

HONG KONG / JUDGMENT

HKSAR v. LEI KAM HUNG

COURT

Court of Appeal

DECIDED

31 August 2007

CASE / FILE NUMBER

CACC324/2006

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

bjbj udgment : 31 August 2007

macrobutton nomacro REASONS FOR macrobutton nomacro JUDGMENT

macrobutton nomacro Hon Tang VP : PW1, the complainant, was born on 30 June 1991. She is the daughter of the woman who cohabited with the applicant more or less continuously between about 1995 and November 2005. In early November 2005, PW1 complained to the social worker at school and her mother that between 1997 and 2005, the applicant had indecently assaulted her as well as had sexual intercourse with her on various occasions, the first of which, an alleged act of indecent assault, occurred in 1997, when she was only 6 years old, and the last, an act of sexual intercourse on or about 31 October 2005, when she was 14. These allegations were repeated by her when she was interviewed by the police. The interview was videotaped. After the applicant was arrested by the police, he was interviewed under caution. The interview was also video-recorded. During the interview, the applicant denied all the allegations made by PW1 against him. However, in relation to 24 October 2005, he said although he did not have sexual intercourse with the complainant, he did indecently assault her by rubbing his penis against her belly, resulting in ejaculation. This evidence was admitted after a voir dire was held. On the basis of such evidence, the applicant was charged with 8 counts, of which 4 were for indecent assault, 2 of unlawful sexual intercourse with a girl under 13, and 2 of unlawful sexual intercourse with a girl under 16. For the purpose of this application, it is sufficient to note that the 7th count alleged that the applicant, on or about the 24th day of October, 2005 had, unlawful sexual intercourse with (PW1), a girl of the age of 14 years . PW1 s videotaped evidence was admissible in evidence under section 79C of the Criminal Procedure Ordinance, Cap. 221. However, section 79C(6) required that PW1 be called by the prosecution. PW1 was called as a witness. With the leave of the court, she was allowed to be questioned by counsel on behalf of the prosecution. Mr Robert Andrews represented the prosecution at trial. In her videotaped evidence, she spoke, inter alia, of two occasions on or about 24 and 31 October 2005 respectively, the subject of the 7th and 8th counts, where she alleged that the applicant had sexual intercourse with her, and that on those

occasions, she covered her face with a quilt. This is what she said in her evidence in answer to Mr Andrews: Q. As I say, just help me about the quilt. Do you remember telling us about the quilt covering your face on the two occasions in October 2005? A. Well, it was not like that. In fact, it was Kam Ho-wang. It was that police officer who was slightly plump, who told me to push all the blame on the defendant, Lei Kam-hung. In fact, all the incidents I related are in the video interview, in fact they all happened with Kam Ho-wang. Q. Well, was your face covered with a quilt on those two occasions in October or not? A. In fact, those incidents did not occur. How could I have covered my face with the quilt? Q. Tell me why, please, (PW1), that you should say that these two incidents of sexual intercourse occurred with Lei Kam-hung during the course of your interview which we all looked at yesterday? A. Well, in fact, what happened was not like this. I told the police officer that I have had sexual intercourse with Kam Ho-wang. However, the police told me not to say in this way and to put all the blame on Lei Kam-hung. That slightly plump police officer told me to say in this way and I dare not do the other things, so I did accordingly. Mr Andrews then asked her about other allegations. Basically she said she made them up because the applicant had scolded her father, So I hated him. As I hated him, I said those things because I remember I saw him when I was six years old. The prosecution did not apply to have her treated as a hostile witness. Mr Whitehouse, appearing for the applicant, here as well as below, then cross-examined her. As a result of PW1 s retraction, the judge directed the jury to acquit the applicant of all 8 counts. However, a new count was added which replaced count 7. Instead of unlawful sexual intercourse, the new 9th count charged the applicant with indecent assault on PW1 on the same occasion. The applicant was convicted and sentenced to 4 years imprisonment. The applicant applied for leave to appeal against conviction and sentence. Mr Whitehouse submitted that having regard to the retraction, the judge ought to have directed the jury to acquit the applicant of the 9th count as well. Relying on R v Galbraith [1981] 73 Cr App R 124, he submitted that the applicant s admission was of a tenuous character because it was inconsistent with PW1 s retraction, thus it was the judge s duty to stop the case. I do not agree that the applicant s admission was of a tenuous character. I am of the view that a properly directed jury could convict the applicant of the 9th count notwithstanding the retraction of PW1. Mr Whitehouse also submitted that the learned judge should have acceded to his request to reconsider her decision in the voir dire that the applicant s admission was made voluntarily. On the evidence, I do not agree with Mr Whitehouse that the learned judge was wrong when she decided not to do so. Mr Whitehouse then submitted that the judge should have discharged the jury, since both PW1 s recorded evidence, as well as the applicant s recorded statement, both of which contained highly prejudicial materials irrelevant to the 9th count had been put before the jury. Mr Zervos accepted that had the 9th count been tried on its own, there were indeed prejudicial material both in the applicant s video-recorded statement as well as PW1 s video-recorded statement which should have been redacted. I agree. But, whether fairness required the jury to be discharged must depend on all the circumstances. One important consideration would be whether the applicant wished to have a new trial before a different jury. Often the decision whether to ask for a new trial would depend on counsel s advice, as well as the wishes of the client. Mr Whitehouse did not ask the jury to be discharged. Mr Whitehouse in his written argument submitted: It is appreciated that such an application was not made by the defence but it

