

HONG KONG / JUDGMENT

HKSAR v. LI LUT WAN

COURT

Court of First Instance

DECIDED

12 December 2007

CASE / FILE NUMBER

HCMA666/2007

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Before: Hon Beeson J in Court

Date of Hearing: 13 November 2007

Date of Judgment: 13 November 2007

Date of Reasons for Judgment: 12 December 2007

REASONS FOR JUDGMENT

The Appellant was convicted after trial in the Magistracy by Mr

Henry

Mierczak on one charge of Indecent Assault. He was sentenced to a Community Service Order of 120 hours. He appealed against his conviction only. The appeal was heard on 13

November 2007 and the appeal against conviction was dismissed. I

advised at the time of dismissal that reasons would be handed down at a later date. Those reasons now follow.

The indecent assault took place on the MTR during the evening rush hour, an event which unfortunately is all too common and which has necessitated regular deployment of plain clothes police officers to detect and thus, it is hoped, deter offenders.

The female victim, PW1, boarded the train at TST station travelling towards Tsuen Wan. It was around 6.30

pm and the carriage was very crowded. Soon after the train began to move she felt a persistent pressing of something hard against her buttocks together with a rubbing sensation.

The victim was suspicious it was a male organ and tried to move out of range only to find the pressure continued. She looked back and saw a man, whom she described as wearing a checked shirt, blackframed spectacles and carrying a bag held diagonally across his body.

When the train arrived at Jordan station the victim moved towards one of the metal poles in the train but felt the same pressure - she saw that the man she had noticed earlier had followed her. The pressing and rubbing sensation continued. It lasted some time and the victim believed it was a male organ.

The victim moved forward to avoid him but again the same man followed her. At Yau Ma Tei Station the victim changed her position in the carriage, but she looked behind and saw the same man there. Two plain clothes police officers (PW2 and PW3) approached and asked the victim and the Appellant to leave the train. The victim was asked what the matter was by PW3 and she related her story on the platform at Yau Ma Tei. PW2 dealt with the Appellant.

PW2 was on surveillance duty in the MTR. He had seen the Appellant first at Admiralty Station, walking backwards and forwards on the platform. He had attracted the officer

s attention by failing to board the train as trains arrived. He was also looking at passengers as they queued up. Eventually he boarded a train and alighted when it reached TST. However the Appellant did not leave the station, but remained on the platform for a while before re-boarding a train continuing in the same direction, towards Tsuen Wan.

PW2 confirmed the train was very crowded. He saw the Appellant position himself close behind the female victim. He saw the Appellant move his lower body forwards, bending towards the victim so that his lower part was touching the middle part of the victim

s buttocks which were in front of him. This touching lasted approximately one minute. He saw the victim move and look over her shoulder several times.

When the train reached Jordan station neither the victim nor the Appellant alighted. He saw the victim move towards the inside of the train - the Appellant followed her. As the train began to move towards Yau Ma Tei he saw the lower parts of the Appellant were touching the victim

s buttocks. According to PW2 this second episode involved 2 or 3

times of touching, each lasting 4 to 5 seconds - he noticed that the victim appeared to be trying to move sideways.

At Yau Ma Tei Station he asked the victim and the Appellant to get off the train and he arrested and cautioned the Appellant for indecent assault. The Appellant replied,

Ah Sir I know I was wrong, give me a chance

. No post-record of this statement was made until the officer arrived back at the Yau Ma Tei Police Station; it was in issue as to whether the words were ever said.

PW2 said he had never lost sight of the victim or the Appellant throughout the incident and that no other male, except the Appellant, stood behind the victim.

The Appellant had a clear record. He denied walking backwards and forwards on

the platform or letting trains depart. He suggested that it was possible his wallet which was in his right trouser pocket may have pressed against the victim, although he had not paid attention to or noticed the victim. He had never intentionally pressed against the body of the victim and had tried to avoid his body bumping into anyone on the crowded train.

He denied pressing his penis against the victim or following her. He claimed he had never been arrested for indecent assault on the platform, nor had he made any admission. He suggested that it was possible that the inertia of the train might have caused his body to touch against the victim at various times.

The perfected grounds of appeal can be summarised as follows:

- (1) To the extent that the conviction of the Appellant relied on proof that he had made verbal admissions to PW2, the conviction was unsafe and unsatisfactory because there was no admissible evidence as to the words of accusation put to him by PW2, to which the utterance, found by the Magistrate to be made by the Appellant, was a response.
- (2) By reason of the failure to prove the accusation by admissible evidence, the utterance, found by the Magistrate to have been made by the Appellant, was not capable of being relied on by the Magistrate.
- (3) If the Magistrate had relied on an accusation in a post-record which was attributed to the Appellant as evidence of the accusation, that post-record was inadmissible for that purpose because by agreement between the prosecution and the Appellant at trial, which agreement was recognised by the Magistrate, the post-record was not in evidence for that purpose.

