

HONG KONG / JUDGMENT

HKSAR v. SIU LOK NGAN

COURT

Court of First Instance

DECIDED

12 July 2007

CASE / FILE NUMBER

HCMA1054/2006

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bjbj HCMA 1054/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 1054 OF 2006 (ON APPEAL FROM ESCC 1252/2006)

BETWEEN HKSAR Respondent and SIU LOK NGAN Appellant

Before: Deputy High Court Judge E Toh in Court Date of Hearing: 18 May 2007 Date of Judgment: 18 May 2007 Date of Reasons for Judgment: 12 July 2007

REASONS FOR JUDGMENT

The Appellant was convicted after trial of four charges of theft. She successfully appeals against her conviction and her conviction was quashed. Herebelow are my reasons. Case for the prosecution The Appellant was a cashier at the Hong Kong Style Caf and Mr Poon (PW1) was the manager. In May 2003, the owners of the caf could not understand why the caf turnover was falling and eventually they hired a firm of private detectives, who sent Mr Ho (PW2) to investigate. On the 27th day of May, when PW1 checked the records, he discovered that some invoices had been cancelled and when he looked at the CCTV tape, he saw the Appellant put something into her pocket on several occasions. PW1 s evidence was that he then asked the Appellant to go down to the basement of the caf and the Appellant had admitted that the invoices were voided by her. The Appellant was then asked to write down what she had done, and the Appellant then wrote out a confession statement, which was Exhibit as P2. At the time of the writing of P2, PW1, PW2 and two partners of the caf were present. Subsequently, PW1 reported the matter to the police, an acting Sergeant 17642 (PW5) arrived at the caf . Under caution, the Appellant made a verbal admission to PW5. Special issue The defence did not challenge the cautioned statement made to PW5 but had challenged the voluntariness of the statement that she

had written prior to the arrival of PW5. The allegation of the defence in the special issue was that at the time of the statement writing, one of the persons present was David Cheung, a private detective hired by the owners. The defence alleged that prior to the Appellant's writing the statement, she had told David Cheung that she had exchanged renminbi from the till and he had told her that it was theft, and if she wrote down the words that she was told to write they would not report this to the police but if she did not admit to stealing money from the cashier's counter, then it would be reported to the police. The Appellant had elected not to give evidence in the special issue nor in the general issue. All the prosecution witnesses denied that, at the time when the Appellant was in the basement, David Cheung was present and they denied making any threats or inducements to the Appellant. It was also in evidence that from a CCTV tape, David Cheung was seen near the cashier's counter at about 1.07 a.m. Apart from the allegation of the defence there was no evidence to show that David Cheung was in the basement at the relevant time. The learned Magistrate accepted that the prosecution witnesses were truthful and reliable and the learned Magistrate also considered that though the CCTV tape showed David Cheung to be in the caf at about 1.07 a.m. that does not mean that he was in the basement and she was satisfied that David Cheung was not in the basement and therefore could not have made any threats or inducements to the Appellant. The learned Magistrate then continued to say this in paragraph 15 of the Statement of Findings: Further, even if the appellant had been so threatened or induced, it would be incredible if she was affected by it in any way: she was a cashier, in a position of responsibility and accuracy as to money, I cannot accept that she would believe exchanging currency at the cash till at the correct exchange rate could be theft. It is also ridiculous that the appellant would admit to a clear and worse instance of theft, then theft by currency exchange. The learned Magistrate also took into account that according to PW1, he said that he had showed the Defendant when they were in the basement ten problematic invoices and from these, the Appellant herself had picked out four and made admissions about these. The learned Magistrate considered that that is another sign that she had made the statement voluntarily. However, she accepted that the Appellant had said that she had exchanged renminbi at the till though this did not affect her finding of voluntariness and that she admitted the self-written statement by the Appellant into evidence. General issue The learned Magistrate in convicting the Appellant relied on the verbal admission made to the prosecution witnesses in the basement, the confession letter, and the verbal reply to caution administered by PW5. In the cautioned statement the Appellant had said: I am really scared. Could you ask the company for a chance for me? I know that it's wrong. Today I stole \$100 odd at the time when I go off duty. I myself took out \$200 odd and exchanged it for 400 renminbi from the company. Now I take it out. The learned Magistrate considered that the Appellant was admitting to stealing \$100.00 odd on that day. She also noted that the amounts cancelled under the four invoices that the Appellant had taken out in the basement (i.e. Exhibits P3, 4, 5 and 6) amounted to HK\$124.00. The learned Magistrate therefore was satisfied that the Appellant was admitting to the theft of that HK\$124.00 when she said under caution that she had stolen HK\$100.00 odd on that day. The learned Magistrate also worked out from the exchange rate prevalent in May 2005 that the Rmb400 found on her at the time of the arrest must have been exchanged as she said in her cautioned admission. She took out HK\$200.00 odd from her wallet and together with the HK\$100.00 odd

that was stolen she had exchanged for Rmb400. The learned Magistrate also took into account, the admission of the Appellant in her statement which have been subsequently handed to the Sergeant in her presence, in which she had set out her modus operandi and the learned Magistrate found that that was consistent with what could be seen on the CCTV tape. She then convicted the Appellant of all four charges. Appeal against conviction Mr Kwok, counsel for the Appellant submitted as his main ground of the appeal that there was a procedural irregularity in that no voir dire was adopted to determine the admissibility of the verbal admissions made by the Appellant before writing the confession letter (Exhibit P2). The learned Magistrate in her oral verdict at p.158 of the appeal bundle L to N: Mr Poon had shown about 10 problematic invoices to the defendant, and from these the defendant herself had picked out Exhibits 3, 4, 5 and 6. She made admissions about these. This is another example of her voluntariness to make admissions that night. The learned Magistrate repeated this in paragraph 17 of her Statement of Findings at page 24, the appeal bundle. The learned Magistrate during the trial adopted an alternative procedure to determine the admissibility of the confession letters and at the end of the prosecution's case ruled that the confession letters were admissible. However he had failed to rule on the voluntariness of the alleged verbal admissions made to the prosecution witnesses in the basement prior to the arrival of the police. Although it is apparent from the transcript that the prosecution had told the court that they were not relying on the verbal admission, evidence was led as to this alleged verbal admission resulting in the learned Magistrate making a finding based on the submission that it showed the Appellant had acted voluntarily in making her confession statement that night. I agree with Mr Kwok that it was apparent from the defence counsel's objection that the defence was also raising the issue of voluntariness in relation to the verbal admissions made prior to the confession letters. It is clear from the authority, the *Tungjai & Another v R* [1997] HK 109 that in cases where it is alleged by the Defendant that he did not make a confession that a ruling was still necessary by the trial judge on the issue of voluntariness. There was enough material here before the learned Magistrate to alert her to hold a voir dire even though the defence counsel had not specifically asked for that to be done. This therefore constitutes a material irregularity and it is particularly so when the learned Magistrate not having ruled on the voluntariness of this alleged verbal admissions had proceeded to rely on it as the truth to support his conclusion that the Appellant had made her written confessions voluntarily. I therefore had no alternative but to allow the appeal and quash the conviction. I also heard counsel on the issue of a re-trial and determine that this is a proper case to send back to the Magistrates' court for a re-trial. (E Toh) Deputy High Court Judge Mr Alex Lee, Senior Assistant Director of Public Prosecutions, for the Respondent Mr Eric Kwok, SC and Mr Tong C Y Li, instructed by Messrs Simon C W Yung & Co., for the Appellant 1udk 1udk 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 i\$&`G ,wC= ,wC= hcma.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 28 October 2026 · Esheria