

HONG KONG / JUDGMENT

HKSAR v. LEE CHI CHUNG

COURT

Court of First Instance

DECIDED

17 August 2007

CASE / FILE NUMBER

HCMA367/2007

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Before: The Honourable Mrs Justice V. Bokhary in Court Date of Hearing: 16 August 2007 Date of Judgment: 17 August 2007 Date of Reasons on Costs: 23 August 2007

J U D G M E N T

The Appellant, a man in his late 30s, was convicted after trial before Ms L K Loh in the Magistrate's Court at Kwun Tong on a charge of indecent assault, contrary to s.122(1) of the Crimes Ordinance, Cap. 200. He now appeals against conviction. Briefly stated, the prosecution's case is that the indecent assault occurred on a MTR train travelling between Hang Hau Station and Tseung Kwan O Station, and consisted of the Appellant reaching out with his right hand and touching a Ms Ho on the buttocks. Ms Ho's evidence was that the touch lasted one or two seconds, that she turned around upon feeling it and that upon turning around she saw the Appellant withdrawing his hand about one inch from her person. On the train, the Appellant was observed by two police officers. One of them gave evidence of seeing the Appellant touch Ms Ho's buttocks. The officers, who apprehended the Appellant after a pursuit at Tseung Kwan O Station, identified him as the man whom they observed on the train and who was seen by one of them touching Ms Ho's buttocks. She identified the Appellant as the man who did that. As was his right, the Appellant chose not to give evidence. The Magistrate said in terms that she drew no adverse inference against him for exercising that right. She was satisfied on the prosecution's evidence that the Appellant was rightly identified, that he had touched Ms's buttocks, that he had done so deliberately, that his conduct constituted an indecent assault as charged and that, accordingly, the charge had been proved beyond reasonable doubt. Noting that the officers had been observing the Appellant because he had been pointed out to them by another student at Hang Hau Station, the Magistrate was, as she said in terms, careful not to draw any adverse inference against the Appellant from that. Four perfected grounds of appeal have been filed on the

Appellant's behalf, three of them to do with identification. The complaint under Ground 1 is that, although she referred to the Turnbull guidelines in her Statement of Findings, the Magistrate had not referred to them when giving her oral reasons for convicting. I do not consider this a good ground for quashing the conviction. It is clear in all the circumstances that the Magistrate had all the considerations relevant to the issue of identification properly in mind throughout. For the same reason, I do not consider that any good ground for quashing the conviction is provided by Ground 2 under which the complaint is that the Magistrate failed properly to examine the circumstances surrounding the identification of the Appellant. Ground 3 is that the Magistrate erred in allowing a dock identification of the Appellant. The particulars of this ground read:

- (i) PW1 was asked to identify the defendant in circumstances which were highly unreliable. (ii) At the time of identification, the defendant was in the custody of PW2, thereby greatly increasing the chance of wrongly identifying the assailant. (iii) The victim was merely asked to confirm that the man she was identifying was the assailant. [p.10 para. 4] The paragraph of the Statement of Findings there referred to reads:
4. Ho Suet-ki (PW1) gave evidence that on the 27 October 2006, after she and her classmate boarded the train at the Hang Hau MTR Station, she felt a touch on her buttocks. She turned and saw the appellant, but she did not say anything. At Tseung Kwan O MTR Station two police officers intercepted her and she told them what happened. The two officers then gave chase, and when she reached the station concourse on the ground floor, she saw that one officer had already intercepted the appellant, and she confirmed this was the man who had indecently assaulted her. Still on Ground 3, it is appropriate to set out paragraphs 21 and 22 of the Statement of Findings, which read:
21. After the appellant was caught, PW3 had asked the victim, if this was the man. I was satisfied that the officer asked this question not because he had any doubt about the identity of the man, but to see if they had caught the man the victim had pointed at, and she confirmed this. Later on, they all waited together at the station master's office for police transport.
22. The defence counsel complained that the appellant was not given a proper identification parade, but he was seen doing the act, he was chased and caught straight away, and he was identified at the scene by the three eye witnesses, each of whom were able to identify him independently, and their identification evidence were in accordance with Turnbull's guidelines. I found that the witnesses had not made any mistake in identification. In my view, the Magistrate did not in any way rely on a dock identification or anything like it to convict. Ground 3 fails. Ground 4 is a complaint that the Magistrate failed properly to consider the testimony of the witnesses, and relied on wrong findings to convict. The particulars of this ground read:
- (i) The victim had not visited the Maxim's Restaurant where the appellant was employed [p.12 para. 11]. In fact, the victim testified that she had visited that restaurant. (ii) The victim, the police and the appellant had all gone to the station master's office together [14 para. 21]. PW2 testified that the appellant and the victim had been taken to different rooms. (iii) The

