

HONG KONG / JUDGMENT

HKSAR v. LEE KWOK WAI

COURT

Court of First Instance

DECIDED

21 September 2007

CASE / FILE NUMBER

HCMA474/2007

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bjbj HCMA 474/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 474 OF 2007 (ON APPEAL FROM TWCC 319/2007)

BETWEEN HKSAR Respondent and LEE KWOK WAI Appellant

Before: Deputy High Court Judge E Toh in Court Date of Hearing: 21 September 2007 Date of Judgment: 21 September 2007

J U D G M E N T

The Appellant was convicted after trial of one charge of Assault Occasioning Actual Bodily Harm, contrary to Common Law and punishable under Section 39 of the Offences Against the Person Ordinance, Cap. 212, Laws of Hong Kong. He appeals against his conviction. There was no dispute that the incident arose from the bitter divorce between the Appellant and PW1. The facts in this case were that the Appellant had gone to the flat and was in the process of taking a stand fan or floor fan and intended to take it out of the main door of the flat, but PW1 had used her body to prevent him from doing so by obstructing the main door. Clearly this was a highly emotional incident and the Appellant upon finding his way out door blocked, he then turned round and wanted to walk into direction of the kitchen and in his state of anger, he threw the fan onto the floor after he had turned round. Unfortunately, the fan broke and a part of it hit PW1 s right toe. It was clear that at the time when the Appellant turned round toward the kitchen, that is, away from the main door. PW1 s evidence was that she also at the same time walked away from the front door because she was thinking that the Appellant may be going to the kitchen to get something else. At that moment, a part of the fan had broken off and hit PW1 s toe and the question for the learned Magistrate was whether the Appellant was reckless in doing so by

throwing the fan down. The learned Magistrate had correctly identified that the issue is not one of hostile intent but one of recklessness. The complaint by Mr Ma, counsel for the Appellant, is that the learned Magistrate had not correctly applied the law to the facts in this present case. The learned Magistrate in coming to his conclusion had referred to the case of the R v G as cited in Sin Kam Wah and another v HKSAR, FAC No. 14/2004, where it said that: In order to convict for an offence under s.118(3)(a) of the Crimes Ordinance, it had to be shown that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. It was further said that: Conversely, he could not be regarded as culpable so as to be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his action. The test for recklessness is equally applicable in this case. The learned Magistrate considered that test and at the end of the day considered that the Appellant was indeed reckless at the time when he threw the fan down onto the floor. Therefore he was guilty of the charge. Mr Ma argued that the learned Magistrate had not found that at the time when the defendant threw down the fan or just before he was in state of anger, and, so, Mr Ma contended that when the learned Magistrate considered the test for recklessness, he had failed to consider the fact that the Appellant was angry at the time and whether that anger could have clouded his perception of the risk to the victim in this case. Mr Ma said that at the end of the learned Magistrate's oral reasons and also in his Statement of Findings, the learned Magistrate when considering this issue of recklessness did not specifically mention whether he thought the anger could have clouded the defendant's perception, so the learned Magistrate had therefore failed to consider the personal characteristics subjectively whether the Appellant would appreciate or foresee the risk. There is no dispute that this case was not a particularly complicated one and the issue was clear from the very beginning. It was clear that there had been bad blood between the Appellant and his wife as a result of the divorce. At the trial, the Appellant had elected to give evidence and gave his version of the events. After a properly and considered assessment of the evidence of PW1 and the Appellant, the learned Magistrate accepted the evidence of PW1. The learned Magistrate had correctly identified the issue in this case and had correctly identified the law involved in this case. And from a reading even of his oral reasons, it was clear that the learned Magistrate had the correct test for recklessness in mind at the time when he considered his verdict. Although the learned Magistrate did not specifically mention anger in the last paragraph he did just a few paragraphs before mention that he found the Appellant had acted in a state of anger. There is no doubt that being a professional and experienced Magistrate, he had not failed to consider the anger of the Appellant at the end when he considered whether the Appellant was reckless. As for the personal characteristics of the Appellant, the learned Magistrate could only go on the evidence that was given before him that had revealed his personal characteristics. I have no doubt that the learned Magistrate found that there was nothing in the defendant's personal characteristics or his age that would genuinely make him not appreciate or foresee the risks involved. So in the circumstances, I find that the conviction was fully supported by the evidence and a proper one. The appeal is therefore dismissed. (E Toh) Deputy High Court Judge Mr Liu Yuen Ming, Senior Government Counsel of Director of Public

Prosecutions, for the Respondent Mr David Ma, instructed by Messrs Lee Chan Cheng, for the Appellant PAGE - 1udk 1udk 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 T U V i\$&`G ,wC= ,wC= hcma.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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