

HONG KONG / JUDGMENT

HKSAR v. LO CHEUK HIM

COURT

Court of First Instance

DECIDED

20 September 2007

CASE / FILE NUMBER

HCMA384/2007

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bjbj HCMA384/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.384 OF 2007 (ON APPEAL FROM ESCC 5308 OF 2006)

BETWEEN HKSAR Respondent and LO CHEUK HIM(ted by a magistrate sitting in the Eastern Magistrates Court on 21 March 2007 of an offence of possession of a dangerous drug, the particulars of which are that on 2 October 2006, in a street he had in his possession a dangerous drug, namely one hand rolled cigarette (burnt) containing 0.11 gramme of cannabis, in herbal form. He was fined \$2,500 by the magistrate. He now appeals against the conviction.

AUTONUMOUT The facts of the case are very simple. On the day in question, he was walking along Morrison Hill Road at 1:12 a.m. when he was stopped by a patrolling police constable. The constable s evidence was he stopped the appellant because he thought that the appellant was looking dull and was avoiding his eyes when they were about six feet apart. AUTONUMOUT The officer immediately suspected him of possession of dangerous drugs and went forward to make inquiries. He told the appellant why he was stopping him and then proceeded to search him. In the appellant s left front trousers pocket he found a cigarette box and inside was a cigarette with green apple printing and the tobacco inside looked different to normal cigarettes. He suspected that it was dangerous drugs and cautioned the appellant. He then asked the appellant a few questions. AUTONUMOUT In evidence chief, he said the first question was what cigarette it was and the answer was there was cannabis . The second question that he asked was where did the appellant get the cannabis. The answer was he got it from a friend. The third question he asked was when did he get the cannabis from the friend and the appellant answered Just now. The officer then declared arrest on the appellant and cautioned him after which the appellant said Ah Sir, I know I am wrong. Can you give me a chance? AUTONUMOUT In cross examination, the officer was asked whether, when he asked the appellant the first question, he was holding the cannabis cigarette and the question was What is this? . The officer agreed that was so, then he was asked this question Q. The next question you asked was, t it cannabis? A. Right. Q. Yes. And the defendant answered you, Yes, it is cannabis. A. Correct. AUTONUMOUT By reading that version that he gave in cross examination, it was quite different from what he had said in chief.

The most important discrepancy, to my mind, is this : he agreed in cross examination that he did ask the question t it cannabis? and the appellant in answer to that question did say Yes, it is cannabis. AUTONUMOUT As Mr Grounds appearing for the appellant submitted, with which I agree, it is only common sense that if the officer found it necessary to ask the question t it cannabis? , then the answer which was given by the appellant just before that question was asked must have been a denial that the cigarette contained cannabis. That is quite different from what the officer had said in chief, namely that in answer to the question what the cigarette was , the appellant replied that that was cannabis. This was not just a discrepancy. This was a material discrepancy because in this particular case, whether the appellant knew that the cigarette contained cannabis goes to the very root of the offence, namely that he was in possession of that cigarette box knowing that it contained a cigarette which had in it cannabis. He was asked to clarify that in re examination and his answer was Perhaps I was confused. AUTONUMOUT fail to see how the officer could have been confused. The two questions which I repeated above in cross examination were simple questions to which the officer without any hesitation apparently immediately agreed with, namely the first question When you held the cannabis cigarette, you asked the defendant, What is this? and the second question The next question you asked was t it cannabis? AUTONUMOUT This evidence given in cross examination also goes to the defence which was put forward. The defence was what the appellant said when he gave evidence, namely that the officer did ask him three questions. The first was What is this? when the officer held the cigarette and he said his answer was I don t know. It s not mine. which logically to my mind then prompted the next question which according to the appellant was He asked me if this was cannabis. The appellant said he then looked at the cigarette and because he had previously had knowledge of cannabis and recognised that it was cannabis so he replied, Yes, it is cannabis. When he was asked the third question where did he get it from, his answer was he told the officer he had picked up a packet of cigarettes from the bar that he was just at and it might belong to a friend. AUTONUMOUT That defence is that the appellant did not know when he had the packet of cigarettes in his pocket that it contained a cigarette which had in it cannabis. He only knew of the existence of cannabis when he was asked by the officer if it was cannabis and the officer was holding the cigarette in front of him for him to look at. AUTONUMOUT The magistrate unfortunately did not deal with that very material discrepancy between what the officer said in his evidence chief and what he said under cross examination. The duty of a magistrate or judge to deal with material inconsistencies is one which is clear and if I can just read through some of the cases which Mr Grounds quoted to further strengthen that self evident matter of law. AUTONUMOUT The earliest of those cases was in 1979 in The Queen v. Lam Kam Ming and another, CACC607/1979 when O Connor J said Significant inconsistencies and conflicts should be dealt with in such manner as to indicate how those matters were resolved. Then in HKSAR v. Sin Cho Yin, HCMA511/1998 where Pang J said that ... good sense and practice requires that the important legal and evidential features of the case should at least be covered by the Magistrate in note form, albeit orally. and that phrases such as I have considered all the evidence before me are inadequate. AUTONUMOUT In Zhuo Cui Hao v. Ting Fung Yee [1999] 3 HKC 634 Chan CJ (as he then was) in the Court of Appeal said Generally speaking, a professional judge is under a duty to analyse in his judgment the material points in the evidence of the case and give reasons as to why