Although expressed as 3 grounds and expressed too in an unhelpfully convoluted fashion, these grounds combined to form a single ground, that the Magistrate dealt wrongly with the evidence of the verbal admission. The complaint of the Applicant can be stated as follows; If the Magistrate relied on the verbal admission of the Appellant as indicating an admission to and guilt for the indecent assault he was wrong to do so, because without evidence of what PW2 had said to the Applicant which elicited the alleged reply, what was said was equivocal and if the Magistrate relied on the post-record, it was inadmissible.

However the first submission advanced by Mr Bruce SC, who appeared for the Appellant but had not appeared at trial, related to identification. He submitted that at no time had the Magistrate evaluated whether PW1 had correctly identified the Appellant at the scene.

Only in his written Statement of Findings did the Magistrate refer to this matter;

I am further satisfied that PW1 at this time had turned around and looked at the Appellant, and thereafter PW1 had moved to an empty space at a column in the train when persons got off at Jordan and there was room to do so. The Appellant had followed her (as observed by PW2 which I will get to shortly).

Counsel submitted that this comment was capable of two constructions; either that the Magistrate accepted PW1 as an identifying witness or, that he was relying on the identification by PW2 as the person that he saw in situations which were significantly proximate to PW1. The former construction would mean there were serious flaws in the Magistrate relying on PW1 as an identifying witness.

It was submitted that identification evidence was critical to the case and thus the Magistrate was obliged to make it clear in his Statement of Findings that the identification evidence had been assessed carefully.

The Appellant

s identity was not something for which the Magistrate relied on PW1

s evidence. Identity was not an issue at trial, because the Appellant never denied that it was he who stood behind the victim on the train; his defence was a denial that he had ever touched PW1 with his private parts. The Magistrate

s brief oral reasons given at the end of the trial and his subsequent, more detailed Statement of Findings shows that the Magistrate did not rely on PW1 for identifying details, but that he accepted and relied solely on the evidence of PW2, who had been observing the Appellant throughout. The prosecution did not seek to rely on PW1

s identification.

Counsel for the Applicant also took issue with the way the Magistrate dealt with the alleged verbal admission by the Appellant and submitted that to the extent the Magistrate relied on it, the verdict was unsafe and unsatisfactory.

The police officer, PW2, gave evidence that after being cautioned and arrested the Appellant responded,

Ah Sir I know I was wrong, give me a chance

. He was not asked by anyone at trial what actually it was he had said to the Appellant to elicit this answer. He stated simply that he had arrested and cautioned the Appellant for Indecent Assault

no other details of the offence which had been put to the Appellant, if any, were revealed.

The prosecution wished to introduce this verbal admission, although it seems to have been done only to complete the picture of how the Appellant was dealt with, rather than adding anything to the evidence of the alleged indecent assault. It was of negligible value without knowing what had been said to the Appellant.

No record was made of the admission until after the parties arrived back at Yau Ma Tei Police Station. When PW2 gave evidence he did not relate the exact words he used when he arrested and cautioned the Appellant. No questions were asked of him in cross-examination either on the general or the special issue, as to the words he used.

As the Appellant denied ever saying those words, that special issue was examined by use of the alternative procedure. A reading of the transcript shows that confusion reigned as a result, beginning with defence counsel entitling his Grounds of Objection as being to the written, post-recorded entry, which the prosecution had not sought to rely on.

A long and confused discussion took place which is recorded inter alia at pages B116 to B127 of the transcript of trial. The prosecutor held to her original position, that she was relying on the verbal admission only and this was the view that the Magistrate took also. Eventually, because of the tenor of the cross-examination by defence counsel of PW2, the Magistrate allowed the written record to be produced as a provisional exhibit for the limited purpose of allowing him a more complete understanding of what the defence was alleging. He made it clear he did not rely on it for the truth of its contents.

I am satisfied having considered the transcript and the Statement of Findings, that the Magistrate in saying he placed full weight on the admission was referring to the verbal admission only the notebook containing the post-recording was not before him as evidence.

However in saying he placed full weight on the admission, he can only have meant he placed weight on it, to the extent that it could bear such weight. All he could be sure of was that the words had been said. Without an examination of the context in which those words were uttered the admission was of negligible value except as an equivocal reaction to arrest.

Mr Bruce argued that because the Magistrate nowhere made it plain that he was relying on the evidence of PW2 as the identifier of the Appellant, he

may have

relied on the alleged admission to bolster the identification. If that were so the Magistrate had relied on the admission on a false assumption which meant there was insufficient evidence on which to convict.

This argument cannot be sustained

there was ample evidence of the indecent assault by PW1 and PW2 on which the Magistrate could and did convict. He did not rely on the evidence of PW1 for the identification, nor was there any indication that he had relied on a combination of the identification by PW1 and the verbal admission, to

bolster

the case against the Appellant.

The circumstances of this case were such that the Magistrate had ample evidence before him, without any reliance on the alleged admission, about what had happened on the train during the indecent assault. He found the Appellant guilty as charged and there have been no grounds put before me to justify my interfering with this conviction.

Accordingly I dismissed the appeal against conviction.

(C-M Beeson)

Judge of the Court of First Instance

Ms Sally Yam, SGC, of Department of Justice, for the Respondent

Mr Andrew Bruce, SC, instructed by Messrs Wat & Co, for the Appellant

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