

HONG KONG / JUDGMENT

HKSAR v. MOHAMMAD SHAZAD NASEEM

COURT

Court of First Instance

DECIDED

8 July 2004

CASE / FILE NUMBER

HCMA243/2004

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bjbj HCMA243/2004 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.243 OF 2004 (ON APPEAL FROM TWCC3258 OF 2003)

BETWEEN HKSAR Respondent and MOHAMMAD SHAZAD NASEEM Appellant

Before : Deputy High Court Judge Fung in Court Date of Hearing : 8 July 2004 Date of Judgment : 8 July 2004

J U D G M E N T

AUTONUMOUT The appellant Mohammad Shazad Naseem was convicted after trial before a Magistrate of one count of obtaining access to computer with a view to dishonest gain for oneself or another, contrary to section 161(1)(c) of the Crimes Ordinance, Cap.200. He was sentenced to 17 months imprisonment. He now appeals against both conviction and sentence. The prosecution case AUTONUMOUT Put it shortly, the prosecution case is that the appellant, a ground staff of Cathay Pacific Airways, used a colleague s password to generate two boarding passes from the computer PID30877 without authorization. AUTONUMOUT It was formally admitted under section 65C, Criminal Procedure Ordinance, Cap.221, by admitted facts (Exh.

- 8) that on 29 March 2003 at 3:00 p.m., two PRC citizens were arrested at Gate 60 of the Departure Lounge at the Hong Kong International Airport for possession of two suspected forged HKSAR passports. They had the boarding passes for flight CX253 to London. The two boarding passes were admitted in Exh. 8 to be issued out of computer PID30877/CN1 at the Cathay Pacific No Bag Check Counter at 13:19 hours using the personal password of Cathay Pacific ground staff PW1. Evidence showed that CN1 was the name for the particular counter. AUTONUMOUT Certain computer records as to the logging in and the issuing of the

two boarding passes out of computer PID30877 were also admitted, inter alia, under section 65C of the Criminal Procedure Ordinance, (Exh. 4). I shall return to this point in more details in a moment. AUTONUMOUT The Cathay Pacific has three computer systems running at the check in counters :

- (1) The CUPID system, giving basic flight information, using a common password; and the CUPAC and the Quick Check system, running together for check in procedures and printing boarding passes and luggage tags using a secret user I/D and password. AUTONUMOUT PW1 said he did not use the computer at CN1 at any time during the relevant period (13:19 hours), and he did not give his user I/D
- (2811) nor his password (510F) knowingly to anyone. AUTONUMOUT PW2 and PW3 were ground staff working at check in counters CN3 and CN4, located next to counters CN1 and CN2. PW2 worked at CN3 between 12:00 noon and 2:55 p.m. on the day in question and she never left her position, and she saw the computers at CN1 and CN2 were not occupied except the appellant had used computer CN1 for about 10 to 15 minutes between 12:00 noon and 1:30 p.m., and no passengers or people had gone to him while he was at the counter. AUTONUMOUT PW3 worked at counter CN4 between 1:00 p.m. and 4:00 p.m. and she left the counter briefly once. She saw the computers CN1 and CN2 were not occupied except the appellant was using the computer at CN1 for five to ten minutes between about 1:00 p.m. to 1:30 p.m. No passengers went in front of the appellant. AUTONUMOUT PW5 was the Project Leader of the Information Technology Department of Cathay Pacific. He said there was no log into the CUPID system through the computer at CN1 between 12:25 and 15:55 hours. AUTONUMOUT PW6 was the Airport Coordinator in the Information Technology Department of Cathay Pacific. She identified the computer records (Exh. 4) for the computer PID30877 between 12:20 p.m. and 1:43 p.m., at which the two boarding passes were issued. She gave evidence that the passes were issued at the computer situated at CN1. The defence case AUTONUMOUT It was admitted that the appellant was of clear record. The appellant did not give evidence but an interview under caution was admitted as voluntary. It is a mixed statement. AUTONUMOUT In the record of interview, the appellant admitted that he knew how to operate the CUPID, CUPAC and Quick Check systems and the proper check in procedures for passengers on computer as he had worked in the counter previously. AUTONUMOUT On the day in question, he had been to Counter CN1. He saw his colleagues at Counters CN3 and CN4. There were no one using the computer at CN1 and CN2. No passengers went before him when he was at Counter CN1. AUTONUMOUT He went to check on the CUPID system for flight information for a person whom he was supposed to meet at the airport. Submission of no case AUTONUMOUT At the close of the prosecution case, counsel for the appellant, Mr Pannu, who appears with Mr Grounds before me, made a submission of no case, relying on the conflict of evidence as to which computer had actually issued the two boarding passes. AUTONUMOUT In the admitted facts (Exh. P 8), it was stated that the two boarding passes were issued out of the computer PID30877/CN1. AUTONUMOUT However, Exh. 8 also contained a reference to a computer certificate of

which was also to be admitted. PW7 as appearing in Exh. 8 was in fact PW6 at the trial. She signed the computer certificate covering certain computer records which was admissible under section 22A(5) of the Evidence Ordinance, Cap.8. The records were admitted as Exh. 4 pursuant to Exh.

