

HONG KONG / JUDGMENT

HKSAR v. LUO XIAN PING

COURT

Court of Appeal

DECIDED

25 May 2007

CASE / FILE NUMBER

CACC114/2006

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

bjbj

Before: Hon Ma CJHC, Stuart-Moore VP and Stock JA Date of Hearing: 25 April 2007 Date of Judgment: 25 April 2007 Date of Reasons for Judgment: 25 May 2007 REASONS FOR JUDGMENT Stuart-Moore, VP (giving the reasons for judgment of the Court):

Background

On 24 March 2006, the appellant was convicted of rape following a 5-day trial before Deputy High Court Judge Wright (as he then was) and a jury. The appellant sought leave to appeal against conviction and, following the hearing on 25 April 2007, we granted leave. Treating the hearing as the appeal, we allowed the appeal and quashed the conviction. We made no order for a retrial as the complainant had indicated in writing that she was unwilling to attend court a second time to give evidence. We now give the reasons for allowing the appeal. The ground of appeal which Mr Macrae SC advanced with success on the appellant's behalf was that the judge had fallen into error by giving the jury a full direction on recklessness as a possible basis for convicting the appellant of rape when hitherto this had formed no part of the case for the prosecution or the defence and when it did not arise on any realistic view of the facts. As it so happens, the judge had given a tacit indication to trial counsel before they embarked upon their speeches that he would not be directing the jury on recklessness but, for a reason which is not apparent to us, it seems that he must have changed his mind. Unfortunately, counsel were not given any notice of this before a direction on reckless rape was given. Prosecution and defence versions It is convenient at this stage to set out the nature of the case for the prosecution and the case for the defence, each of which was succinctly dealt with by the judge in his summing up, in order clearly to understand this ground of appeal in its proper context. It will be seen immediately that the difference in the accounts given by the complainant on the one hand and the appellant on the other was a stark one. In short, the complainant alleged that after a considerable struggle with the appellant, she was forced into an act of sexual intercourse with him. The appellant testified that the complainant had agreed to have intercourse with him in return for a monetary payment

but, when she later increased the amount she wanted to be paid, he refused to go on and no sexual intercourse ever took place. The judge dealt with the allegation, and the complainant's evidence in particular, in this way:

51. There is no dispute that on the night of 30 November 2004 [the complainant] was sent by her employer to Room 4008, The Atrium, at the Marriott Hotel at the request of the Accused who had sought the services of a masseuse. She arrived there according to her evidence as well as the entry on the exhibit P53 at a little before 11:30 p.m.. She finally gained entry to the room where she found the Accused and two other males sitting on couches around a small table. She sat to one side for some while and was then told by the Accused to massage his head whilst he continued talking to his companions. She did so. After a while the other two males left.
52. It was [the complainant's] evidence in court that the Accused then told her to go to wash her hands which she did in the bathroom. When she returned to the living room the Accused was still sitting on the same sofa. As she walked back into the living room he said to her Take off pants : she saw him, at this stage, taking off his own pants. She walked close to him. He then told her to massage his stomach. She was standing very close to him when he grabbed her right hand and pulled it towards him telling her to touch his penis which she said she could feel was erect. She did not wish to do this, tried to avoid touching him and told him that she was not willing to do so. He continued to pull her hand in an attempt to touch his penis. She protested saying she would not do that and was not a prostitute. He offered to pay her but she said she did not want his money.
53. He said that as she would not fondle him he would fondle her and he put his hand or hands underneath her upper garments attempting to take off her bra. The two of them struggled, with her pulling on her upper garment to stop him. He then pushed her to the floor in the gap between the sofa on which he had been sitting and the coffee table. He pressed on her with his body. She continued to protest. While she was pulling down her upper garment he succeeded in removing, in one motion, her snug fitting jeans as well as her underpants. Having removed her lower garments he inserted his finger or fingers into her vagina a number of times.
54. She told you in her evidence in chief that he had then held his penis and inserted it into her vagina. She had struggled and felt pain. She had shouted at him that she was in pain and asked him to let her get out. He ignored her saying that he would pay her \$5,000 whilst she continually threatened that she would report the matter to police.
55. She said that he then stood up, pulled her up off the floor and dragged her into the bedroom where he pushed her on to the bed. He again repeatedly inserted his finger into her private parts and although he held his penis and tried to insert it into her vagina it seemed to have softened and he was unsuccessful. She continued to weep and attempt to push him away. She had grabbed his hair and his shoulder. She was crying and resisting him at all time. He had again said to her that he would pay her \$5,000. In the hope of stopping him, she said

that she would take \$20,000. He appeared astonished by this. She took advantage of his astonishment to go back into the living room and put on her clothes.