must be remembered that the appellant had already been in custody for 9 months and a retrial could not have taken place for many months afterwards. It is unnecessary for me to decide whether the judge should have taken the initiative to discharge the jury. It was certainly within her discretion to do so. An earlier jury had been discharged for reasons unrelated to the defence. The applicant was represented by experienced counsel. It appeared that counsel did not wish a new trial. Although I believe the jury should have been discharged had Mr Whitehouse so applied, I do not find it necessary to decide whether in the circumstances of this case the judge ought to have taken the initiative to discharge the jury and order a retrial, I would in any event allow the appeal because on the basis of Mr Whitehouse next submission. When PW1 gave her oral evidence, she was neither sworn nor affirmed. As she was over the age of 14 at the time, section 4 of the Evidence Ordinance, Cap. 8, which permits a child under 14 years of age to give unsworn evidence did not apply. Mr Whitehouse submitted and Mr Zervos accepted that PW1's evidence should have been given on oath or affirmation. That being the case, her evidence was inadmissible. See *R v Sharman* [1998] 1 Cr App R 406, and *R v Simmonds* [1996] Cr LR 816, (transcript: Smith Bernal) unreported, dated 3 April 1996, both decisions of the English Court of Appeal. In *Sharman* the appellant was convicted after trial of offences of indecent assault, gross indecency with a child and attempted rape against a young girl E, committed when the girl was 8 to 12 years old. The appeal concerned the unsworn evidence of recent complaint given by another young girl P, who was aged 14 years at the date of the trial, but whose evidence had been recorded on videotape when she was still aged 13 years. This is what Mantell LJ said in *Sharman*: What is the effect on the trial? If the failure to administer the oath was a mere technicality then the irregularity, which is conceded, was not material. It might be said that it is extremely unlikely that had P been sworn she would have deviated in a single instance from the answers which she returned to questions both in chief and cross-examination. But for the court to make that assumption would be to diminish the requirement that evidence be sworn or affirmed to the point where the procedure becomes virtually meaningless. As Evans L.J. said in *Simmonds*: The courts proceed on the basis that the oath imposes a sanction, temporal if not religious, and for those reasons the courts do not receive unsworn evidence except where it is expressly permissible for them to do so. So as Evans L.J. went on to say in that case: The evidence ostensibly given was not evidence at all. He went on to conclude that the court could not be satisfied about the safety of any convictions because they could not be confident that such evidence: did not play a significant part in the jury's decision to accept the evidence of E. The appeal was allowed, the conviction quashed and a re-trial ordered. *R v Simmonds* was also concerned with an offence of indecent assault on a girl who was within a day or two of her 12th birthday when the offence took place. Her evidence had been recorded and two video interviews were played to the court as her evidence-in-chief. She was then cross-examined. After she had been cross-examined and re-examined, it came to the attention of the court that she was aged 14 by the date of the trial, and therefore her evidence ought to have been given under oath or affirmation. The judge then had the oath administered and she was asked the following questions: You have not taken that oath before. There are two things that I want to ask you. We have seen two videotapes of interviews with you which were taken some time ago. Bearing in mind that you are now on oath, were the contents of those interviews true -- what you said in

