

HONG KONG / JUDGMENT

HKSAR v. MOK KIN KAU

COURT

Court of First Instance

DECIDED

13 August 2007

CASE / FILE NUMBER

HCMA1161/2006

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bjbj HCMA1161/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.1161 OF 2006 (ON APPEAL FROM STCC 13868 OF 2005)

BETWEEN HKSAR Respondent and MOK KIN KAU (charged with one count of assault occasioning actual bodily harm. The particulars alleged that the appellant had on 30 September 2004, inside Flat D, 20/F, Villa Athena, Block 8, 600 Sai Sha Road, Ma On Shan, in Hong Kong, did assault female Priyati, thereby occasioning her actual bodily harm. AUTONUMOUT The appellant denied the offence and pleaded not guilty. After the trial, the magistrate found the defendant guilty and imposed a community service order as sentence. The appellant now appeals against his conviction. The evidence AUTONUMOUT At the trial, the prosecution had called two witnesses and the defence called three. A number of documents, including the medical report, a warning letter, a receipt of salary, and some photographs, had been produced as evidence. AUTONUMOUT The main prosecution witness was PW1. She was then a domestic helper in the appellant s employment, the contract of which had commenced on 22 August 2004. PW1 said that on the morning of 30 September, before the appellant left the premises for work, he had assaulted her. She said what had happened was that the appellant requested her to sign on the salary receipt but for some reason she refused. The appellant then grabbed her upper garment, brought her to the dinning table, bumped her head on the table surface and scolded her at the same time. She said the assault took place at around clock. AUTONUMOUT PW1 said that she cried as she felt very painful in her forehead. The appellant then stopped the assault, took back the piece of paper and returned to the room. A few minutes later, he left for work. She waited until 10:00 a.m., when the employment agency would be open, to relate the matter to the staff there. Then she went back to the premises to pack her luggage. Later she was taken to hospital and a report was made to the police. AUTONUMOUT During the cross-examination, PW1 accepted that it was recorded in her witness statement that before [the appellant] assaulted me, I looked at the time of the TV. I knew it was 8 clock sharp . She then explained what she meant was that she had looked at the clock on top of the television set, and not the television screen. PW1 pointed out that when she gave the first two statements to the police, there was a staff from the employment agency who acted as an

interpreter and the statements were written in Chinese only. She said she was less careful in signing the statements because she trusted the police. AUTONUMOUT PW1 disagreed, inter alia, that she was expressly given a rest day on every Saturday of the month. She disagreed that the appellant's wife, DW3, had offered her payment of wages on 22 September, but she did so on 26 September. On that occasion, DW3 accused her, wrongfully, for having stolen a cover of the Octopus card. PW1 admitted that at the time she still owed the agency money, about seven months wages. However, she said she was not anxious to get the wages as she had a contract of two years. PW1 was further cross-examined on a number of issues such as : the relative position of the table and herself when the assault took place, how the appellant had hit her head on the table, why she did not resist and the circumstances in which she was asked to sign, in the presence of the police, a document admitting having stolen some potato chips and other items. AUTONUMOUT PW2, the staff of the employment agency, was called to testify. She stated that on 30 September, at about 10:50 a.m., PW1 came to see her and she saw injury on her forehead. She arranged PW1 to go to the hospital and made a report to the police. She admitted under cross-examination that the appellant's wife had always complained about PW1's performance. AUTONUMOUT The appellant had elected to give evidence at the trial. He basically denied having assaulted PW1 on that morning. He said he had the habit of driving his wife and son to the MTR station and the school respectively every morning. He would usually leave the flat at around 8:00 a.m. The appellant had testified that PW1's performance was unsatisfactory. He told the court how he had once caught PW1 stealing his son's potato chips. He said his wife had issued a warning letter, and that the police were called to his flat to deal with the situation. PW1 also refused to sign on the receipt of the wages and so he had to handle the matter again on the morning of the material day. He mentioned that PW1 was not entitled to the salary of four rest days because she was not given any assignments on those days. AUTONUMOUT The appellant said that in the morning of 30 September, PW1 still refused the wages and sign the receipt, so his wife took back the money and the document. They left home at about 7:45 a.m. and, as usual, went down to the car park to take the car. He said that his car was parked on Level 5 near Block 10 and it would take about 15 minutes walk from his flat to reach the car. AUTONUMOUT The defence had also called DW2, the security guard of Villa Athena. He was on duty at the relevant time. He had produced the Exit Log Sheet (D3) which included the entry of the appellant's vehicle leaving the gate at 7:59 a.m. He also clarified that the clock at the gate was about one minute faster than the standard time. AUTONUMOUT As to DW3, the wife of the appellant, she gave a similar account of what had transpired that morning. She stated that later at about 11:00 a.m., she had called PW2 regarding PW1's refusal to sign and requested for a replacement. At about 4:00 p.m., she was notified that her son had not been picked up from the school. She then found out from PW2 that PW1 would no longer work for her. The magistrate's findings AUTONUMOUT The learned magistrate came to the view that PW1's overall evidence was firm and coherent; what she said was consistent with the injury she had sustained and the medical report tallied with the nature of the injury. The magistrate considered PW2 to be an independent witness. He pointed out that PW2 had met PW1 shortly after the incident and her description of the injury supported PW1's account. AUTONUMOUT After analysing the defence evidence, the magistrate said he did not believe the versions given by the appellant and his wife. Regarding DW2, the