56. You will have remembered that she related the fact that the Accused had in fact bitten her right nipple. She was categorical about the location of that bite. (Appeal bundle pp. 17-19) The relevant parts of the appellant's evidence were set out by the judge in the following terms: 91. by November 2004 [the Accused] had used the services of [the complainant's] employer for approximately [2 years]. He had a standing arrangement with them that they would provide a female for massage or for what he called a whole set, in other words massage and sexual intercourse. He would be charged between \$800 and \$1,000 for a straightforward massage and approximately \$3,000 when it included sex.
92. On the 30 November 2004 he had telephoned in the early evening for a masseuse to be sent to him. Thereafter two friends arrived unexpectedly and he tried to abort the arrangement. This turned out not to be possible. [The complainant] arrived. He and his visitors were still talking. She started to massage his head at his request. He confirmed her evidence that he was sitting on the right-hand side sofa. He told you that he and his friends were discussing a substantial business transaction while she massaged his head. His friends left. As she told you, she showed them out.
93. [The complainant] moved to the sofa where the Accused had placed his feet on the coffee table and was now watching television. She started to massage his legs and his thighs. He asked if she was providing sexual intercourse: she indicated that she would masturbate him for a fee of \$3,000 or provide sexual intercourse for \$5,000. He protested that this was more than he usually had to pay. She agreed to the reduced fee of \$3,000 for sexual intercourse provided he paid in advance. He gave her \$1,000 and told her that he would give her the balance afterwards. She then removed his clothing and put it on the arm of the sofa next to him. She took off her clothing and put it on another sofa. He commented on a red mark on her breast which she attributed to tight clothing. 94. She sat on his right leg facing him and fondled his penis. She kissed various parts of his body. She then moved to his left hand side and continued fondling his penis. He failed to attain an erection. She offered her right breast to him to kiss which he did. He said he had not bitten it but had sucked it. She asked him if he would be prepared to pay her an additional \$2,000, telling him about her family circumstances and claiming that she was providing a good service for him. He agreed. She continued fondling him.
95. She suggested going into the bedroom after about 10 to 20 minutes alone in the living room. They went into the bedroom together and lay on the bed. He lay on the left-hand side of the bed with her head on his upper right arm. They caressed one another's genitals, he using his left hand. This went on for some 10 minutes. He had not inserted his finger into her vagina but had simply fondled what he described as her labia minoris and a little bit further, too. He had rubbed her. He had still not achieved an erection.

96. She continued to fondle his penis and then rubbed it against her genitals. He obtained an erection and he discovered that she, too, was aroused. He got out of the bed to fetch a condom whereupon she said to him that as he was so comfortable she wanted him to increase the payment to \$20,000. His response was to ask her whether she was crazy, to say that he would not pay that amount and to tell her that she had better leave. He walked away into the bathroom where he took a shower.
97. When he came out of the shower he found her sitting at the foot of the bed. Although she had previously spoken to him in Putonghua she now addressed him in Cantonese. She said to him that \$20,000 was not much to him and that she had been making him comfortable. He refused to pay whereupon she said that if he continued to refuse she would sue him for rape. He lost his temper and told her to leave. He went out to the living room and put on his clothes. She went out to the living room and also got dressed. (Appeal bundle pp. 29-32)
- Recklessness At the end of the evidence and before speeches, the judge very properly dealt with a number of matters with counsel relating to his summing up. The third of these was recklessness . The following dialogue took place: Court: Okay. Recklessness? Mr Plowman: Well, it s an ingredient, but I don t know that it arises here. Mr Leung: My Lord, the prosecution opened the case and all along proceeds on the basis that the defendant knew that she was not a Court: So you don t want me to address recklessness? Mr Leung: Can I perhaps just think about that in a moment and I ll let your Lordship know my position. I tend to agree with my learned friend, I understand it s an ingredient, but that s apparently not the case that how the prosecution proceeds. Court: Well, I think that s probably right, but if you do want me to address it then I want to know on what basis. Mr Leung: Yes, I accept that. Court: And when I say what basis , I mean objective or subjective. Mr Leung: Yes, I understand. (Appeal bundle pp. 234-235) Mr David Leung, who prosecuted at trial, understandably, and in our view correctly in the light of the facts of the case, did not at any later stage invite the judge to give the jury a direction on recklessness and he made no reference to it in his final speech. It is speculative to suggest that certain comments in Mr Plowman SC s final speech about the ingredient of consent may have left the judge feeling that he owed it to the jury to explain what was meant by the word reckless contained in the definition he was duty-bound to give the jury of rape. Suffice it to say, whilst we do not criticise Mr Plowman for the remarks he made, his submissions closely bordered on the issue of recklessness which it had been counsels contention earlier was not a matter of any relevance. If there had been an act of sexual intercourse then, on the complainant s account, it was rape but if there had not or may not have been, the appellant had to be acquitted. Mr Plowman had said as follows: So what I am now about to address you about, and I have to do this for the sake of completeness, is address the second ingredient, the ingredient of consent . I have to do this in the event that you did find that there was sexual intercourse proved beyond reasonable doubt, I hope you understand the logic of all that. If you were to find that there had been sexual intercourse, you must then find, or consider, rather, the second issue, that is whether or not she consented and of course that he knew she did not consent. The defence case is quite simple, whatever happened in that room

