

HONG KONG / JUDGMENT

HKSAR v. LEE WAI HUEN

COURT

Court of First Instance

DECIDED

30 August 2007

CASE / FILE NUMBER

HCMA528/2007

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bjbj HCMA528/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 528 OF 2007 (ON APPEAL FROM KTCC 7866 OF 2006)

BETWEEN HKSAR Respondent and LEE WAI HUEN (Ngpa1 by Mr Eddie Yip sitting in Kwun Tong Magistracy of a charge of indecent assault on a woman on board a public bus. He was sentenced to seven days imprisonment. He now appeals against both the conviction and the sentence. The prosecution s case AUTONUMOUT The crux of the prosecution s case was that the defendant plucked at the strap of the victim s brassiere at her back when travelling on the upper deck of a bus. The victim was a housewife and on the day in question she was seated on the upper deck next to a window. She leaned her right side against the window and her left side against the backrest. Her front was at an angle facing the aisle. Her back was at an angle facing the window. The middle of her back was away from the backrest. No one was sitting beside her. There were a few passengers on the upper deck. AUTONUMOUT The weather was quite cool. She was wearing a jumper and underneath the jumper she only wore a brassiere. AUTONUMOUT During the journey, she felt a light pluck at the buckle of her brassiere at the middle of her back. It was one-off and of a short duration. She turned around to check what was going on but failed to find out the cause. The appellant was sitting immediately behind her, also near the window. No one was seated beside him. AUTONUMOUT After the bus travelled for a distance, she again felt two or three plucks, this time somewhat harder. These were downward and outward plucks at the strap of her brassiere at the middle of her back. She turned around and saw the appellant. His left hand was holding the top handle of her backrest and his right hand was holding the right side of her backrest near the window. She accused him of molesting her and called him perverted . He replied that if she did not like that, she could sit elsewhere. He said something else which she could not hear clearly. She said she would report to the police. AUTONUMOUT She then went down to the lower deck and told the driver of the matter and a few minutes later police arrived. The appellant denied her allegations to the police. The defence case AUTONUMOUT The appellant gave evidence to the effect that he was 40 years of age, married and had a daughter. He was gainfully employed. He had a clear record. AUTONUMOUT He said it was his habit to use his

left hand to hold the top handle of the backrest in front of him and his right hand to hold the right side of the backrest near the window frame. He did the same on that occasion. He did not heed the presence of the victim immediately in front of him until she made accusations against him. He felt humiliated and replied that if she did not like that, she could sit elsewhere.

AUTONUMOUT He was not aware of having touched her. He might have come into contact with her shoulder by accident. In any event, he did not intend to touch her. The magistrate's findings AUTONUMOUT The magistrate found the victim credible and reliable. He rejected the appellant's evidence. Grounds of appeal AUTONUMOUT Iu for the appellant advanced two grounds of appeal. The first was that the magistrate erred in law and facts in finding the response of the appellant when he was confronted by the victim as (1) an admission of physical contact on the victim and (2) using it to contradict the evidence of the appellant that he was not aware of having touched the victim. AUTONUMOUT This arose because the magistrate in his Statement of Findings said that he found that the appellant's oral reply to the victim, namely that if the victim did not like that, she could sit elsewhere, to be an admission of a physical contact with her. He said that it contradicted the appellant's oral evidence in court that he was not aware of having touched her. This allegation of unawareness of any touch was the crux of the case according to the magistrate. AUTONUMOUT In my judgment, the magistrate should not have found this reply to be an admission of a physical contact with the victim, or indeed to be any admission at all. The reply by the appellant was ambiguous and could have been interpreted to mean a number of things. He admitted in his evidence that he did say what was alleged but he said that he felt humiliated at the time. AUTONUMOUT I do not agree with counsel that the finding by the magistrate that this was an admission was the basis of the magistrate rejecting the appellant's evidence and/or enhancing the victim's credibility. AUTONUMOUT In my view, the magistrate, having heard the evidence of the victim and the appellant and having observed their demeanour in court, came to the conclusion that the victim was a credible and reliable witness and that the appellant was not. AUTONUMOUT Inherent in that finding must have been a finding by the magistrate that if nothing at all had happened that day the victim would not have turned around and made accusations against the appellant. In my view, the error mentioned above was not so material that it fatally flaws the conviction. AUTONUMOUT The second ground of appeal advanced was that the conviction was unsafe and unsatisfactory because the magistrate erred in relying on the uncorroborated evidence of the victim and failed to appreciate and/or to evaluate the major discrepancies in her evidence. AUTONUMOUT The first discrepancy between her evidence in court and her written statement to the police was whereas she had said in court that she was sitting with her back towards the window, in her statement she stated that her back was towards the aisle. She said in court that her evidence was correct and her statement was erroneous. She said that she was still agitated when she signed the statement and did not see clearly what was written in it. The magistrate accepted her explanation to be truthful and reliable. AUTONUMOUT The second discrepancy between her evidence and her statement was that whereas in her evidence she said that two or three plucks at the strap of her brassiere were outward and downward, in her written statement, the movements were up and down. In her evidence, she said that she could not see much difference between those two descriptions. The magistrate accepted her observations to be fair and reasonable. No doubt, implicit in that finding