magistrate stated that he accepted his evidence about the exit time of the appellant's car as recorded in the log sheet, but not his evidence on the distance between Block 8 and Block

10. The magistrate also doubted whether DW2 had really seen two passengers on board the appellant's car. AUTONUMOUT The magistrate had obviously considered all the relevant matters raised in the trial. He had, systemically, covered and analysed all the main topics in his Statement of Findings such as : the Discrepancies Between PW1's Oral Testimony and her Witness Statement, Point of Impact on the Table, The Details of PW1's Injury, The Warning Letter (D2), The Acknowledgement Receipt (D1), the Time of the Incident and the Issue of Possible Frame-up by PW1. His conclusion was that the prosecution had proved the offence beyond reasonable doubt and so he convicted the appellant. The grounds of appeal AUTONUMOUT The appellant had put forward the following grounds in this appeal :
 - (1) the learned magistrate had wrongly assessed the question of motive on the part of PW1;
 - (2) the alleged assault could not have taken place as PW1 stated because the appellant would have left home by 8:00 a.m.;
 - (3) the lack of resistance on the part of PW1 during the alleged assault would be an unusual feature;
 - (4) if the alleged assault had taken place as PW1 had described, there would have been injury on her nose or neck areas;
 - (5) there was no basis for the court to hold that the appellant could have altered the document and the defence was never given the opportunity to address this issue; and
 - (6) in the circumstances, the appellant had been denied a fair trial. AUTONUMOUT Defence counsel had expanded on all these matters in his written submission and counsel for the respondent had helpfully made a written reply on all the areas raised. I am grateful for their effort in preparing the written submissions and also their succinct oral submissions in court. Assessment of the appeal AUTONUMOUT Having considered all the arguments, I agree that the learned magistrate had erred in his assessment of the evidence in two areas : the time of the assault and the question of the possibility of a frame-up by PW1. As to the other matters raised by the appellant, I do not find them meritorious. AUTONUMOUT On the issue of time, the gist of PW1's testimony can be read in the transcript as follows (page 12, PW1's cross-examination) Q. Now you told the police it was 8 am sharp when you looked at the clock before the assault. Is that correct? A. Correct. Q. Yes. So how long before the assault did you look at the clock? A. I did not really look at the clock but it is my habit that I would know what time I get up, what time my employer would go to work. Q. Ms Priyati, surely you would realise that giving a witness statement to the police is a pretty serious matter. Do you agree with that proposition? A. Agree. Q. So when you gave that answer, you must have thought carefully about it? Is that right? A. At the time, I didn't think much. I was very sad. When the interpreter said that, it was okay. Q. Was it accurate? A. It was the approximate time because my employer went to work around 8 clock. Q. You know the

