

HONG KONG / JUDGMENT

HKSAR v. RODERICK DEYKIN BUNDEY

COURT

Court of First Instance

DECIDED

17 October 2007

CASE / FILE NUMBER

HCMA357/2007

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bjbj PA.. HCMA357/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 357 OF 2007 (ON APPEAL FROM ESCC 5096 OF 2006)

BETWEEN HKSAR Respondent and RODERICK DEYKIN BUNDEY Appellant

Before : Deputy High Court Judge D. Pang in Court Date of Hearing : 7 September 2007 Date of Judgment : 17 October 2007

J U D G M E N T

AUTONUMOUT The appellant was convicted after trial of one charge of Possession of a Dangerous Drug , contrary to section 8 of the Dangerous Drug Ordinance (Cap. 134), and was sentenced to a fine of \$2,000. He appeals against that conviction. The charge AUTONUMOUT The charge is that on 6 October 2006, inside the Lan Kwai Fong Sitting Out Area, Lan Kwai Fong, Central, the appellant had in his possession : (a) one burnt cigarette containing 0.61 g of a plant material containing 0.06 g of tetrahydrocannabinol, being a tetrahydro derivative of cannabinol; (b) one cigarette containing 0.92 g of a plant material containing 0.09 g of tetrahydrocannabinol, being a tetrahydro derivative of cannabinol; and (c) one plastic bag containing 30.38 g a plant material containing traces of tetrahydrocannabinol, being a tetrahydro derivative of cannabinol. The prosecution case AUTONUMOUT It was 11:47 pm. PW1 and 2 were two police officers in uniform. On a bench they saw the appellant who not only avoided eye contact but got up to leave the location. This prompted a search from PW1 who found in the appellant s trousers pocket one tobacco pouch [item

- (c) in the charge] containing one burnt cigarette [item (a)] and one whole one [item (b)]. Thinking that the cigarettes smelt queer, an arrest was made by PW1. AUTONUMOUT According to PW1, the appellant had stated the following under caution know it is grass. I take it for myself. Give me a chance. Back at the station, and without giving any reason, however, the appellant had refused to sign for confirmation. Contrast this with PW2 whose evidence is that he did not hear whether the appellant had made that statement. What he did hear was said in the station and it was the appellant refusing to sign because he was not cautioned. AUTONUMOUT PW1 and 2 were Chinese officers. The appellant spoke only English. AUTONUMOUT This is the long and short of the prosecution case as per the Statement of Findings. The defence case AUTONUMOUT The appellant gave evidence. He said he was a veteran smoker who rolled his own cigarettes. He and his wife had been socializing in a nearby restaurant when, during one of his nicotine trips, he met a group of three English people. A conversation was struck up and the woman borrowed his tobacco pouch [item (c)]. She rejoined the group a few minutes later and handed the appellant a burnt cigarette, or cigarette butt [item (a)]. The appellant gave her a mild ticking-off and received from her a freshly rolled one [item (b)]. He smoked neither of them however and put them both in his tobacco pouch. The freshly rolled one was sealed by he himself licking. AUTONUMOUT His encounter with the police took place in a subsequent trip. By then he was feeling a little indisposed. But it is not true that he tried to walk away. He was never arrested. He refused to sign PW1's notebook because he had never spoken those words a point he made clear at the station. AUTONUMOUT The appellant also called his wife and two character witnesses. The magistrate's findings AUTONUMOUT In the end, the magistrate convicted the appellant. The following is his analysis of the evidence (relevant part only)
30. Having considered all the evidence carefully, I first find that PW1 and PW2 are both honest and reliable witnesses. I find that the Defendant did act suspiciously when PW1 and PW2 first spotted him at the sitting out area. I find that the Defendant did stand up as if to leave and it was then that PW1 and PW2 approached him to intercept and search him. I find that PW1 smelled the said 2 cigarettes and found the smell to be queer and suspected that they contained cannabis.
31. I find that PW1 then arrested and cautioned the Defendant for the offence of possession of dangerous drugs in English. I find that the Defendant did reply him with words to the effect that the Defendant knew the cigarettes were grass, that he took it for himself and he asked PW1 to give him a chance. I find that the Defendant meant that he knew that the rolled-up cigarettes were cannabis, as he himself admitted in cross-examination that he knew grass is a nickname for cannabis.
32. I find that although the Defendant later on had refused to sign in PW1's notebook to confirm what he had said at scene, he did in fact say it and that PW1 was telling the truth about the Defendant's confession. I find that the confession was made and was made voluntarily by the Defendant.

