

HONG KONG / JUDGMENT

HKSAR v. PARK JEE HYEON

COURT

Court of First Instance

DECIDED

6 September 2007

CASE / FILE NUMBER

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bjbj HCMA 433/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. HCMA 433 OF 2007 (ON APPEAL FROM TWCC 2883 OF 2006)

BETWEEN HKSAR Respondent and PARK JEE HYEON Appellant

Before: Hon Fung J in Court Date of Hearing: 6 September 2007 Date of Judgment: 6 September 2007 Date of Reasons of Judgment: 10 September 2007

J U D G M E N T

The appellant Park Jee Hyeon was convicted after trial by a magistrate of 2 charges of assault occasioning actual bodily harm, and was sentenced to a total of 5 months imprisonment. She appealed against both conviction and sentence. At the hearing, I allowed the appeal, quashed the conviction and sentence, and ordered a re-trial. I now give my reasons. Prosecution case The charges alleged that the appellant assaulted her Indonesian domestic helper (PW1) on 16 February and 25 February 2006. On the first occasion, PW1 was ordered to couch on the floor of the flat, and was made to bang her head on the ground. PW1 did not do so hard enough and the appellant kicked her repeatedly, causing injuries to her face and head. She was warned not to disclose the matter. On the next day (i.e. 17 February), the appellant's husband (DW1) saw the injuries on PW1's face. PW1 lied to him that she had fallen accidentally. On 25 February 2006, DW1 brought PW1 to see Dr. Lam Chin Fai (PW4) for knee pain. The medical report stated that PW1 was suffering from rheumatoid arthritis. Incidentally, PW1 was also found to be suffering from head injury which she had sustained few days before. There was subcutaneous haematoma (i.e. bruises) over her forehead and scalp, with bilateral purplish peri-orbital bruises (i.e. black eyes). PW1 told Dr. Lam the injuries resulted from a fall. She said she did not tell Dr. Lam she was

assaulted because DW1 was present. Upon return from Dr. Lam, the appellant slapped PW1 4 times in the face, causing the corner of her mouth to bleed. The appellant ordered PW1 to wear a face mask to prevent DW1 seeing the bleeding. On 26 February, PW1 made a report to the police. PW1 brought the police to see her employment agent (PW2). PW2 took 4 digital photographs of PW1's injuries. The photographs showed bruising over the right and middle forehead, bruising over right eye and left eye, and an abrasion in the inner right arm. After seeing PW2, at 16:32 hours, PW1 went to see Dr. Wong Pui-Fai (PW5) at the A&E Department of Yan Chai Hospital. She told Dr. Wong she had been assaulted on numerous occasions with fists and limbs since February and sustained head injury. The last assault was on 16 February. Dr. Wong noted: (a) haematoma at forehead and right angle of mouth; (b) peri-orbital bruise around right eye; (c) abrasion at right arm; (d) pigmented skin at both hands (claimed to be scald wound). The haematoma at right angle of mouth should not be an open wound or bleeding. At 18:20 hours, PW1 was admitted to the Neurosurgery Department of Princess Margaret Hospital. Dr. Mo Pan Herbridge (PW3) saw PW1 and found her to have multiple face and head injuries particularly bruising over her right peri-orbital region. X ray CT scan showed no fracture or intracranial haemorrhage. Dr. Mo gave evidence that the bruised right eye was consistent with complaints of being kick and punched. Defence case The appellant and DW1 said that in the early hours of 17 February, they heard a big bang. They went to have a look and PW1 told them that she had a fall in the bath. Later that day, they saw PW1 had a swollen eye, which almost closed, but PW1 refused to go to the doctor. The appellant denied making PW1 crouch and kicking her in the face. The appellant also denied slapping PW1 and making her wear a face mask. After seeing Dr. Lam, DW1 telephoned PW2 requesting replacement of PW1 because her illness was previously unknown to them. The appellant said PW1 might have eavesdropped on the telephone conversation. Magistrate's reasons The magistrate highlighted numerous inconsistencies in PW1's evidence and her witness statements. The magistrate noted that PW1 had made clear reference to the police officer of the kicking in the head and the slapping of her mouth. The inconsistencies related to the lack of details in the witness statements of matters surrounding the actual assaults. The magistrate took into account PW1's education level, fear and nervousness, and the problem of interpretation. He noted that the interviewing police officer had a photograph showing the serious injuries to PW1's head and face, and also the relevant medical information, yet none of these matters was contained in the witness statement. The magistrate warned himself against possible exaggeration. He found PW1 to be an honest and reliable witness. The magistrate said PW1 did not tell Dr. Lam about the appellant causing the injuries, but claimed she had a fall. The magistrate believed that PW1 would not have done so if she had planned to fabricate against the appellant. At para. 21 of the Statement of Findings, the magistrate said: I found the claim of hearing a bang and being told by PW1 that she had fallen in the bath was not true, and in this respect, I found the photographs clearly showed bruising to the inside of PW1's right eye which I believed could not have been caused by a fall in the bath. I believed that if there had been a such a fall PW1's middle forehead would have taken the impact, and I did not believe that such an injury would have caused a black eye. I also did not believe the fall in the bath would cause the multiple head and face injuries found on PW1 that Dr. Mo's referred to in his reports. Fresh evidence The appellant seeks to adduce: (a) the medical report of Dr. Philip Beh Swan-Lip,

