

HONG KONG / JUDGMENT

HKSAR v. LEE TAT MING

COURT

Court of First Instance

DECIDED

28 February 2007

CASE / FILE NUMBER

HCMA612/2006

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bjbj HCMA612/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 612 OF 2006 (ON APPEAL FROM TWCC 756 OF 2006)

BETWEEN HKSAR Respondent and LEE TAT MING (

AUTONUMOUT The appellant was convicted after trial of two charges of Obstructing a Public Officer , contrary to section 23 of the Summary Offences Ordinance, Cap.

228. He was sentenced to six weeks imprisonment for each offences, both sentences to run concurrently. He appealed against conviction only. AUTONUMOUT After hearing submission I dismissed the appeal. I now give my reasons. Prosecution case AUTONUMOUT The prosecution case was that the appellant, who was in solitary confinement inside the Ma Po Ping Prison, failed to change from his pyjamas into his prison day clothes as required by the Prison Rules when requested to do so by a prison officer (). PW4 requested the appellant to change out of his pyjamas as PW4 was about to take the appellant to do his daily walk. AUTONUMOUT According to PW4, if the appellant refused to go for his daily walk and did not give any reason for such refusal, the appellant would then be in breach of the Prison Rules. PW4 was unable to cite the number/section of the particular rule at the time. The appellant did not say whether he was going for a walk or not, he just did not get changed. AUTONUMOUT When the appellant continued to pay no heed to PW4's several requests, PW4 reported the matter to his superior () sometime before 9:30 a.m. AUTONUMOUT PW2 went along to the appellant's cell with PW4 and two other officers (PW1 and PW3). At the time, the appellant was still wearing his pyjama pants. He was sitting inside the cell, with one leg popped up against the gate of the cell. He was holding a radio, listening to it with headphones. PW2 told the appellant to get changed so as to do his exercise. The appellant then got up and walked to the end of the bed. AUTONUMOUT According to PW2, the appellant never told him he (the appellant) did not want to walk. PW2 agreed that it is not

compulsory for the appellant to do the walk, however, PW2's evidence was that a prisoner could only refuse if reasons were given, such as not feeling well. AUTONUMOUT After PW4 opened the gate, as instructed by PW2, PW2 entered the cell with PW1. PW2 told the appellant to hand over the radio to PW1. After the appellant handed the radio over, PW2 instructed PW1 to check the back of the radio to see if it was the appellant's property. At this juncture the appellant became incensed and snatched the radio back from PW1 while uttering foul language. He also pushed PW1. When PW2 came to assist PW1 the appellant shook him off. PW1 tried to subdue the appellant but the latter put up a struggle. PW3 rendered assistance while PW4 went to raise the alarm. The appellant continued to struggle. PW2 eventually sprayed the appellant with his tube of OC spray after giving the appellant warnings. The appellant was finally subdued. Defence case AUTONUMOUT The defence case was that the appellant did not refuse to change out of his pyjamas when requested by PW4 to do so on a number of occasions that morning, it was just that he was slow in doing so. The appellant said he did not want to go for a walk and has made his intention known to the officer. He said he had done the same on previous occasions, i.e. telling the officer he did not want to go for a walk. He disagreed that he was required to walk for half an hour duration twice daily unless he had medical reasons not to do so. AUTONUMOUT The appellant said PW2 came later with two officers and the three entered his cell on the pretext of a search. PW2 grabbed him on his chest while the other two officers threw his belongings such as his radio (which was placed on his bed) and cigarettes (which was inside his prisoner's bag) around in the cell. Then PW2 suddenly accused the appellant of assaulting an officer even though the appellant did not do anything of the sort. The appellant was then pushed down and sprayed by PW2. He was also assaulted by the other two officers. AUTONUMOUT The defence also called another inmate (Chui) to give evidence. According to Chui, when he woke up that morning he overheard the appellant verbally refusing to change out of his pyjamas when requested by an officer. Chui said he was then taken for his morning walk. A patrolling supervisor saw the appellant wearing pyjama pants and scolded the appellant. PW2 was also present and said he would come back later to deal with the appellant. AUTONUMOUT After Chui returned to his cell after the walk, he saw PW2 arriving with two to three other officers. The officers entered the appellant's cell and started to throw the appellant's properties such as his radio, cigarettes, newspaper etc. out of the cell. Chui then heard PW2 swearing and said You even assault the Ah Sirs? Chui then heard sounds of body being punched or kicked and the appellant shouting for help. Chui also heard sounds of OC Gas being sprayed. AUTONUMOUT Chui disagreed that unless he had medical reason, he must do the walking session everyday. Chui said that there was no penalty for refusing to walk, he could simply refuse. Magistrate's findings AUTONUMOUT The learned magistrate, after consideration, came to the conclusion that PW1, PW3 and PW4 were honest and reliable witnesses and he believed the incident had happened in the manner they described. Regarding PW2, the learned magistrate found him generally honest and reliable but did not accept all of his evidence. The learned magistrate has this to say

