

HONG KONG / JUDGMENT

HKSAR v. LEE WAN LUNG

COURT

Court of Appeal

DECIDED

26 November 2007

CASE / FILE NUMBER

CACC190/2006

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bjbj ppellant

Before : Hon Stuart-Moore VP, Stock JA and Yeung JA in Court Date of Hearing : 11 October 2007
Date of Judgment : 11 October 2007 Date of Reasons for Judgment : 26 November 2007

REASONS FOR JUDGMENT

Hon Stock JA (giving the reasons for judgment of the Court):

Introduction

AUTONUMOUT This was an application for leave to appeal against a conviction for the indecent assault of a young girl who at the time of the offence was aged almost 5 years. On 11 October 2007 we granted the appellant leave to appeal against conviction and treating the hearing of the application as the appeal, we allowed the appeal and quashed the conviction. These are our reasons for that decision.

Background

AUTONUMOUT The appellant is a senior police officer who at the date of the suggested offence was aged 41 years and a person of previous good character. AUTONUMOUT He lived in quarters in Kwun Tong with his wife and two teenage children, a son and a daughter. The wife did not work. AUTONUMOUT The girl lived with the family from Sunday night to Saturday night every week since some time in 2003. She had been fostered to their care by the Social Welfare Department, though she went to her mother's place every Saturday night until Sunday night. AUTONUMOUT At trial in the District Court before Deputy Judge Thomas there were two charges of indecent assault; the first, that the appellant indecently assaulted the girl at the appellant's flat on a day unknown between early July 2005 and 3 August 2005; the second, that he indecently

assaulted her at the same address but on a different occasion during the same period.

AUTONUMOUT It was common ground that in July 2005 the appellant contracted gonorrhoea by contact with a prostitute and that his wife thereafter also contracted the disease. He attended a clinic for examination on 23 July 2005 and was duly thus diagnosed. The girl then presented with symptoms and was taken to a clinic and similarly diagnosed. AUTONUMOUT The girl was interviewed for the first time by the police on the night of 3 August. In the course of the second of two interviews conducted that night she alleged that the appellant had placed his private parts against hers. That allegation combined with the evidence of gonorrhoea was the foundation for the charges and for the conviction, though in the event the conviction was of one offence, not two offences, of indecent assault. The interviews of the girl were intended to stand as her evidence in chief at trial pursuant to the provisions of section 79C of the Criminal Procedure Ordinance, Cap. 221. AUTONUMOUT The appellant did not give evidence at trial. He was interviewed by the police on 4 August and again on 31 August 2005. In those interviews he denied any improper contact with the girl. He said that a few days before about 19 July that year he had consorted with a prostitute or prostitutes and had noticed discharge on 19 July. He attended a clinic on 23 July. He had, he said, no idea how the girl had come by the disease. AUTONUMOUT The defence case was that the testimony of the girl was manifestly unreliable both because of the circumstances in which it was taken at midnight and when the girl was obviously very tired and also because of a sea of inconsistencies in it; and, further, that this disease is communicable other than through sexual transmission, most particularly in the case of pre-pubescent girls, albeit rarely. There was expert evidence on this subject and but for the issue that has in the event resolved the appeal, it would have been necessary for us to address in some detail the contested effect of the expert evidence adduced. The judge's analysis AUTONUMOUT The judge's finding of guilt was a two-stage process. On the basis of the girl's testimony he was satisfied that she had been sexually assaulted, but not satisfied about the identity of the assailant. On the basis that the appellant had gonorrhoea and on the view he took of the expert evidence of the chances of non-sexual transmission, he identified the appellant as the assailant. AUTONUMOUT In his Reasons for Verdict the judge commented adversely on the circumstances in which the girl was interviewed. He concluded that the interview was of a fractious and tired four year old and that both in the interviews and in cross-examination she was not a satisfactory witness. He referred to inconsistencies and nonsenses, internal as well as external contradictions. He concluded that: ... it is simply not possible to rely upon the evidence of [the girl] in any detail. What I am entirely satisfied about, however, is the fact that there was sexual interference. That is quite clear from the evidence of the girl, both in the interviews and in her cross-examination in court. But in view of the inconsistencies and the difficulties that adults have I include myself in that in interpreting the entirety of the interviews, it is quite clear that no tribunal of fact can derive from the evidence of [the girl] any further assistance as to the identity of the interferer and the circumstances in which the sexual interference took place. I ruled against [the] submission [that the interviews of the girl should be excluded from consideration] because in my judgment it is quite clear that the girl was giving evidence that she was the subject of sexual abuse and it is for that reason that the evidence is before me. But I go no further than that. I do not rely at all upon [the girl] for the details of how the abuse came about. AUTONUMOUT Whilst we can readily