8. At any rate, it appears that the Magistrate and the parties treated Exh. P4 also as admitted facts. AUTONUMOUT To state very briefly, Exh. 4 was to the effect that two boarding passes were issued out of computer PID30877 but at the location CN2. AUTONUMOUT In the midst of the submission of no case, the Magistrate indicated that he was to have PW6 s recalled because he could not really understand the matter as it stood. AUTONUMOUT Pannu objected to the recall and said it was grossly unfair to the appellant. The Magistrate did not make any ruling on the submission on no case and he made the following order : Now, I am going to order the recall of this witness. It is important that the court understand what s happened here, and the court is not in the position to fully understand. AUTONUMOUT PW6 gave evidence to the effect that PID30877 was the computer and it was in fact located at counter CN1 and not counter CN2. AUTONUMOUT There was also some ambiguity from reading Exh. 4 that two persons seems to be using computer PID30877 at the relevant time. PW6 explained that another user ID not relating to PW1 appeared at the same time because it was the last successful log in before the relevant log in with the user ID and password of PW1, and the record of the last user only changed upon the next successful log in. AUTONUMOUT It transpired that there were certain other queries as to the expertise of PW6. But the matter was resolved by further admitted facts. Grounds of appeal AUTONUMOUT Grounds has filed multiple grounds of appeal. But Ground 1A was argued in the foremost and it was agreed that if I could reach a decision on Ground 1A, there was no need to deal with the other grounds. Ground 1A is as follows 1A. (1) The trial Magistrate erred in law and/or the conviction recorded against the Appellant was unsafe and unsatisfactory by reason of the complete failure of the trial Magistrate in his Statement of Findings (transcript 6
- 24) or in his oral reasons for verdict given at trial (transcript 598D 605A) to record and explain the submission of no case to answer made by the Appellant and what transpired thereon and thereafter prior to the opening of the Defence case which included the re opening of the prosecution case and the recalling of PW6 and her further crucial evidence and the further admitted facts to make good deficiencies in the prosecution case his or any discretion judicially;
- (3) Thereby the trial Magistrate will wrongly hinder or prevent the Appeal Court from performing or being properly able to perform it s duty and/or enable justice to be done or be seen to be done. AUTONUMOUT Grounds referred to Archbold Hong Kong 2004 at 8 237 where it stated : The court would ordinarily be reluctant to have a witness recalled where there had been opportunity for examination, cross examination and re examination when first called to testify : R. v. Eastman (1995) 84 A.Crim.R.118. See also HKSAR v. Chan Wai Man [1998] 4 HKC 76 where the Court of First Instance held that it was not open to the Magistrate

to allow the prosecution to reopen its case to recall a witness that had been left out after the Magistrate had indicated that the defendant had no case to answer in the absence of that witness. AUTONUMOUT Grounds also referred to R. v. Tsutsumi Motonobu [1989] 1 HKC 434 per Duffy J. In that case, the prosecution case was closed, and it transpired that certain drawings with legends in German and French were admitted without accompanying certified English translation, and hence inadmissible under the Evidence Ordinance. The magistrate allowed the prosecution case to be open, and he gave brief reasons at the trial that these are matters of form rather than substance and there was no prejudice to defence. In interest of justice that he should allow it. And in his full reasons of ruling in the Statement of Findings, the magistrate gave reasons that he had considered that although the errors related to the crucial aspects of the prosecution case, they were errors of technical nature and it was not a case of permitting the prosecution to call additional evidence.