Clinical Associate Professor in Forensic Pathology of the University of Hong Kong, on the causes of a black eye; and (b) a short download from Wikipedia entitled Black eye . The admission of evidence on appeal is provided for under s. 83V of the Criminal Procedure Ordinance (Cap. 221):

- (1) For the purposes of this Part, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice- order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case; order any witness who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Court of Appeal whether or not he was called in those proceedings; and subject to subsection (3), receive the evidence, if tendered, of any witness.
- (2) Without prejudice to subsection (1), where evidence is tendered to the Court of Appeal thereunder the Court of Appeal shall, unless it is satisfied that the evidence, if received, would not afford any ground for allowing the appeal, exercise its powers of receiving it if- it appears to it that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and it is satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it. (3) In *Chan Tung-cheung v. HKSAR* [1998] 1 HKLRD 36 (CFA), Litton NPJ giving the determination of the Appeal Committee said at p. 38H: The first matter an appellate court must determine in an application to adduce fresh evidence was whether the evidence if received would afford any ground for allowing the appeal. If this condition is not satisfied it will not be necessary for the court to consider the other matters In *R v. Tam Chung-shing* [1989] 1 HKLR 42, 47H, Silke VP said that: the court will not receive inadmissible evidence nor will it receive evidence under sub-section (1) if it is satisfied that it would not afford any ground for allowing the appeal or it is unlikely to be credible for there must be some curb on the reception of fresh evidence to avoid the indefinite prolongation of legal process. The applicant also needs to give reasonable explanation for the failure to adduce the evidence at trial (see *HKSAR v. Cheng Sui-wa* [2003] 4 HKC 571 per Stock JA (as he then was)). The appellant explained that the prosecution did not find it necessary to call expert evidence to support their case. Her legal representative believed that it was not necessary for them to adduce expert opinion. Mr. Cheng, for the respondent, objected to the admission of fresh evidence. He pointed out that when the case came up for trial on 17 January 2007, the defence applied for adjournment on the ground that time was needed to study the medical evidence of the prosecution and the defence was minded to call their own medical evidence. Adjournment was granted until 30 January 2007. In the e-mail dated 26 January from DW1 to the lawyer (attached to the Wikipedia download), the lawyer was asked to get proof from the doctor that the bruises to the eyes of PW1 were due to head injury. Yet, it was decided that no such evidence be called for the defence. Dr. Beh said that there are 3 possible ways of getting peri-orbital haematoma or black eye:

- (1) A consequence of head injury with fractures of the base of the skull;