difference between giving an exact time and an approximate time. Do you agree? A. Agree. Q. Yes. And do you agree that in answer to the next question in that document you said the following, After assaulting me, he went into his bedroom and talked to his wife for about five minutes. Around 8.05 am, he left home. His wife also left home for work around 8.10 ? A. Agree. Q. Yes. So, in one answer, you give an exact time and in the other answer, you give two approximate times. Do you agree? A. (No audible response) COURT: Witness, do you agree to the question put to you? If you don't understand, tell the court. Don't waste our time. A. Please repeat. Q. Do you agree with me that in one question, you give what you intended to be an exact time and in the other question, you gave what you intended to be two approximate times? COURT: (To Interpreter) Exact time. A. Yes. Q. Yes, very well. So you looked at the clock and it was exactly 8 clock. Is that right? A. I did not look at the clock. It was only an approximate one. COURT: I don't understand. According to the second part of the answer 4, that is what you told the police officer. Is that correct? A. Yes, I said that before. COURT: So what does it mean? So do you mean that you did not actually look at the watch look at the clock there or what? A. I did not look at the clock. AUTONUMOUT If PW1 did tell the police before, and was true, that the assault had taken place at 8 clock sharp, then there would be an anomaly in the evidence. On the face of it, the appellant would not be present to commit the assault, as the security guard testified, and the magistrate accepted, that the appellant had left the gate before 8:00 a.m. It would be a similar situation as an alibi. In this respect, the magistrate adopted the following reasoning First of all, having examined the Exit Log Sheet, I had no doubt to suspect the evidence of DW2 in respect of the time of exit. Having accepted that and depending on how long it took from defendant's flat to his car, it appeared the time defendant left the flat was around 7.45 am. Was it a conflict of time with what PW1 had alleged? According to PW1, she had explained that at that time she was looking at the clock on top of the television set. Therefore, when she said it was 8 clock sharp, it meant the clock over there was showing the time of 8 clock. In my view, it is not uncommon that some people adjust their clocks faster while others adjust slower. It is just a common sense of human habit. There was a possibility that that clock on top of the television set was some 15 minutes faster than the standard time. As such, it was not conclusive to say there was a conflict of time between PW1's evidence and the defence. Also, taking into account the evidence in respect of distance between block 8 and 10, I did not think it would take 15 minutes walk. In any event, the issue of time was in my view neither here nor there in the present case. [Emphasis added] AUTONUMOUT The respondent agreed with the magistrate's analysis and further advanced the following points in support of the court's conclusion :

29. The victim knew what the time was that the appellant and his family left the flat in that morning. Had she wanted to fabricate the assault, she would not have any difficulty in fixing it at a time to tally with the appellant's departure time. The discrepancies in the timing tend to negative dishonestly on her part.

