the Appellant deliberately kicked the male victim on the head despite three policemen being present. He felt this showed Appellant's complete disrespect for authority and for the safety of the victim. He took the view, quite rightly, that kicking someone's head could have very serious consequences for the victim. Sentencing Procedure The Magistrate called for Detention Centre and Training Centre reports and remanded the Appellant in custody. When court next resumed the Appellant was represented. Counsel put forward, in explanation, that the Appellant was under the influence of alcohol at the time and, without suggesting this was a minor offence, pointed out that he did not aim particularly at the victim's head. After assessing the reports, the Magistrate thought a Rehabilitation Centre Order was appropriate, even though the Appellant was young (17), a first offender and the charge comparatively minor. As required, he obtained a report confirming that a place was available and that the Rehabilitation Centre programme was recommended for this Appellant. The Magistrate noted that the Rehabilitation Centre programme placed great emphasis on the rehabilitation and training of young persons. There was a short period of confinement, after which the Appellant would be helped to find a job after which he would work outside the centre under supervision. All reports confirmed that the Appellant had been misbehaving since Form I, was associated with dubious peers and ignored good advice from his parents. He had begun a course with the Construction Industry Training Authority but quickly dropped out. He failed to keep a stable job and was leading what is usually referred to as a hedonistic life style. The most serious aspect of the reports was his continuing to associate with dubious peers, some of whom were triad members. The Magistrate felt that without a course of rehabilitation and vocational training, the Appellant was likely to return to his old habits. On that basis he made the order which is now appealed. The Appellant was convicted and sentenced on 14 May 2003, by which time he had spent 20 days in custody. On 9 June 2003, he applied, successfully, to a High Court Judge for bail. The Appellant by that time had spent more than 45 days in custody. Appeal The basic ground of appeal was that a custodial sentence was manifestly excessive for conviction on a Common Assault which caused no injury, and which was probably committed because the Appellant had been drinking. That was not put forward as mitigation, but in explanation of his behaviour. Counsel for the Appellant submitted that there was no logical reason for the Magistrate to reject the explanation for and mitigation of the offence, or to ignore the favourable recommendation of the Probation Officer. It was submitted that a first conviction after plea for a relatively minor charge should not be used as justification for a general review of the offender's character and previous conduct, for the purpose of deciding whether he needs reformation by detention. That submission is incorrect. A Magistrate, even, perhaps especially, for a first offence must take into account the offender's character and previous conduct. It may well be that a custodial sentence is the only proper way to deal with a first offender. The reports confirmed that the Appellant had a good, close relationship with family members who were supportive of him. The reporters agreed about the deterioration of his behaviour from the time he left school round about Form III. They agreed that he did not have a steady job; his work performance was poor; he was mixing with unsavoury companions

and he was easily influenced. The Probation Officer believed the Appellant had gained insight into his faults and was willing to work to improve himself. In the three months before trial, he cut down his contacts with the said peers and tried to engage in stable employment. His mother had taken the role of supervisor to assist him from going astray. The Probation Officer considered the Appellant had a strong motivation to start afresh and had assured family support. He felt that probation supervision which was counselling-oriented would be more beneficial than the work-oriented Community Service Order programme and recommended probation for 12 months with the condition that the Appellant study and/or work as directed by the Probation Officer. When considering all the reports, I noted that although the family was very supportive, those reporting had not had direct contact with the Appellant's father, although he was living in the family unit. At the hearing, I requested the Appellant's counsel to take instructions as to the nature of the relationship presently existing between the Appellant and his father and whether supervisory contact was possible. I was assured that the Appellant's father had had a good relationship with his son until he was about 16, but in the last year or 18 months the father's work pattern had so drastically altered because of the recession that he had less time to spend with his son, or supervise him. However, all family members were very concerned about the Appellant and a number of them, including his father, attended court. Overall, the circumstances indicated that the Appellant should be given at least one chance to rehabilitate himself without being placed in a custodial setting. The Probation Officer's report had been good, the Appellant was fortunate in having a family prepared to support him and, in my view, a custodial sentence although possible, was not mandatory in the circumstances. The Appellant's drunkenness did not excuse his behaviour but it does indicate an opportunistic rather than a planned assault. There was no injury suffered by the victim. It is highly likely that the Appellant was too affected by alcohol to notice the police officers, rather than that he behaved as he did, to demonstrate deliberately a lack of respect for authority. Accordingly, I believed a Probation Order, with conditions, was a suitable way to deal with this Appellant. I considered 18 months was an appropriate probation period, with conditions that the Appellant reside and work as directed by the Probation Officer and that he obey a curfew between the hours of 11 p.m. and 6 a.m. from today to 30 November 2003. A report from the Probation Officer at the end January 2004 to advise on the Appellant's progress was required. The Appellant consented to the making of the order and understood and accepted the conditions. It was made very clear to him that for a breach of condition, or any difficulty while he was on probation, he could be brought back before the court and sentenced for this offence as if the Probation Order had not been made. It was also explained that, in such circumstances, a custodial sentence would be almost inevitable. For these reasons, I allow this appeal and substitute for the Rehabilitation Order imposed, a Probation Order of 18 months duration, subject to the conditions outlined. (C-M Beeson) Judge of the Court of First Instance Ms Virginia Lau, SGC of the Director of Public Prosecutions for the Respondent Mr John Haynes, instructed by Messrs Quan & Co., for the Appellant

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