he has reached a particular conclusion or decision. This is the only way to make people understand why their evidence is not accepted by the court and why they lose in a case.

AUTONUMOUT In an earlier case *The Queen v. Yam Kam Ting* [1989] 2 HKLR 673, Yang CJ said that the failure in that case to resolve a discrepancy which touched upon an important aspect of the case led him to the conclusion that the conviction was unsafe and unsatisfactory and must be set aside. AUTONUMOUT The magistrate, after hearing the final address, adjourned for about half an hour and came back and gave very detailed oral reasons for his verdict of guilty. These oral reasons are, for all intent and purposes, quite similar to what is contained in the Statement of Findings, save for one material difference. In dealing with the discrepancy, the magistrate never identified what the discrepancy was nor did he repeat it in his reasons for verdict. What he said when he gave his oral reasons was this While it is true that PW1 in his answer given in cross examination at first did differ from his answer in chief, that has been clarified in his re examination, and I accept his explanation that he was confused when he answered the defendant s senior counsel s question. [Emphasis added] AUTONUMOUT The difference between what he said there and in the Statement of Findings is that instead of the words at first did differ , the magistrate in his Statement of Findings replaced those four words with the following While it is true that PW1 in his answer given in cross examination in relation to the sequence of questions he asked of the defendant did differ ... and the rest of the paragraph follows what he said in his oral reasons in court. So in his oral reasons he accepted that there was a difference between what was said in chief and in cross examination and that was in his Statement of Findings identified not as a matter of difference but a matter which only related to the sequence of questions that he asked of the defendant. AUTONUMOUT To compound the problem, after the magistrate in his oral reasons set out the prosecution s case and the defence case, he then made his findings of fact and he said that he found PW1 to be an honest and reliable witness. He found that the defendant did say to him words to the effect that he knew the cigarette contained cannabis. AUTONUMOUT In dealing with the appellant s evidence, he said On the contrary, I reject the defendant s evidence. Then he gave some reasons which are not really reasons for rejecting the appellant s evidence. He mentioned the appellant s education, that he was not so drunk that he would not able to understand and communicate with the officer and he must have known full well what consequences might result from the answers he gave to PW1. The magistrate then said this What the defendant is now saying in court, once I accepted PW1 s version as the truth, cannot then be the truth, and I so find. AUTONUMOUT Granted this is only said after he had said that he rejected the appellant s evidence, but it perhaps still gives one an insight into the reasoning process of the magistrate, namely the one reason why he might have rejected the appellant s evidence was the fact he had already accepted the police officer s evidence. That, as Mr Grounds quite correctly submitted is a wrong reasoning process. You cannot say that because you have accepted the prosecution witness s evidence that it then follows that you cannot accept the appellant s evidence. That is not the function of a defendant s evidence. A defendant, as we all know too well, does not have to prove anything. He gives evidence in some cases to try and persuade the court or the jury to find that having heard his evidence they have a lurking doubt or reasonable doubt about the prosecution s case. AUTONUMOUT In this particular case, the appellant s evidence goes, to my mind, fully to explain why the officer had asked the question t it cannabis?