appreciate why a judge might put to one side testimony of a young girl as to fine detail whilst relying on key assertions, we fail, with respect, in this case, to see upon what basis the judge could, as a matter of logic, accept beyond reasonable doubt one vital aspect of her evidence, namely, that she was sexually assaulted whilst at the same time treating the remainder of her evidence in vital aspects, most particularly as to the identity of the suggested assailant, as entirely unreliable. AUTONUMOUT We have not only read the transcripts of the video interviews of the girl but we have seen the videos themselves. We can fully understand why the judge had reservations about the testimony given the inconsistencies, a number of obvious nonsenses and the tiredness of the girl. Those reservations might have resolved themselves by the tribunal of fact putting the girl's evidence aside altogether, as the judge was invited to do. Conversely, the tribunal of fact might have taken a view that despite those facts and features, the girl's testimony on the essential facts, namely, the fact of sexual assault and the identity of the assailant, was nonetheless reliable. But in this case, there is no basis that we can see for accepting reliability as to one but not the other. AUTONUMOUT In the course of the first of the two interviews, the girl made no accusation of sexual interference against anyone. She was sleepy. In terms of ascertaining any concrete reliable information about anything at all, the interview was going nowhere. This is not a criticism of the skilled and sensitive interviewer or of anyone else. But it is the fact. There was then a break for fifteen minutes. Immediately after the break, the girl was asked about the appellant himself and whether he had done anything to make her unhappy, and she made the allegation upon which a great deal of reliance is placed, that it was the appellant who had taken off his pants and done something to her with his pat pat. It was clear beyond any peradventure about whom the girl was then talking, and if the judge took the view that her testimony was not reliable as to the identity of the assailant it had to follow, in the context of her story as it emerged, that it was not reliable about the fact of the assault either. AUTONUMOUT This spills over into another aspect of the analysis that caused us some concern. It is noteworthy that the girl made her first allegation of sexual assault immediately after the break between the two interviews. It is common ground that during that break the girl was spoken to by her godmother. There was some suggestion that the godmother had scolded the girl during that interview but we do not have the transcript of the godmother's testimony on this issue. Clearly, the judge had to satisfy himself that the girl's sudden revelation of the assault so soon after the second interview commenced was not made as result of any inappropriate remark made to her by the godmother. In this regard the judge, having made his remark to which we refer at [12] above, that he did not rely at all upon the testimony of the girl for the details of how the abuse came about, went on as follows:

25. In the light of that approach I do not propose to go any further through consideration of how the interviews with the girl were conducted and any other matters of possible contamination by, in particular, the godmother. I say that because it is quite clear that in between the two interviews on 3 and 4 August, when the girl came out after the first interview, the godmother spoke to the girl concerned. There has been disagreement as to whether this was a scolding or merely a conversation, but there is a suggestion that the godmother told the girl to tell the entirety of what she knew.