victim was able to describe the man who assaulted her [p.12 para. 14]. The victim did not describe the man who assaulted her, nor did she describe his clothing. (iv) All the witnesses had said the touch occurred before the train started moving [p.13 para. 17]. The victim testified that the touch took place at the time the train was moving out of the platform. PW2 testified that the touch occurred 10-15 seconds before the train moved and that when the train moved out the assailant had already moved to the other side of the train. As to item (i) of Ground 4, the relevant passage in the Magistrate's Statement of Findings reads: The defence case as I gathered from cross-examination of the victim was that whatever happened to her was accidental, that she could not be sure the appellant was the man on the train, and she recognized him because he was a cook at Maxim's Restaurant at the Tseung Kwan O Station (the victim said she had never been to that restaurant). The Magistrate's statement that the victim said that she had never been to that restaurant is inaccurate. In a transcript prepared by the defence and accepted by the prosecution, it appears that Ms Ho said, in answer to a question by the Magistrate herself, that she had been to that restaurant once or twice. As to item (ii) of Ground 4, the relevant passage in the Magistrate's Statement of Findings reads: After the appellant was caught, PW3 had asked the victim, if this was the man. I was satisfied that the officer asked this question not because he had any doubt about the identity of the man, but to see if they had caught the man the victim had pointed at, and she confirmed this. Later on, they all waited together at the station master's office for police transport. Item (iii) of Ground 4 was not pursued. As to item (iv) of Ground 4, the relevant passage in the Magistrate's Statement of Findings reads: Further, all the witnesses said that the touch had occurred before the train started moving, and the train was not very crowded (from the victim and PW3). I was satisfied the touch was deliberate and intentional. In the transcript to which I have referred, these questions and answers in the examination-in-chief of Ms Ho appear: Q: While you were being indecently assaulted was the train in motion? A: Not yet. Q: You mean not yet start off from Hang Hau station? A: The door already closed but train not yet started. But then one sees this in the cross-examination of Ms Ho: Q: So at which point When you turned around was the train moving yet? A: Yes. Q: Oh? How long has it been moving for when you turned around? A: Erm about 2 seconds. Q: And the touching happened immediately before that? A: Yes. Q: So in fact the touching happened at the moment the train pulled out of the station when the train started? A: Yes. The matter under item (ii) can, I think, be treated as immaterial to the Magistrate's decision to convict. But I do not think that the same can be said about the matter of the restaurant or the matter of the train being in motion. On the face of the Magistrate's Statement of Findings, her belief that Ms Ho had never visited the restaurant formed a material part of her view on identification while her belief that the train was not in motion formed a material part of her view on intentional conduct. It is not a question of whether the Magistrate could have convicted notwithstanding what Ms Ho actually said on these matters. The question is whether it is safe, satisfactory and just to affirm the conviction reached by the Magistrate upon these material errors on her part as to the true state of the evidence. This question, I am driven to conclude, must be answered in the negative and therefore in the Appellant's favour. Accordingly, the appeal is allowed and the conviction is quashed.

REASONS ON COSTS

After I gave judgment allowing the appeal and quashing the conviction, the Appellant applied for the costs of the trial and of the appeal. The Respondent opposed such costs, but I awarded them to the Appellant, to be taxed if not agreed. Counsel for the Respondent, as I understand her, expressed the hope that I would provide written reasons for my order as to costs. I consider the reasons obvious, but am prepared to say this. Costs were opposed on two bases. One was that the Appellant had brought suspicion upon himself, and the other was that his appeal succeeded on a technicality. Counsel for the Respondent argued that the Appellant had brought suspicion upon himself by saying this to the arresting officer after caution: perhaps because of a lack of sleep therefore I accidentally touched others . I was not satisfied that that involved the Appellant bringing suspicion upon himself. It is exculpatory since it raises the possibility of accident, which turned out to be an issue in the case. As for counsel for the Respondent's argument that the Appellant's appeal had succeeded on a technicality, the short answer is that he was acquitted on mistakes made by the Magistrate in relation to material issues of fact. That is not a technicality. I should mention that counsel for the Respondent, after having conceded the accuracy of the transcript prepared by the defence, said in the course of the hearing of the appeal that she withdrew her concession in so far as it related to Ms Ho's answer Not never in response to the cross-examiner's words You have never been to the restaurant . It is immaterial to consider whether it was open to counsel for the Respondent to withdraw the concession which she had made. It is immaterial for these simple reasons. That exchange was obviously ambiguous. That is why the Magistrate herself asked whether Ms Ho had ever been to the restaurant. Ms Ho's unambiguous answer to the Magistrate was that she had been to the restaurant once or twice . (V. Bokhary) Judge of the Court of First Instance High Court Mr Oliver H Davies, instructed by Messrs Jal N Karbhari & Co, for the Appellant Ms Patty Lee, of the Department of Justice, for the Respondent PAGE 1udk 1udk i\$&H @d/Z o!@R< 5%4j 5%4j >~t6 HCMA.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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