and that was simply because the appellant had said to the officer that, in answer to the question what the cigarette was, he did not know because the cigarette was not his. AUTONUMOUT am not saying that the magistrate was wrong to have rejected the appellant's evidence. What I am saying is because the magistrate failed to mention, assess and evaluate the very material discrepancy in the officer's evidence, he could not have properly assessed the appellant's evidence which he gave before the magistrate. AUTONUMOUT The second ground of the appeal that Mr Grounds advances is the magistrate, both in his oral reasons and the Statement of Findings, did not show or indicate that he had ever considered the element of intention to possess which is required when one is dealing with the charge of possession of dangerous drugs. It is trite law that a person could only be in possession of an object if he knowingly has it in his physical and actual custody or otherwise within his physical control, and intends to have custody of it or to exercise control over it as and when the occasion requires. AUTONUMOUT The ingredients of physical custody are firstly that the defendant must know the object is there, secondly that he intends it to be there, thirdly that he is aware of its nature; and fourthly that he intends to exercise control over the object as and when required. AUTONUMOUT If any authority is required for that trite proposition of law that can be found in one of the cases that Mr Grounds quoted, namely the case of *The Queen v. Li Man Kit*, HCMA392/1989 where Bewley J said ... Possession is a matter of intention intention to exercise control over something. If a friend comes to stay with me and brings his golf clubs, which he keeps in the hall, they remain in his possession: they are not in, mine. It makes no difference if I know he has stolen the golf clubs and I tell lies to the police about this. ... AUTONUMOUT So to summarise, there are three matters in this appeal which have caused me considerable concern. Firstly, the magistrate apparently failed to evaluate the very material discrepancy in the police officer's evidence in what he said in chief and what he said in cross examination. Secondly, the magistrate was in error to have said that because he had accepted the police officer's evidence, he, in effect, could not accept the appellant's version of events. Thirdly, that it would not appear that the magistrate ever considered the ingredient of intent to possess. In relation to that, Mr Grounds relies on what the magistrate said in his Statement of Findings which incidentally was not in his oral reasons. The relevant passage is this What the defendant is now saying in court, once I accepted PW1's version as the truth, cannot then be the truth, and I so find. The defendant is not telling the truth about the lack of knowledge of the cannabis cigarette in court. AUTONUMOUT That is also what the magistrate had said in his oral reasons. But in the Statement of Findings, there is a further addition and it is this ... It is not for me to speculate how or why the defendant came into possession of the dangerous drugs. All I have to consider is whether he was in possession of the dangerous drugs and whether he knew that it was cannabis that he had in his possession. Mr Grounds relies on the phrases All I have to consider is ... and what followed after that is firstly what was in his possession and secondly did he know it was cannabis. There was no mention by the magistrate whatsoever of intention to possess. AUTONUMOUT For those reasons, I find that the conviction of the appellant is unsafe and unsatisfactory and I allow the appeal against conviction and the conviction is quashed. The sentence or the fine, if it had been paid, would have to be refunded to the appellant. So the appeal against conviction is allowed. Conviction is quashed. The fine, if paid, has to be refunded to the appellant. (Peter Nguyen) Judge of the Court

of First Instance, High Court Miss Sally Yam, SGC of the Department of Justice, for HKSAR Mr Christopher Grounds and Mr Trevor Bell, instructed by Messrs Henry Wan & Yeung, for the Appellant PAGE - PAGE A B C D E F G H I J K L 1udk 1udk &`#\$ eH[; eH[; & 6" English.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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