33. PW1 and PW2 were cross-examined thoroughly by Mr. Graham Harris of counsel. Neither of them had been shaken in their testimony. I have noted that in relation to whether the Defendant did say why he refused to sign the notebook, PW1 said the Defendant did not explain why, whereas PW2 said that the Defendant did say that he refused to sign because he was not cautioned at scene and so he did not admit to what was said in the notebook. I do not, however, find that to be a significant discrepancy. That was the only so called discrepancy between their evidence. I have also noted that PW2 said he did not hear what was being said between PW1 and the Defendant at the sitting out area, but that is understandable since PW2 said his English was not that good and he was not the person responsible for questioning the Defendant.
34. I find the Defendant not a credible witness despite the fact that he is of clear record. I find that he lied about whether he made the confession to PW1 at scene. I find that even if the part of meeting the female in the street who took the tobacco pouch away and then returned and rolled a cigarette for him was true, it is inconceivable that someone who had been smoking tobacco since he was 15 was not able to detect the strong smell of the cannabis when he was given the cigarette by the blonde female. It is PW1's evidence, and not challenged by the defence, that the tobacco inside the bag had a queer smell.
35. If it was in fact the female who had given the cannabis cigarettes to the Defendant, and if the Defendant did lick to seal up the rolled up cigarette himself, it is inconceivable that he did not detect the queer smell and thereby causing him to suspect whether something might be wrong with the contents of the cigarette.
36. The Defendant is alive to the drugs issue, as DW2 has also suggested. Friday night in Lan Kwai Fong on a festive evening (it is not disputed that it was the weekend of the Mid-Autumn Festival), strangers taking away one's cigarette pouch and then coming back offering rolled-up cigarettes with queer smell, that would have put anyone on guard about the contents of the cigarette, let alone someone of the Defendant's smoking experience. I find his evidence that there was nothing to cause him to suspect the cigarette that the female rolled up for him had cannabis in it inherently unbelievable. This appeal AUTONUMOUT A number of grounds have been advanced on the appellant's behalf. AUTONUMOUT do not propose to deal with each and every one of them. AUTONUMOUT Suffice it to say that the magistrate was not entirely accurate in his summary of PW2's evidence. Contrary to what is stated in paragraph 33 of the Statement of Findings, the reason the appellant gave for not signing his post-recorded confession is two-fold: (a) no caution at the scene, (b) it was never said. That it is so is clear from the transcripts (pp. 21-22 of the appeal bundle). That is the first point. AUTONUMOUT Second, PW2 was present when PW1 invited the appellant to sign. The three of them were together in the same room. That is PW2's evidence. The question thus arising is how in the circumstances could PW1 be adjudged to be telling the truth when he stated that the appellant had given no reason for refusing to sign in his notebook? In this regard, whether PW2 got every word and meaning the appellant said is irrelevant. It remains a positive concession that admits no room for PW1's negative claim. AUTONUMOUT These

questions inevitably put in doubt the magistrate's conclusion that PW1 was honest, and that a confession was made voluntarily under caution. They go to the crux of the matter because the confession is clearly one of the things the magistrate relied on in entering the conviction.

Judgment

AUTONUMOUT Like the magistrate, I find the appellant's version of events incredible. But finding the defence incredible is never a good enough reason to ground a conviction. AUTONUMOUT The appeal is allowed. The conviction is quashed and the sentence set aside. (D. Pang) Deputy High Court Judge Miss Yam Ho, Sally, SGC of Department of Justice, for HKSAR Mr Gerald McCoy, SC, instructed by Messrs Knight & Ho, for the Appellant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V t" (# t" (# & `#\$ "@AB & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title 0(:. 0(:. 0(:. Microsoft Word Document MSWordDoc Word.Document.8

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