9. I considered carefully whether PW2 had entered the defendant's cell with an intention of teaching the defendant a lesson for not having changed. I noted in this respect that he had arrived with two officers to support him and he had only made a cursory attempt to talk to the defendant about his behaviour through the cell bars before entering the cell, and he did not make enquiries to understand the reason for the defendant's not changing and he did not warn the defendant that he would be punished if he did not change his clothes. He also never asked the defendant upon whether he actually wanted to go out walking that day, but took the view, in my belief, that the defendant had to go out whether he liked it or not.
10. I found from the evidence that there was a choice available to the defendant upon whether he would go out for a walk and I also found that there was no penalty if he decided not to go out. I did not accept the prosecution evidence that it was a requirement unless there was some medical reason and he would have to do envelopes if he did not go out. I did however find that prison regulations required the defendant to change his clothes when he woke up in the morning and I found that the defendant had shown truculence and disobedience in this respect on that day since he had woken up.
11. I found, after considering this aspect, that I believed PW2 was acting to some extent with impatience and he was not prepared to take any more steps to realistically verbally warn the defendant before he entered the cell, even though the defendant had I found moved towards the back of the cell by the time the door was opened. I believed he also took a course of action by entering the cell and seeking removal of the radio under the precursor of a check, which would obviously result in reaction from the defendant. I did not believe that the checking of the radio was an absolute necessity at that time, as I believed a check had already been done when the defendant awoke and I found that the defendant had been kept thereafter alone in a locked cell. I found that PW2's arrival with two colleagues and his entering the cell and taking the radio under the guise of a check was done as a result of his losing patience and to show the defendant that he meant business. Whilst I found this was not perhaps the best and most appropriate behaviour by PW2, it did not in my view take him outside the bounds of his acting within his duty, nor did it take PW1 and PW3 out of their bounds of acting within their duty bearing in mind the defendant's truculence and disobedience that morning. I therefore found that the snatching back of the radio and the pushing of PW1 was an obstruction. I also found that the throwing of PW2's hands off was an obstruction by the defendant. (Emphasis applied) Ground of appeal AUTONUMOUT Chan Shiu Ming, counsel for the appellant, advances one ground of appeal only. Mr Chan submitted that since the learned magistrate disbelieved part of PW2's evidence and found that his arrival with two colleagues and his entering the cell and taking the radio under the guise of a check was done as a result of his losing patience and to show the defendant that he meant business, the learned magistrate should have found that neither PW2 nor PW1 were acting in performance of their public duties. That being the case, the appellant's acts of snatching the radio from PW1; pushing PW1; and shaking off PW2 could not amount to obstructions to the two officers in performance of their public duties. AUTONUMOUT Chan placed emphasis on the findings by the learned magistrate that PW2 has entered the cell and

taken the radio under a guise of a check and submitted that such conduct was an abuse of authority. The court should be condone such behaviour and should not upheld a conviction of obstruction when the prosecution witnesses adopted such behaviour, Mr Chan submitted.

Judgment

AUTONUMOUT An appeal under section 113 of the Magistrates Ordinance, Cap. 227 is by way of rehearing on the evidence before the trial court supplemented by such further evidence as the intermediate appellate court may admit under its statutory power to do so : see Chou Shin Bin v. HKSAR, FACC No. 11 of 2004. AUTONUMOUT In my view, it must be acknowledged that a magistrate has the advantage of observing witnesses giving evidence in court, the judge on appeal could only rely on the written transcript. The credibility and reliability of any particular witness is solely within the assessment of the magistrate. Where the findings of the magistrate are shown to be unreasonable or illogical, or inherently improbable; or that the magistrate has misunderstood, or misquoted, or failed to consider any significant aspect of the evidence, the conviction would then be rendered unsafe and unsatisfactory. AUTONUMOUT Having perused the transcript of the evidence of all witnesses, I have to say I found the learned magistrate s findings about the daily walk somewhat surprising. AUTONUMOUT Rule 36(1) of the Prison Rule (Cap.

