

HONG KONG / JUDGMENT

HKSAR v. SIU TAT YUEN

COURT

Court of Appeal

DECIDED

8 June 2007

CASE / FILE NUMBER

CACC201/2005

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bjbj /nyr%RL ?e@S art-Moore V-P, Stock JA and Beeson J in Court Date of Hearing: 23 March 2007
Date of Handing Down Judgment: 8 June 2007 J U D G M E N T Hon Stock JA (giving the judgment of the Court):

Introduction

This is an appeal against conviction. The applicant faced nine counts upon an indictment relating to three separate incidents, each one of which, according to the evidence of the relevant complainants, carried marked similarities in the suggested modus operandi of the applicant. In April 2005 after trial before Deputy Judge To and a jury, he was convicted of all counts save the sixth and sentenced to a term of eight years and two months imprisonment. The first two counts alleged that on 25 February 2004 at the Essex Hotel, Kowloon City, he raped Ms Chan: in other words, two separate rapes during the course of a relatively prolonged encounter between them in a room at that hotel. The third count alleged that he stole her mobile telephone. The fourth and fifth counts asserted separate acts of rape on 12 March 2004 at the Essex Lodge in Kowloon of Ms Law and the sixth count, of which he was acquitted, alleged theft of her mobile telephone. The seventh count alleged that on 20 March 2004 he raped a Ms Liu at the O Mas Hotel in Kowloon; the eighth count that in the same room he indecently assaulted her; and the ninth count theft of her mobile telephone. The evidence of each of the complainants was similar. Each worked as a hostess in a club and each, with her consent, was taken out by the applicant from the particular club to a hotel for the specific purpose of paid sexual intercourse. Once at the hotel room, the hostess raised the question of the amount of payment at which point the applicant became very angry, took hold of the complainant by her neck and made various serious threats of violence. Each alleged that as a result of the applicant's conduct she made it clear by conduct that consent to sexual intercourse with the applicant was withdrawn: Ms Chan said that throughout the sexual encounters which then followed she was crying aloud and that after the first act of non-consensual intercourse, she begged him to release her but he would not allow her to go and insisted on a further act of intercourse. There were other sexual acts such as oral sex and attempted buggery. He then insisted upon sexual intercourse again, this time without a condom and she expressly refused, but he forced her. Thereafter he said that he was going to collect his

car to drive her back to the nightclub and warned her not to leave in the meantime, else she would suffer. He left and did not return. Ms Chan telephoned the receptionist and told her to report the matter to the police, and then telephoned her friend, a Ms Lam, who went to the hotel and found Ms Chan with only a towel round her body, crying and apparently in fear. The police arrived and they noted that Ms Chan's eyes were red and swollen as if she had been crying. Miss Law said that she made it clear that she wanted to leave but the applicant did not allow her to do so, took hold of her hair and pushed her against a wall and then onto the bed and told her that if she cried he would beat her to death. He forced her to have oral sex with him and committed an act of buggery. Sexual intercourse took place on two occasions. He left. Miss Law was seen by a member of staff at the hotel barefoot and crying, and a friend, Miss Yu, was called who gave evidence of Miss's distressed condition, as did the manageress of the establishment. The argument with Miss Liu was not about money but about lighting conditions and in the course of this argument, according to the evidence, he became angry, slapped her cheek, gripped her neck and threatened to cut her hair. She told him that she was not going to perform intercourse if he did not wear a condom and asked to be allowed to leave. He agreed to wear a condom. Sexual intercourse took place. They took a bath and he talked of his propensity to violence against women who did not do as he wished. He asked for sexual intercourse again and she refused on the pretext that she was in some discomfort. He became angry and, out of fear, she complied with his demand for oral sex and masturbation. She asked to be permitted to leave but he refused and assaulted her. He eventually left and was shortly thereafter arrested by the police in connection with the alleged sexual assaults on Ms Chan and Ms Law. The police went to the room which the applicant had occupied and there, according to the evidence, they found Ms Liu in a distressed condition. The defence offered by the applicant in the case of each complainant was that such sexual acts as took place were with the female's consent, that there were no acts of violence on his part, nor any threats of violence, that the girls were self-evidently content with what was going on and that none protested or asked to leave. It was thus implicit in his evidence that each complainant had fabricated her testimony and he offered as a reason for this the fact that, as was common ground, he had not paid any one of them for their sexual services. In relation to Ms Chan, he did not grab her neck and there was nothing to suggest that she did not consent. After sexual intercourse they sat on the bed watching television and had a bath together during which they held a friendly conversation. At the end of their encounter, he told her that he did not have enough money and would go and collect money in order to pay her. In relation to Ms Law, he said that there was no violence nor any threat of violence, that they had a happy time together and there was no indication of lack of consent on her part. She happily agreed to the second act of sexual intercourse and to have food with him afterwards. As for Ms's account, there was as in the case of the others much common ground as to the sexual acts that she alleged had taken place but no common ground as to the alleged violence or threats. He admitted that there was some slight disagreement about dimming of the lights but this was readily resolved. After the first act of intercourse they bathed together and chatted. He said that he had indeed told her of a previous occasion in which he had consumed drugs and become violent with a girl but that this was in the course of friendly conversation. He never slapped her or gripped her neck and there was no indication that she did not consent. It was also common ground that no marks or signs of