those interviews? Answer: Yes. Question: Then after those interviews were shown to the ladies and gentlemen of the jury, Miss Williams asked you a number of questions. Did you answer truthfully? Answer: Yes. The judge said: Thank you. Are there any questions arising out of that? And counsel said The court allowed the appeal and quashed the conviction, and Evans LJ who gave the judgment of the court said: Here there was no explanation, no warning to the jury that the answers had been given unsworn and therefore were not strictly evidence in the case, unless and until they were given that character by some subsequent ratification. Without such an explanation it seems to us that the situation is effectively indistinguishable from one which would arise if the mistake had not been discovered until after the trial had been concluded and the verdict given. Then, as Mr Russell-Flint properly concedes, an appeal based on the ground that the conviction could not be supported by unsworn evidence would be unanswerable and on any view at least a retrial would be necessary. It seems to us that we have to return to the question whether, in the absence of any warning to the jury and when the matter was dealt with at the time when it was and in the way in which it was, in those circumstances this case can be distinguished from that. We would hold that it cannot and that for these reasons, which under the previous law would have resulted in our ruling that a material irregularity occurred, we hold that this conviction cannot be regarded as safe. For those reasons this appeal will be allowed and the conviction will be quashed. The applicant did not give evidence, but his defence was that the admissions he made to the police were not voluntary. He made them as a result of threats or inducement on the part of the police. More importantly, they were untrue. The jury in considering their verdict had to consider whether they were satisfied beyond reasonable doubt that the admissions the applicant made, in particular, the admission he made relating to the 24 October 2005, was true. In doing so, the jury must consider all the evidence including the retraction by PW1 of her allegation that on that occasion, the applicant had unlawful sexual intercourse with her, as well as her allegation that she was induced to make that allegation because she was persuaded to do so by the police. I have no doubt that the consideration of her evidence played a significant role in the jury's decision. Mr Zervos submitted that having regard to the evidence in this case, we should not regard the verdict as unsafe, or that we should apply the proviso. I am not satisfied that this is a case where a reasonable jury, properly instructed, would on the evidence without doubt convict the appellant. Thus, I could not regard the conviction as safe. Nor could I apply the proviso. Hon Yuen JA: I agree. Hon Burrell J: I agree that the conviction should be set aside and that a retrial be ordered. However, in my judgment, the primary reason for so doing is that once PW1 had retracted her video recorded evidence and given that the judge directed an acquittal on Counts 1-8 it was unfair to the defendant to leave the new 9th count to the same jury. In my judgment the jury should have been discharged and a new jury empanelled to consider the 9th count alone on the basis of the defendant's video recorded interview under caution. Although the jury was properly directed to ignore PW1's video recorded evidence on Counts 1-8 its prejudicial content was so great that the conviction which resulted on Count 9 cannot be regarded as satisfactory. Subject to these additional remarks I agree with the judgment of Tang VP. macrobutton nomacro Hon Tang VP : For the above reasons, we gave leave to appeal against conviction, and treating the hearing of the application as the hearing of the appeal, we allowed the appeal and quashed the conviction. We also ordered a new trial.

(macrobutton nomacro Robert Tang) Vice-President (Maria Yuen) Justice of Appeal (M.P. Burrell) Judge of the Court of First Instance Mr Kevin Zervos, SC, Ag. DDPP of Department of Justice for the Respondent. Mr Frederic Whitehouse, instructed by Messrs N. K. Tsang & Co., assigned by Director of Legal Aid, for the Applicant. PAGE - A B C D E F G H I ludk ludk ludk B C D E F G H I J K L M N O P Q R S T U V (#p# "0 "0 "0 "0 "0! "0" "0# "0\$ "0% "0& "0' "0("0) "0* i\$&`G @\$ _Rs Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR 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=58433
CASE PAGE	https://chat.esheria.ai/case-law/hong-kong/hksar-v-lei-kam-hung-2007

Prepared on 25 October 2026 · Esheria