

HONG KONG / JUDGMENT

HKSAR v. LEE SOU LEUNG JOSEPH

COURT

Court of First Instance

DECIDED

13 April 2007

CASE / FILE NUMBER

HCMA1092/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj HCMA 1092/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 1092 OF 2006 (ON APPEAL FROM TWCC NO. 2596 OF 2006)

BETWEEN HKSAR Respondent and Lee Sou Leung Joseph Appellant

Before: Deputy High Court Judge E Toh in Court Date of Hearing: 13 April 2007 Date of Judgment: 13 April 2007 Date of Reasons for Judgment: 26 April 2007

J U D G M E N T

The Appellant was convicted of one charge of indecent assault after trial. He appealed against his conviction which resulted in his appeal being allowed, and his conviction quashed. The prosecution applies for an order for re-trial and here below are my reasons for allowing the appeal and my ruling on the re-trial. Case for the prosecution It is not disputed that the Appellant, at the material time, was inside the Vanilla Pod Spa room of the Victoriana, a Spa at the Hong Kong Disneyland Hotel in Lantau and PW1 was giving him a massage. PW1 had started work at the spa 3 months before and on the day of the offence, the Appellant had booked a body scrub, 2 massages and a facial which took approximately 5 hours. It is not disputed that the Vanilla Pod room had a transparent glass window which measured approximately 2 ft. by 3 ft. and anyone passing by the window would be able to see what was happening inside the room. After PW1 had applied the scrub on the Appellant, he took a shower and then lay on the bed where upon PW1 proceeded to massage him. Initially, the Appellant lay face down and it was PW1 s evidence that whenever her hand touched the Appellant s hand, the Appellant would hold her palm with his hand. After the massages, PW1 proceeded to do a facial for the Appellant and this time the Appellant lay on his back. The facial included a shoulder massage and PW1 applied oil

on the Appellant's shoulders. It was at this stage that PW1 said the Appellant lifted up both hands and held both of her hands that was on his shoulders, he then tucked two-thirds of her forearms underneath his back. PW1 then said that she felt that the Appellant weighed down his body on top of her hands and she was unable to move her hands. At this stage, the Appellant turned his head to the right and kissed once on the remaining one-third of her right forearm and at the same time, stretched his right hand upward, brushed with the fingers of his right hand along her right wrist then up her arm to the side of her right chest. At that time, PW1 said she was sitting opposite to the Appellant's head facing the glass window, her abdomen was more than a foot away from the Appellant's head. PW1 said that after she was brushed on the chest, she shrank away, withdrew her hands and told the Appellant to relax and she replaced the Appellant's hands on the bed. PW1 claimed that although she was embarrassed, she continued to massage the Appellant, on his face, but the Appellant once again tucked her hands under his back, kissed her forearm in the same way and brushed her chest with his fingers. At that stage, she shrank away and felt frightened and the Appellant asked her whether she could provide other services or what is commonly called additional time of one hour. She told the Appellant that she would go and check if she had other appointments, PW1 left the room and met her colleague, Irene (PW2), and after relating the events to her, PW1 cried and subsequently, the police was notified. PW2 was the colleague to whom PW1 had made her complaint. She said that she saw PW1's eyes were red and she had asked PW1 what had happened and then PW1 told her that her customer had touched her chest and kissed her hands. PW2 then reported to her superior and the superior then reported to the police. Defence Case It is not necessary for the purpose of this judgment to repeat the full evidence of the Appellant who had elected to give evidence. In gist, the defence was that he did hold PW1's hands in order to show her the spot where he needed to be massaged as he was very tired. He said that he could not explain properly just exactly where the spot was and that is why he held her hands and directed her to the actual spot. The Appellant denied ever deliberately touching PW1's chest at any time. However, he did not rule out the possibility that he may have accidentally touched her chest and that perhaps during the massage, his mouth may have come in contact with the forearm of PW1. The Appellant said that at the end of the treatment, he had asked PW1 if she could continue and PW1 had left the room to make enquiries. Subsequently, he was told that PW1 was not feeling well and so he got dressed. At no time did PW1 ever ask him what are you doing. The Appellant had denied that he had ever deliberately kissed or touched PW1 on her chest. Magistrate's Findings The learned Magistrate began his assessment of the evidence by considering the evidence of the Appellant. The learned Magistrate at paragraph 8 of his Statement of Findings said this: I found that his evidence is unreliable. When being cross-examined, in respect of the following matters, he hummed and hawed in replying many times, dodging the questions:

- (a) why didn't he simply make oral request for pressing (massaging) further inward, but had to hold her hands to (put them) underneath (his) back;