short of sexual intercourse was consensual and [the complainant] did nothing to suggest that she was not consenting. Now, I put it that way because it s important that you see where the burden of proof lies. It s not for this defendant to prove that she was consenting, it s for the prosecution to prove beyond reasonable doubt that she was not. It s important that you look at it through the correct end of the telescope. You might take the view that on all the evidence that you ve heard in this case, you are satisfied she did consent, or you might take the view that you are not sure. But either way, your verdict would be one of not guilty, either way, because, the prosecution has not proved that she failed to consent. That s all I want to say about that, because as you understand, that s not really our case. Our case is that there was no sexual intercourse here. (Appeal bundle pp. 147-148) When the judge summed up, he correctly defined rape giving a standard direction as follows: What is rape? A man commits rape if he has unlawful sexual intercourse with a woman who at the time does not consent to it, and if, at the time he has sexual intercourse with her, he either knows that she does not consent to it, or is reckless as to whether she consents to it. (Appeal bundle p.11) The judge then turned to the specific ingredients of the offence which the jury would need to find proved if they were to convict. It was in this context, having dealt with the requirement on the prosecution to show that sexual intercourse had taken place and that this was without the complainant s consent, that the judge then turned to recklessness saying: thirdly, that at the time of sexual intercourse, the Accused knew either that [the complainant] did not consent or he was reckless as to whether she consented.

36. In this context the prosecution has to prove that the Accused had a guilty mind in the sense that he knew [the complainant] did not consent or that he was reckless as to whether she consented. Knowledge needs no elaboration. It means simply that he was aware that she was not consenting.
37. Both counsel agree, and I share their view, that the issue of recklessness does not arise in this matter. Nor does mistake. It is the prosecution s position that [the complainant] did not consent to sexual intercourse and made that lack of consent so obvious that the Accused knew her not to have consented. It is the Accused s position that although, in fact, she did consent, sexual intercourse did not take place. However, since the facts are for you I am obliged to tell you what the law would be in such a situation lest you should consider either situation on the facts as you find them. I shall do so briefly.
38. The definition of what constitutes recklessness in circumstances such as these is this: the Accused would have been reckless as to whether [the complainant] was consenting to the sexual intercourse if he was aware at the time of a risk that she was not consenting to it and it was, in the circumstances known to him, unreasonable to take that risk and yet he took it. It follows that the Accused would not have a guilty state of mind and would not have been reckless if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risk involved in his action. Even if that was or may have been the case he would not have been reckless. In other words the prosecution must make you sure that the Accused actually foresaw the risk that she was not consenting. The risk that the Accused has

to foresee of [the complainant] not consenting to sexual intercourse must be real and not a fanciful one.