was the magistrate himself also thinking that there were not too many differences between those two descriptions. AUTONUMOUT I can see nothing wrong with the magistrate accepting the explanations of the victim on those two matters. These were matters which related to minor details. Even though the magistrate did not say so in terms when he gave his reasons for verdict and when he wrote out his Statement of Findings, it is implicit in his verdict of guilty that he must have been satisfied beyond a reasonable doubt that there must have been some sort of incident which involved the appellant touching the strap of the victim's brassiere which made the victim turn around to confront him and then to report the matter to the driver of the bus.

AUTONUMOUT This was a conclusion that the magistrate was entitled to arrive at, having heard the evidence of the victim and having observed her demeanour while she gave evidence in the witness box. This was a finding of fact by the magistrate which should not be lightly interfered with. AUTONUMOUT In my judgment, the two grounds of appeal advanced by counsel cannot succeed. Appeal against sentence AUTONUMOUT The magistrate sentenced the appellant to seven days imprisonment. He now appeals against the sentence. AUTONUMOUT In imposing that sentence, the magistrate felt that he had to follow what the Court of Appeal in *Attorney General v. Wai Yan Shun* [1991] 2 HKLR 209 said, namely that having regard to the prevalence of indecent assaults occurring on the MTR, a period of imprisonment of between 14 and 28 days would normally be appropriate for a first offence. AUTONUMOUT The magistrate was of the view that for indecent assaults occurring in less crowded public transport, similar sentences should be imposed. One cannot disagree with that sentiment because these indecent assaults on public transport vehicles can get out of hand if deterrent sentences are not passed by the courts. However, one has to consider the nature of the indecent assault before considering these sentences of imprisonment. AUTONUMOUT In the instant case, the magistrate was of the view that a brassiere was an item of intimate clothing but he also accepted that the assault in this case was less serious than a touch on the more intimate parts of the female body. The magistrate took into account the appellant's previous good character but came to the conclusion that a fine would fail to address his criminality and the public concern. AUTONUMOUT I take the view that the assault in this case must be regarded as one which is on one of the lower rungs of criminality for offences of this nature. This case is quite different from the case quoted by Miss Kam for the respondent of *HKSAR v. Ng Wai Lok*, HCMA1172/2003, where the appellant had put his fingers on the victim's body below her armpit and at the strap of her brassiere. There there was contact with a part of her body. In the instant case, there was none. The touch was over the victim's jumper and it was at the position of where the victim's brassiere strap was. The strap was plucked two or three times. That was the extent of the assault. I am of the view that a fine would be an appropriate sentence for this indecent assault. The appellant is 40 years of age, married and has a daughter. On the day in question he was gainfully employed. He had a clear record. I am of the view that a fine of \$1,500 is an appropriate penalty for this offence. AUTONUMOUT The appeal against conviction is therefore dismissed and the appeal against sentence is allowed to the extent that the seven days imprisonment will be substituted by a fine of \$1,500 which is to be paid out of the bail money. (Peter Nguyen) Judge of the Court of First Instance, High Court Miss Teresa Kam, GC of Department of Justice, for HKSAR Mr Thomas Iu and Mr Chan Wai Ming, instructed by Messrs Li, Wong & Lam, for the Appellant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U

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