- (b) what he thought as to why the female had to withdraw her hands from underneath his back. Further in paragraph 9, he observed: Anyhow, having considered and observed the facial expression and demeanour of the Defendant in the witnesses box when giving evidence, I saw that his facial expressions were evasive when giving evidence, I rule that he was not telling the truth in court, he was just telling lies. Then after correctly reminding himself of the burden of proof, the learned Magistrate at paragraph 10 said the following:
10. I have reminded myself of the following points: .
- (b) the corroborative evidence on sexual offence requirement or the warning in respect of sex offences;
- (c) the legal principles in respect of recent complaint;
- (d) all the legal principles concerning indecent assault. Then the learned Magistrate went on to find that PW1 and PW2 were honest and reliable witnesses and accepted their evidence. The learned Magistrate found as a fact that on both occasions, the Appellant asked PW1 to extend her hand(s) a bit further inward and (to press) harder. During that time, PW1 did say to the Appellant, what are you doing? . The learned Magistrate concluded that the brushing of PW1 s chest by the Appellant was a deliberate act of indecent assault and said at paragraph 14 there is no misunderstanding in this case, nor was there any misunderstanding that PW1 might (have) agreed to the Defendant s improper behaviour, all the grounds relied on by the defence and the possibilities had been considered, but has been negated completely one by one. The learned Magistrate then went on to convict the Appellant. Appeal Directions on the Law It is important, in every case, that the learned Magistrate has demonstrated a proper assessment of the facts and that he had given himself proper directions on the law. As mentioned above, the learned Magistrate s generic self-reminder as to the law was as Mr Macrae submitted of no assistance to the Appellate Court. As Pang J. said in HKSAR v. Sin Cho Yin HCMA No. 511 of 1998: I am aware of the workload in the Magisterial Courts and it would be unrealistic to suggest that their oral reasons should take the form of a carefully prepared written judgment. But good sense and practice requires that the important legal and evidential features of the case should at least be covered by the Magistrate in note form, albeit orally. Having said that, over-generalized statements such as I have warned myself of all necessary warnings as required by law or in the absence of specific references, phrases such as I have considered all the evidence before me is, in my view, inadequate. The Chief Justice in the case of *Oriental Daily Publisher Limited v The Commissioner for Television and Entertainment Licensing Authority* [1998] 4 HKC at page 515C said: The benefits of a duty to give reasons It has been said that a duty to give reasons imposes an additional burden on the decision maker. Probably, it would involve some additional work. But decision makers who are under such a duty should not regard it as a burden. They should view the duty positively as it brings various benefits. The Tribunal should certainly take a positive attitude towards it. Firstly, it would impose desirable intellectual discipline and concentrate attention on the relevant issues. It would thus assist in ensuring that any decision is made on proper grounds and contribute to the effective

disposal by the Tribunal of its work. Secondly, reasons would assist in demonstrating to the parties that the Tribunal has carried out its task properly and would enable them to decide on the appropriate course of action in the case at hand, including whether to appeal for judicial review. . Thirdly, the reasons given by the Tribunal will promote and enhance consistency in its decision making and assist the law enforcement and prosecuting authorities . Fourthly, the giving of reasons would demonstrate to the community that the Tribunal is functioning properly and this would engender public confidence. In the present case, whilst corroboration is not necessary and a warning is discretionary, the learned Magistrate had, surprisingly, mentioned at paragraph 10 of the Statement of Findings, which was quoted above, that he had reminded himself about corroborative evidence on sexual offence requirement or the warning in respect of sex offences . This Court is at a loss as to what he actually meant. Did he mean that corroboration was required? Did he find evidence which were corroborative of PW1 s evidence? These are mysteries which the learned Magistrate never sought to clarify. It is commonly known that the requirement for corroboration for sexual offences is no longer required, but a trial judge has the discretion according to the circumstances of the case to give himself an appropriate warning. Even more mysterious is that the learned Magistrate then followed the corroboration point with the reminder to himself of the legal principle in respect of recent complaint . Immediately after reminding himself of those legal principles at paragraph 11 of the Statement of Findings, after he accepted PW1 and PW2 as honest and reliable witnesses. He said this: I accept their evidence as the truth of what actually happened. As Mr Macrae pointed out we do not know if the learned Magistrate was relying on what PW2 said she heard from PW1 as corroborative of PW1 s evidence and therefore reflecting the truth of what actually had happened; or that the learned Magistrate was merely saying that he accepted PW2 as telling the truth when she said PW1 said those words to her and that at all times he bore in mind that, in law, the complaint cannot be used as corroboration of the truth of what was alleged but merely to show consistency. I agree that this is crucial in this appeal and on that point alone I would have allowed the appeal. Assessment of the facts The learned Magistrate found as a fact that PW1 had said to the Appellant after the alleged indecent assault, the words what are you doing? . A reading of the transcript showed when PW1 gave evidence in chief, she had said that after the alleged assault she did not cry out but said to the Appellant relax a little bit, put your hands back onto the bed (see page 36F of the Appeal Bundle). PW1 said she said those words after the alleged first assault and after the alleged second occasion of assault she did not say anything and left the room on the pretext that she was going to check if she had any other appointments. Under cross-examination at page 49 of the Appeal Bundle: Q: You did not say to the Defendant, because you touched me, therefore I want to leave the room. A: No. Q: You never while inside the room accused the Defendant with the words to the effect that why did you touch me ? A: I did. Q: You did? What did you say? A: I when he kissed my hand I asked what are you doing ? Q: When the prosecutor asked you in the examination in chief, you had never mentioned these words, correct? A: That s because they had not been asked. PW1 also agreed that she had never mentioned to this in her statement to the police nor, she agreed, had she mentioned this prior to the cross-