- (2) A direct blow to the eye;
- (3) A result of gravitating blood from injury to the forehead. As to (1), Dr. Beh noted there was no fracture of the skull nor any brain injury or bleeding. As to (2), a direct blow to the eye can cause injury to the eye and the surrounding tissues, and one would expect to see injury to the eye ball itself and not just the peri-orbital tissues. As to (3), any blunt impact to the forehead that can cause a bruise will have caused bleeding within the layers of skin over the forehead. The collection of blood will be affected by the pull of gravity and move in a downward fashion. Collection of this blood around the eyes results in the appearance of a black eye or peri-orbital haematoma. Because there is no actual bleeding, the swelling quickly subsides as the fluid of the collected blood is absorbed by the body. The colouration takes longer time (sic.) as it requires the breakdown and removal of iron pigment. Mr. McGowen, for the appellant, submitted that while considering the relevance of the fresh evidence, one must consider how the magistrate had approached the injury to the forehead and the black eye. In para. 21, the magistrate said that he did not believe that PW1 had a fall because the impact of a fall would be on the forehead rather than a black eye. That seems to have overlooked that a black eye without injury to the eye ball could have resulted from an impact on the forehead. Mr. Cheng accepted that the reasoning of the magistrate seemed to treat a fall on the forehead and a black eye as mutually exclusive. But Mr. Cheng submitted that Dr. Beh's opinion on (3) still leaves open a question of fact as to the cause of the black eye, i.e. either from a fall or assault on the forehead. Be that as it may, the magistrate should not have taken the presence of a black eye as negating a fall, but to consider whether any impact to the forehead with the possible result of a black eye was caused by a fall or an assault. Mr. Cheng submitted that the magistrate's conclusion also took into account the multiple face and head injuries as noted in Dr. Mo's reports. Dr. Mo's report stated multiple face and head injuries but only gave particulars of the black eyes and none else. Dr. Wong's report gave further particulars of the injuries. On the head, he noted bruise on the forehead, right black eye, and the bruise at the corner of the mouth. Then there is abrasion and some old scabbed marks on the arm. The bruise at the corner of the mouth related to the 2nd charge, and Mr. Cheng accepted that probably should not be taken into account in assessing the injury of the first charge. Hence, apart from the bruise on the forehead and the black eyes themselves, there does not seem to be other multiple face and head injuries to support the finding of the magistrate. In the premises, the fresh evidence, if believed, would belie the magistrate's approach to the medical evidence. Prima facie, Dr. Beh's opinion is likely to be true. The explanation for not calling such evidence at trial may not be entirely satisfactory, but it is not such as to otherwise deny the reception of the evidence in the interest of justice. Mr. Cheng submitted that given that a magisterial appeal is by way of rehearing, I could assess the evidence afresh, such that in applying the correct reasoning, to consider upholding the conviction on the whole of the evidence. I am afraid that I am not placed to conduct a paper trial, and to assess the credibility of the witnesses without hearing them, given that there are numerous inconsistencies in the evidence of PW1 as noted by the magistrate. In the premises, I admitted Dr. Beh's report and allowed the appeal as the

conviction was unsafe or unsatisfactory. Then I considered whether to order a re-trial. Re-trial The power to order a re-trial is discretionary to be exercised judicially where the interests of justice so require. The strength of the evidence is a relevant consideration. A re-trial will not be ordered where a conviction is improbable, or where a conviction will, assuming the same evidence is given, be unsafe and unsatisfactory. Position of the defendant is also relevant, though not determining consideration (see Archbold Hong Kong, para. 4-19; Au Pui-kuen v. A-G [1979] HKLR 16 (PC); Wong Ching-chu & ors. v. R [1957] HKLR 61). Mr. McGowen submitted that a re-trial should not be ordered as PW1 had initially claimed that she had a fall rather than was assaulted, her evidence was fraught with inconsistencies, no open wound was observed for the mouth injury, and the charges are not very serious. The issue of the case (including any fresh medical evidence to be led) is ultimately a question of fact. I do not wish to go into the details of the evidence save that I am of the view that a conviction at the new trial is not improbable. Hence, I ordered a re-trial of the charges. Costs Mr. McGowen asked for costs of the appeal, accepting no order as to costs of the trial below as the appellant's previous lawyers did not see fit to tender the expert evidence. Mr. Cheng did not raise any objection. Hence, I ordered the costs of the appeal be to the appellant, to be taxed if not agreed. (B. Fung) Judge of the Court of First Instance High Court Mr Raymond Cheng, SGC, Department of Justice, for the Respondent Mr James McGowan, instructed by Messrs Tang, Wong & Cheung, for the Appellant

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