26. In giving evidence, [the godmother] told me that she had noted reticence on the part of the girl concerned to answer fully the questions and she merely wished to encourage the girl to tell all that she knew. Certainly, criticism can be levelled at the fact that that was said to the girl, and that the interviewer apparently made no attempt to stop the communication. But, as I have indicated, I do not propose to rely upon the evidence of [the girl] further than to accept that she was giving truthful evidence of sexual interference. AUTONUMOUT What the judge was there saying was that because he dismissed from his mind the girl's allegations for the details of how the abuse came about it was unnecessary for him to consider the issue of contamination by the godmother. That is fine so far as it goes, but it ignores the fact that he did rely on a cardinal allegation made by her immediately after the meeting with the godmother, namely, that she had been sexually abused. If the judge was to rely in any material particular upon allegations made by the girl in the second interview he was bound to satisfy himself that the reliability of those allegations had not been thus contaminated which, so it would appear, he did not do. AUTONUMOUT The issue that caused us particular concern was triggered by the following passage from the Reasons for Verdict: The evidence of [the girl] was admitted by the adducing of the tapes of the interview, in each case with the girl, together with the transcripts and certified translations. Under the provisions of section 79C of the Criminal Procedure Ordinance that evidence stood as the examination in chief of the girl concerned. I did not see the videotapes in their entirety, but in the course of cross-examination I saw sufficient of each interview on video to understand what had happened in the interviews. (Emphasis added). AUTONUMOUT It is clear from these remarks and from our examination of the court record that the tapes themselves were not played as evidence in chief and that in so far as they were played in cross-examination they were not played in full. In this latter regard, we wondered at one stage whether the judge might have viewed the tapes in chambers, but his own comment suggests not and, in any event, since the evidence on these tapes was tendered as the evidence in chief, the fundamental principle that dictates that a criminal trial be held in open court requires that where a video recording is tendered as evidence in chief under the section, it be played in open court. There may be some unique circumstance in which such a tape must be played other than in open court but, if so, this was not such a case. AUTONUMOUT It seems common ground that the tapes were not viewed in court before or during cross-examination of the girl. To Mr McGowan's best recollection, parts of them were viewed when he cross-examined the interviewing officer. We are prepared to assume that a substantial proportion of them was viewed in court at that stage, not least because we notice that that witness was cross-examined for a long time. Nonetheless the correct procedure was not followed. AUTONUMOUT The correct procedure was for the videos to be watched: in full; and in open court before the girl was cross-examined. AUTONUMOUT It was vital in this case to watch these videos in their entirety, first because they were presented as the evidence in chief, and second although the first reason suffices because there was an assessment to be made about the reliability of a little girl's allegations, an assessment that could only properly be made, not by a study of the transcript, but by watching her interviews unfold from beginning to end. Whilst the judge saw the greater part of the interviews, that

was not, with respect, what was required. AUTONUMOUT It was also important for the court to watch these videos before cross-examination of the girl for the simple reason that cross-examination must always follow examination in chief. That is not simply a matter of form; it is difficult to see how cross-examination can sensibly be conducted and its efficacy tested unless one has first heard the testimony in chief. AUTONUMOUT Zervos SC for the respondent very properly took the view that in the light of the failure to view the full tapes in open court he could not support the conviction. Conclusions AUTONUMOUT For these reasons, we allowed the appeal. After we gave our decision in respect of this appeal we were provided with part of the transcript of the trial in which was revealed the judge s reason for pressing on with cross-examination at the stage he did. The young girl was in the room reserved in the court building for young witnesses, ready to proceed with her evidence and the judge was anxious that she not be made to sit in that room watching the tapes. That was likely to be an unnecessary exercise and one that would probably have delayed cross-examination until the following day. We understand and sympathise with the judge s concern for the girl. This problem ought, with respect, to have been anticipated in the planning stage for the trial, enabling the tape to be played before the girl s arrival at court. It does not in any event answer the point that the judge did not, it seems, see the tapes as a whole. AUTONUMOUT An application has been made for a retrial. We have received written representations in this regard and we order that the appellant be retried. We direct that the case be listed for mention in the District Court within two weeks of the date hereof for a date to be fixed for a trial within three months. Bail is granted on the same terms as those imposed prior to the first trial. AUTONUMOUT We have also received representations as to costs. Our order is that the appellant is to have his costs of the appeal and below to be taxed if not agreed. (M. Stuart-Moore) Vice-President (Frank Stock) Justice of Appeal (Wally Yeung) Justice of Appeal James McGowan instructed by M/s Peter W.K. Lo & Co, assigned by DLA for the Appellant Mr Kevin Zervos, SC, DDPP(Ag.) & Mr David Leung, SGC of the Department of Justice for 1udk 1udk R S T U V &`#\$ % ^,X v?\_.. J[ 6 vx@n .l^L k1B[p "E)`r c@sH <~j6 J[6 .l^L k1B[v?_.. "E)` & 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