examination when these words were put to her. In re-examination, the witness said that she had failed to tell the police that she had asked the Appellant what he was doing because she had been very tired and the whole course could not be fully recorded. Counsel for the prosecution asked the following: Q: Then during the cross-examination the counsel asked you just now, that you had never said to the Defendant what are you doing and you agreed to it. However, before that you said that in fact you have said to the Defendant what are you doing, so in fact did you say that to him or not? A: Yes. This was a very important point because if PW1 had said it that would indicate to the Court that she was surprised by what the Appellant had done and was taking him to task about it. However, from the transcript, it would appear that the first time that PW1 mentioned this was when she was being cross-examined when it was suggested to her by counsel asking her why she did not react by asking the Appellant what he was doing. Further, in the cross-examination, she agreed with counsel for the defence that she had never said those words. Then in re-examination, she claimed that she had. This was evidence which called out for a careful analysis by the learned Magistrate. Not only do the court on appeal have to know how the learned Magistrate sought to analyse this part of her evidence in view of her apparent discrepancy but counsel and the Appellant were also entitled to know. Unfortunately, the learned Magistrate merely made a finding of fact that he believed PW1 had said those words without telling us why and how he came to that conclusion despite the apparent discrepancy. This is crucial in view of the fact that the defence was that it never happened or if it did happen that it was an accident and that the Appellant was not aware that he was being accused of having indecently assaulted PW1. Of course, had the learned Magistrate properly assessed and analysed this part of PW1's evidence, he could have, after a proper analysis, still find that he believed she was telling the truth when she said in cross-examination that she took the Appellant to task. Unfortunately, we do not have the benefit of that and this finding of fact in view of the discrepancies mentioned above renders the learned Magistrate's findings to be unsafe and unsatisfactory. Mr Macrae also complained about the learned Magistrate's assessment of his client's evidence in the witness box and demeanour. I wish to reiterate here that demeanour is a poor guide as to whether a witness is telling the truth. It is one of many factors, however, for a learned Magistrate to consider but the most important factor is whether the evidence of the Appellant was logical and reasonable. In considering that, the Magistrate would take into account the demeanour of the witness in answering questions, however, when doing so he should remind himself that a witness may appear nervous or inarticulate because it may be his first time giving evidence in the witness box. Another matter, which caused me some concern, was the learned Magistrate at paragraph 14 of his Statement of Findings (page 192 of the Appeal Bundle) said: the subsequent brushing of PW1's chest was the Defendant's deliberate act of indecent assault, there is no misunderstanding in this case, nor was there any misunderstanding that PW1 might (have) agreed to the Defendant's improper behaviour, all the grounds relied on by the defence and their possibility have been considered, but has been negated completely one by one. It was never an issue at the trial that the Appellant thought PW1 might have agreed to his improper behaviour. Why the learned Magistrate felt that important enough to mention it here, is a

mystery to all of us. However, it may be an indication that the learned Magistrate did not have the issues in this case clearly in his mind.

Conclusion

For the above reasons, I find that the conviction is unsafe and unsatisfactory and therefore the appeal is allowed and the conviction is quashed. Re-trial Ms Tsang on behalf of the Respondent applied for a re-trial on the basis that the evidence for the prosecution is good and proper and the appeal was allowed because of the Magistrate's mistakes and the Appellant had not served any part of his sentence. Mr Macrae opposed the application on the grounds that it would be harsh to re-try the Appellant and the witnesses would have a second bite of the cherry. He also said that the Appellant has suffered psychologically since September last year when first accused of this offence and the publicity in the case has not only affected his home life but had caused his friends and Church to question his honesty and integrity. Mr Macrae also added that the evidence is not clear cut and is a matter of evaluation. In *R v Holgate (No. 2)* [1996] 3 HKC 324, the Court of Appeal said: on an application for a re-trial, it is necessary for the Court to consider all the surrounding circumstances. These included the seriousness of the offence, the history of the proceedings, the evidence for both prosecution and defence, the complexity or otherwise of the trial, the reasons for the success of the appeal, the lapse of time since the alleged offence and since the trial, and the length of the sentence which the Appellant may have served. It is necessary then to weigh the public interest in ensuring that those guilty of serious crimes are brought to justice and punished against the effect of putting a successful appellant through the ordeal of a further trial. Obviously, if after all these matters have been considered, no reasonable prospect of a conviction after a new trial is demonstrated, one would not be ordered. It is clear that the facts of this case is not a complicated one and the proper assessment of the credibility of each witness is crucial. This case has been brought to court within a short time and though it is unfortunate that the Appellant has suffered some publicity and had a cloud hanging over his head since September last year, nevertheless, public interest and the seriousness of the offence have to be put into the balance. I therefore consider that this is an appropriate case for a re-trial and I so order.

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 hcma.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=56886

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-lee-sou-leung-joseph-2007>

Prepared on 28 October 2026 · Esheria