234) (the Rule) provides Every prisoner unless excused by the Medical Officer on medical grounds shall take such exercise as may be ordered. AUTONUMOUT PW4, who was the immediate officer supervising the appellant, gave clear evidence that the appellant was required to go for a walk, to do exercises, everyday; and that failure to do so without reason would be in breach of the Prison Rule. AUTONUMOUT The prosecutor actually referred to the need of medical grounds wordings used in the said Rule before an inmate can be excused from doing exercise when she cross examined the appellant and Chui. AUTONUMOUT It is clear to me that there is a legal requirement that inmates shall exercise as may be directed unless there are medical grounds for non compliance. If a walk outside the cell everyday does not amount to a form of exercise, I do not know what it amounts to! In any event, PW4 clearly referred to the walk as an exercise. AUTONUMOUT Admittedly, the evidence of PW2 might have confused the learned magistrate in this respect. PW2 agreed that it was not compulsory for an inmate to do the walk. However, when reading his evidence as a whole, it is clear that PW2 has never said an inmate could choose whether to walk or not. His evidence was that inmate could elect not to walk provided that reasons were given. PW2 gave an example that for humanitarian grounds an inmate may be excused from doing the walk, which of course is not quite the same as the medical grounds stated in Rule 36(1).

25. PW4 made clear reference to the Prison Rule but was not able to point to that particular rule (Rule 36(1)). Although PW4 said he would have to go back to refer to some document, no one has ever asked him to do so. The prosecutor did not refer the learned magistrate to the said Rule 36(1) either, though from the tenor of her cross-examination of the appellant and Chui, she was aware of that rule.
26. In my view, the said Rule is made under the Prison Ordinance (Cap.
- 234) and is part of our legislation in Hong Kong. A piece of legislation does not cease to exist simply because a particular prosecution witness is not able to give its exact number, or that the prosecution has not referred to it to the court. The law is clear, all inmates shall exercise unless there are medical grounds for not doing so. The morning walk on the day in question is clearly a form of exercise. There is no basis for the learned magistrate to find that the appellant, being an inmate, could choose to walk or not.
27. PW4 told the appellant to get out of his pyjamas so as to exercise. The appellant has never said he did not want to go for a walk. By repeatedly refusing to get changed, the appellant has clearly indicated by his conduct that he was not going to exercise. The evidence also clearly shows that the appellant was not sick. The irresistible inference was that the appellant was being difficult and petulant.
28. One has to look at all the factual matrix of this case to view the act of PW2 entering the cell and later asking PW1 to check the radio.
29. PW4 started work at 6:30 a.m. There is no clear evidence at what time he first asked the appellant to get out of his pyjama for a walk. PW2 said usually it is around 7:00 to 7:30 a.m. when the cell was closed that prisoners are required to change to daytime uniform. In any event, the evidence clearly shows that before 9:30 a.m., PW4 has repeatedly (three to four times) asked the appellant to get change and the appellant simply ignored him. When PW2 came along to the cell, what was the appellant doing? He was sitting on the floor, with one foot on the bars, and listening to the radio with headphones. PW2 again requested the appellant to get change for a walk. By this stage the appellant got up and walk to the end of the bed. The appellant never indicated, at this stage, to PW2 that he was not going to get change or not going for a walk. As far as PW2 was concerned, the appellant was going to get change and going for a walk. PW2 then asked PW4 to open the gate for him (PW2) and PW1 to enter. PW2 then asked the appellant to hand over the radio, which the appellant complied. It was only when PW1 checked the radio as instructed by PW2 that the appellant snatched back the radio and did the subsequent acts to PW1 and PW2.
30. It is important to note that the radio was not placed somewhere in the cell, but held by the appellant when he was still in his pyjama pants. Taking the radio away for the appellant under the circumstances would ensure that the appellant get change promptly, and that the appellant would not be able to bring the radio out with him for the walk. While there is some doubt whether it was really necessary to check the radio as well, the evidence does not support the learned magistrate's findings that the PW2's entry of the cell and the taking of

the radio from the appellant were under the guise of a check . It could well be that the checking of the radio was purposely done as a show of authority, there being no dispute that prison officers do have the authority to check properties in the possession of prisoners, I cannot see how such an act of checking would have taken either PW2 or PW1 outside the bounds of their performance of their public duty.

31. For these reasons, the appellant was properly convicted of the two charges. The appeal was therefore dismissed. (Judianna Barnes) High Court Judge Miss Sin Pui Ha, Mary, SADPP of Department of Justice, for HKSAR Mr Chan Siu Ming, instructed by Messrs Tung, Ng, Tse & Heung, for the Appellant PAGE - PAGE A B C D E F G H I J K L M N O P 1udk 1udk A B C D E F G H I J K L M N O P Q R S T U V &`#\$ 5_ga 5_ga 5_ga 5_ga 5_ga 5_ga '4? & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 26 October 2026 · Esheria