39. Whether he was unreasonable in taking the risk by having sexual intercourse with [the complainant], with that foresight, is a question of fact for you. One matter you may wish to consider is whether the Accused, with the foresight of the real risk of there being no consent, carried on regardless so that his attitude was that he could not have cared less. You will note that in considering whether or not it was unreasonable for the Accused to take a risk you must judge that in the context of the circumstances known to him. It was what was in his mind that is important. [Emphasis added.] (Appeal bundle pp. 12-14) The application Mr Macrae's submission can be put shortly. He argued that at no stage during the trial had any evidence been advanced which could give rise to a guilty verdict on the basis of recklessness and it had never been considered as a real possibility until it was raised in the summing up. Mr Macrae accepted that ultimately it must be for the judge rather than counsel to determine whether a particular matter of law should be left to the jury but here everyone, including the judge, had appeared to be agreed about the directions to be given or, as in the example of recklessness, not to be given. Of course, as Mr Macrae also accepted, the fact that a judge has acceded to counsels requests may not always be satisfactory. In *HKSAR v Coady* (No.2) [2000] 3 HKLRD 573, where neither the prosecution nor the defence had advanced a case on the basis of provocation, this court found, when allowing an appeal against conviction for murder and substituting a verdict of manslaughter, that there had been sufficient evidence adduced at trial for it to have been necessary for a defence of provocation to be put before the jury. (See also: *R v Coutts* [2007] 1 Cr App R 60). Here the position was very different to that in *Coady*'s case. The directions given to the jury on recklessness, far from providing a basis on which the appellant might be acquitted, raised a wholly new basis for convicting the appellant of rape. In the result, Mr Macrae submitted, there is no way of knowing whether the jury may have convicted, as they had been invited to consider doing, upon the basis of recklessness which he described as being, at the very least, highly speculative and, in reality, not open to the jury on the evidence presented to them. An additional matter which we raised with Mr Macrae was that although the judge had provided what may be regarded as a technically correct definition of recklessness, this had been done in what effectively amounted to a vacuum as the jury were never provided with any factual basis upon which a reckless rape verdict could arise. In due course, we put this to Mr Robert Lee for the respondent. He suggested that recklessness could possibly have arisen having regard to the evidential background which showed what had led the complainant to be in the appellant's apartment in the first place. Amongst other things, the appellant had said that he had spoken to one Jackie Yan at the massage agency and requested a girl who would provide sexual services. Thus, when she arrived he was expecting someone who was likely to consent to having sex with him. Although this was followed by behaviour on the complainant's part which in no way indicated consent, this may, Mr Lee suggested, have generated an awareness of a real risk of non-consent. In such circumstances, he argued, there was a properly laid foundation for recklessness. We do not

need to consider whether Mr Lee s analysis carried with it a true sense of reality because, as we have already indicated, the judge never presented such a foundation to the jury with the result that they were effectively left having to guess at what might have been a proper basis for a verdict of reckless rape. More importantly, with respect, having rightly given every indication to counsel before their speeches that he would not be asking the jury to give a verdict based upon recklessness, and having directed the jury that he shared counsels view that recklessness did not arise, the judge ought not then to have provided a full direction on recklessness leaving it open to the jury to convict on that somewhat diluted basis if they saw fit to do so. In the result, this amounted to a new route to conviction which had been opened up at a stage when it was too late for trial counsel, both of whom were highly experienced, to do anything about it. We expressed the view during the course of argument, and do so again now, that if the judge had entertained second thoughts about recklessness, perhaps in the light of Mr Plowman s comments in his speech about consent, he should nevertheless have indicated to them that he was thinking of changing his mind so that they could address him on the subject. We have little doubt that, had they done so, the judge would have been persuaded that there was no real evidential basis for a guilty verdict founded upon recklessness on the appellant s part. For the sake of completion, we should also add that the judge was, of course, under no duty to direct the jury on reckless rape where, in circumstances such as these, it had never been suggested and where there was no obvious foundation for it (see: R v Ng Pong-lung CACC 468/1993). Mr Lee accepted that this was not a case in which it would be appropriate to consider the application of the proviso and we agreed with him. Accordingly, for the reasons we have given, the appeal was allowed, the conviction was quashed and the appellant was discharged. (Geoffrey Ma) Chief Judge, High Court (M. Stuart-Moore) Vice-President (Frank Stock) Justice of Appeal Mr Robert S K Lee, SADPP, of the Department of Justice, for the Respondent. Mr Andrew Macrae, SC and Mr Derek Chan, instructed by Messrs Ivan Tang & Co., for the Appellant. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk "0 "0 "0 i\$&`G Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong 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=57191
CASE PAGE	https://chat.esheria.ai/case-law/hong-kong/hksar-v-luo-xian-ping-2007

Prepared on 28 October 2026 · Esheria