AUTONUMOUT Upon appeal, Duffy J stated at p.437 that Whatever may have been the situation in the lower court, I will decide this appeal on the simple issue as to whether the magistrate was right in law to allow the prosecution to reopen its case to correct the errors pointed by Mr Grounds in his submission of no case to answer, errors which did not correct would have brought the case to a premature end to the appellant's favour. AUTONUMOUT In dismissing the appeal, it was held that the court could exercise its discretion to allow the prosecution to reopen its case when the evidence it sought to adduce was not only of a technical or formal nature but included the matters of substance. Evidence omitted by mistake could be adduced after the Crown case was reopened. The matter was one of judicial discretion and not to be interfered with by an appellate court unless injustice resulted to either side (A.G. v. Chow Chuen Fu, HCMA351/1984 (unreported) followed). AUTONUMOUT Grounds submitted that all the Magistrate said was he could not understand the evidence at the close of the prosecution case. The Magistrate never gave reason that he had considered any prejudice to the appellant before he exercised his discretion to allow the reopening of the prosecution case. Mr Grounds went further to state that on the face of the record, the Magistrate did not consider the point of prejudice at all. AUTONUMOUT Grounds referred to the initial grounds of appeal filed and the grounds complained the material irregularity of the Magistrate allowing the case to be reopened and to recall PW6. But even then, the Magistrate did not deal with the matter in the Statement of Findings. AUTONUMOUT Shine for the respondent agreed that Exh. P 8 was admitted under section 65C of the Criminal Procedure Ordinance and apparently, it was common ground at the trial that Exh. P 4 was also admitted, inter alia, under section 65C. She conceded that at that stage before the recall of PW6, it could not be said whether Exh. P 8 or Exh. P 4 was correct.

AUTONUMOUT Hence, I find that the combined effect of Exhs. P 4 and P 8 was that the two boarding passes were admittedly issued at computer PID30877 at CN1 or CN2.

AUTONUMOUT Shine submitted that before the Magistrate made the order as to recalling PW6, Mr Pannu only said that it was grossly unfair to the appellant without specifying details. Then the Magistrate ordered the recall, and in doing so, the Magistrate must have implicitly ruled out that there was any prejudice to the appellant. In fact, with the benefit of hindsight, there could have been no prejudice because it was all due to a misunderstanding

and the recall of PW6 clarified the position. It was pointed out that Mr Pannu in cross examination did not deal with the location being at CN2. AUTONUMOUT Shine also referred me to the Tsutsumi Motonobu case, in that it was broad discretion of the Magistrate to allow the reopen of the prosecution case and any appellate court should be slow to interfere unless injustice result. AUTONUMOUT On the point of lack of reasons, the Magistrate gave brief reasons that he could not understand the case. Reading from the record, it cries out without saying that the Magistrate was troubled with the inconsistencies between two pieces of admitted facts, Exhs. P 4 and P 8, as to the location of the computer which issued the two boarding passes. I note that at that stage, the Magistrate was unsure and he was not under the impression that the primary admitted facts were Exh. P 8 and P 4 was an error.

AUTONUMOUT What is not so implicit was the consideration of prejudice. I find that in situation such as this where the reopening of prosecution case was to re introduce new and crucial evidence of more than a technical nature, the consideration of any prejudice to the accused should be undertaken. AUTONUMOUT I invited Mr Grounds to make submission as to what prejudice might there have been to the appellant. Mr Grounds stated that the appellate court was exercising the supervisory jurisdiction to examine the exercise of the discretion of the trial court, to see whether it had taken into account all the relevant factors, or had failed to do so, or had taken into account irrelevant factors. It was not for the appellate court to exercise the discretion afresh in lieu of the trial court. AUTONUMOUT I note that in this case there is a special feature that admissions had been made on behalf of the appellant. In effect, both CN1 and CN2 were admitted to be the location of PID30788. I cannot say whether there is or is not prejudice resulting from making any admission in the first place, or whether admissions were to be withdrawn. I cannot categorically say that no prejudice or injustice could ever arise, even with the benefit of hindsight, without hearing the submissions and considering the matter afresh. AUTONUMOUT I find that the Magistrate had failed properly to deal with the question of prejudice to the appellant, if any, before considering the reopening of the prosecution case and recalling of PW6.

AUTONUMOUT I am empowered under section 119(1)(d) of the Magistrate Ordinance, Cap.227, in case an error has been committed, to make such order as I think just. In considering the requirement of justice, and having considered what transpired at trial, I order that that the appeal should be allowed and the conviction set aside. Mr Grounds had already indicated that he could not resist a re trial if the appeal were allowed on this ground, but he asked for the re trial to be placed before another magistrate. Hence, I order the re trial to be placed before another magistrate. (B. Fung) Deputy Judge of the High Court Ms Lydna Shine, SGC of Department of Justice, for the Respondent Mr Christopher Grounds & Mr P. Pan 1udk 1udk P Q R S T U V (#p# &`#\$ &`#\$ V) /6 JOQN V) / JOQN & 6" CACV Jeannie MY MokSo ABC.dot setup Microsoft Word 9.0 Judiciary CACV Title Microsoft Word Document MSWordDoc Word.Document.8

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