30. There was nothing speculative for the learned magistrate to regard that the discrepancy in the time was due to different clocks being referred to.
31. The victim and DW2 gave the estimated time according to the clocks they saw. It is daily experience that one clock may read differently from another as they are not synchronized. The learned magistrate must be entitled to apply his common sense by reference to such common experience of life.
32. Neither the victim nor the other witnesses were expected to give the exact time of the events. The time they gave was no more than estimates.
33. Given the clocks may differ and the different times given by the witnesses were all estimates, it would not be inherently improbable for a discrepancy in terms of a few minutes (the distance between Blocks 8 and 10 hardly took 15 minutes walk) to be found in their evidence. [Emphasis added] AUTONUMOUT would certainly agree that the time of an assault is not usually an important or even relevant element in a trial of assault. Of course, in most cases, when a witness gives evidence on the time, it is often just an estimation. However, I am not sure one can adopt this understanding in the particular context of this case, in view of what PW1 had told the police. One could say that it is the witness herself who turned the time into a significant factor. In reporting a crime, the certainty of particulars on the main event could enhance the credibility of the complainant and therefore the expression of a precise time may not necessarily be meaningless or unintentional. Considering the relevant parts of the witness statement as referred to in the trial, the contents did seem to draw a distinction between the exact time and the estimated time. In the circumstances, I doubt whether one can dismiss the expression of clock sharp simply as the result of imprecise or sloppy interpretation or otherwise. AUTONUMOUT Sin, for the respondent, had made some strong points in reply to this time issue. She must be right when she contended that it would be our daily experience that one clock may read differently from another as they would not be synchronized and neither the victim nor the other witnesses could be expected to give the exact time of the events. But here, it was PW1 who had chosen to state a precise time on the assault in her statement and the magistrate did not simply find that clocks were generally not synchronized or sometimes people may deliberately advance the time on their clocks. He found that to be the case here. There was really no direct evidence about that and I do not believe there was sufficient basis for the magistrate to infer, beyond reasonable doubt, that the clock, which PW1 said she looked at, and subsequently denied having done so, was artificially advanced, and if so, why 15 minutes? AUTONUMOUT On this issue, I would have to agree with the defence that the magistrate was not entitled to make the finding that there was a possibility that the clock was some 15 minutes faster than the standard time. AUTONUMOUT The defence had obviously suggested that PW1 had frame-up against the appellant. This matter had been noted by the magistrate and in his Statement of Finding, he made the following analysis

21. According to the defence, it was a case of total fabrication. There was an indisputable fact that PW1 had injury on her forehead. With the observation of PW2, it was quite a severe one of egg-size swelling on the forehead. Having considered the area at the forehead and the extent of injury, I was of the view that any suggestion of self-infliction was against the common sense. Further, it was common ground that PW1 refused to sign and no wages had been given to her up to time of the incident. It was not a case that PW1 was so eager to get the wages from her employer. In the contrary, due to her refusal to sign, nothing was received. Thus, there was no benefit behind for her to frame up such a case against her employer. Having considered all the circumstances, I could not think of any valid reasons or purposes for her to make any false allegation. I did not believe PW1 fabricated the case against the defendant by self-inflicting injury on her own forehead. [Emphasis added]
- AUTONUMOUT Despite Ms s able submissions, I am not sure I entirely follow and agree with the learned magistrate s reasoning. If common sense is to be used here, it must be the case that a domestic helper would actually want to be paid fully and on time. Now, given the background and the relationship in this household, was there really no reason at all for PW1 to make up such a case against her employer? Looking at the situation objectively, the attitude and treatment rendered by this couple towards PW1 could be said to be rather unkind, some may even say harsh and mean. For a bag of potato chips, they would go to the extent of calling upon the police, in the night, to go to their flat to deal with PW1. She had to sign to acknowledge having stolen the chips of her litter master , and further that she ate some barbecue pork without asking for my master s permission . It must be a very humiliating experience for PW1. Would she not want to leave the employment out of desperation? AUTONUMOUT If PW1 chose to leave because her employer was unkind , she would not be entitled to compensation. The employer had done nothing legally wrong. However, if the employer assaults her, that would be different and PW1 could certainly leave with the full range of compensation. I am not in the least suggesting that PW1 must have self-inflicted the injury and used that as an excuse to leave her employment. That would be a matter for the trial magistrate. But before a conclusion could be reached, the magistrate must fairly and in a balanced manner consider all the relevant circumstances. In the present case, to say that PW1 had plainly no motive to make up the case is ignoring relevant material, and the evidence was not that she could not have the opportunity to do so.

Conclusion

AUTONUMOUT In all the circumstances, I consider that the magistrate s finding that the clock on the television set was possibly 15 minutes faster and therefore the issue had no bearing on the credibility of PW1 is not justified by the evidence. I accept the defence contention that the magistrate should have invited the parties to address this point before making the finding. Even if the defence could have raised it but did not, it would still be incumbent upon the prosecution to prove the case and remove any reasonable doubt. Furthermore, the assessment of the evidence regarding the issue of motive, despite the learned magistrate s meticulous approach, lacked balance. For these reasons, I consider the conviction unsafe and unsatisfactory. AUTONUMOUT

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