

HONG KONG / JUDGMENT

HKSAR v. LUK KAI SING

COURT

Court of First Instance

DECIDED

17 April 2007

CASE / FILE NUMBER

HCMA721/2006

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bjbj HCMA721/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 721 OF 2006 (ON APPEAL FROM FLCC 2939 OF 2005)

BETWEEN HKSAR Respondent and LUK KAI SING (F O R J U D G M E N T

AUTONUMOUT On 22 March 2007, I allowed the appeal against conviction and I quashed the conviction and the fine of \$2,000 imposed on the appellant. I ordered that the fine was to be repaid to the appellant. I said that I would give my reasons for the decision on a later date and that I now do. The Background AUTONUMOUT The appellant was convicted by Mr William Ng sitting in Fanling Magistrates Court of the offence of criminal damage. The particulars of the offence are that he had, on a certain day in the lobby of the North District Hospital, without lawful excuse, damaged the uniform sewed edge of the epaulette of the left shoulder of the victim, intending to damage such property or being reckless as to whether such property would be damaged. The prosecution s case AUTONUMOUT The evidence was that the appellant became very agitated on the day in question and, in a very loud voice, was demanding to know why a security officer on the ground floor of the hospital was preventing him from going up to the first floor. He was causing such a disturbance that a police officer was called. When the police officer appeared at the scene, the appellant was talking to another security officer, also in a very loud voice. AUTONUMOUT That security officer gave evidence that the appellant pointed his finger at his face and was scolding him, and the appellant also pulled at the epaulette of that witness a few times which eventually caused the stitches of the epaulette to become unfastened. AUTONUMOUT The police officer was standing next to the appellant at that time. His evidence was that when the appellant was pointing his finger at the security officer, he, the police officer turned his head to tell the appellant not to do that and he did not see the appellant do anything to the epaulette of the security officer. AUTONUMOUT The magistrate in his oral reasons for the verdict said, inter alia, that at the time the appellant was very agitated and angry, and the magistrate accepted beyond a reasonable doubt that under those circumstances, the appellant

pulled at the epaulette of the left shoulder of the security officer causing the stitches to become unfastened and at that point of time, a police officer was looking at the appellant. He concluded by saying that the prosecution had satisfied him beyond reasonable doubt that the appellant was guilty of the offence and that each ingredient of the offence had been proved. AUTONUMOUT In those oral reasons the magistrate did not find as a fact that the appellant had intended to damage the property of the victim nor did he find that the appellant was being reckless as to whether such property would be damaged. The element of recklessness was mentioned for the first time by the magistrate when he wrote out his Statement of Findings on 27 July 2006, more than a month after he found the appellant guilty on 5 June 2006. The defence counsel in her final address had not mentioned the element of recklessness to the magistrate at all. The law AUTONUMOUT In *Sin Kam Wah & Another v. HKSAR*, FACC14/2004, page 375, the Court of Final Appeal decided that in order to convict of an offence of rape under the Crimes Ordinance, it had to be shown that the defendant's state of mind was culpable, in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. Conversely, he could not be regarded as culpable so as to be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions. The Court of Final Appeal also decided that juries should be directed in terms of the *R. v. G* and another subjective interpretation of recklessness. AUTONUMOUT In *R. v. G* and another [2003] 4 All 765, the House of Lords decided that a person acted recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to :

- (1) a circumstance when he was aware of a risk that it existed or would exist; and
- (2) a result when he was aware of a risk that it would occur; and it was, in the circumstances known to him, unreasonable to take the risk. The learned judges decided that it was a salutary principle that conviction of serious crime should depend upon proof not simply that the defendant had caused (by act or omission) an injurious result to another, but that his state of mind when so doing was culpable. The charge of criminal damage AUTONUMOUT The charge under consideration is laid under section 60(1) of the Crimes Ordinance, Cap. 200 which says quite clearly that a person is guilty of the offence of criminal damage of property belonging to another if he intends to destroy or damage any such property or he is reckless as to whether any such property would be destroyed or damaged. The mens rea of the offence is quite clearly that either he has to have the intention to destroy or damage or he is reckless whether by his actions the property would be destroyed or damaged. AUTONUMOUT The magistrate had simply said that he was satisfied that all elements of the offence had been proved, but he did not specify which limb of the offence he was finding against the appellant, that is, whether the appellant intended to damage the property or he was reckless as to whether or not the property would be damaged. AUTONUMOUT In my view, that is a material irregularity and quite apart from whether the evidence was sufficient to sustain the conviction, the omission on the part of the magistrate is a material irregularity and the appeal must be allowed. It was for that reason that I

allowed the appeal. (Peter Nguyen) Judge of the Court of First Instance, High Court Mr Lam Siu Man, Sharman, SGC of the Department of Justice, for HKSAR Mr Alex Ng, instructed by Messrs Cheung & Yip, for the 1udk 1udk &`#\$ &`#\$ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 25 October 2026 · Esheria