injury was seen on any of the complainants at the time of their complaints. Recklessness and honest belief In dealing with the defence offered at trial and the core issues that the jury had to address, the judge in his summing-up dealt, at length and repeatedly, with the issue of recklessness and the defence of honest belief and the suggested relationship between the one and the other. On the cases presented by the respective parties these defences did not arise, for which reason Mr Zervos SC for the respondent suggests that they should never have been left. He points out that the issue in this case was whether or not the assertions of the complainants as to violence and threats of violence and their obvious reluctance to engage thereafter in sex, made clear by either by words or conduct to the applicant, were true. The allegations of threats and of actual violence were simply denied. The defence was that the women were self-evidently at all times willing to engage upon the sexual acts alleged. That being so the issue was simple: did those acts happen or not? The suggestion therefore is that the judge gave to the applicant the benefit of defences that were not raised or properly available, for which reason this court, he says, need not concern itself with such flaws in the directions as to recklessness and honest belief as may be demonstrated, and, furthermore, the court can rest assured that the jury must have put them to one side. One has some sympathy with the contention that recklessness and honest belief were not realistic issues in the case: if the evidence of the applicant was or may have been true, actual consent was at all times obvious; conversely, if the testimony of the complainants was accepted by the jury, it is difficult to see how they could have concluded that the applicant might honestly have believed in the possibility of their consent, or how he could escape a charge of recklessness. That said, it must nonetheless be recognised that these issues were left with the consent, and apparent encouragement, not only of the defence but also of prosecuting counsel; and the judge referred to specific conduct which he said could give rise to such possible defences: this included the fact that in the case of Ms Chan she agreed that she had chatted with the applicant about her background and cooperated during intercourse by making moaning sounds, conduct that might suggest to the applicant that she was then consenting; in the case of Ms Law that she played a game with him and offered him chewing gum giving rise to the question whether he might have believed that she had, despite his rough conduct, actually consented; and matters in a similar vein in the case of Ms Liu. In these circumstances, the better approach we think is to examine those facets of his directions on the subject of recklessness and honest belief which are said to have been materially flawed, and to examine then, should there prove to be flaws in the directions, the consequences of them. In the course of his first foray into the definition of rape and the defences available, the judge said this: The third element of which the prosecution must satisfy you is the state of mind of the accused, also at the time sexual intercourse occurred. The prosecution has to prove to your satisfaction that the accused either knew that the woman did not consent to have sexual intercourse with him or was reckless as to whether she consented or not. A man is reckless as to whether a woman consented to sexual intercourse if you are sure that he did not know and did not care whether the woman was consenting or not, and carried on regardless to have sexual intercourse with her. In other words, his state of mind was that he could not have cared less. What if a man genuinely, although mistakenly, believed that the victim was consenting? The law is that if the accused genuinely believed that the victim was consenting at the time of sexual intercourse, he cannot be guilty of

rape . So if it is, or if it may be, the case that the accused held a genuine but mistaken belief that the victim was consenting, then you must acquit him of the rape charge. In deciding whether or not the accused believed, or may have believed, that the victim was consenting, you should have regard to all the circumstances, you should also have regard to the existence, or absence, of reasonable ground for such a belief. In considering that question, you should put yourself in the accused's mind and with his background, and then decide what he was really thinking at the time sexual intercourse took place. But if you are sure that the accused knew the victim did not consent, then, of course, there is no need for you to consider this defence of genuine mistaken belief because it is contradicting in terms. This defence is only available when you find that the accused was reckless in not caring whether the victim consented and proceeded to have sexual intercourse with her regardless. These are the ingredients of an offence of rape. (Emphasis added). There are a number of problems with these directions: in relation to recklessness, the direction did not require the jury to ask whether they were satisfied that the applicant himself foresaw the risk of lack of consent, the subjective test now required as a result of *Sin Kam Wah & Another v HKSAR* (2005) 8 HKCFAR 192; and there was an illogicality in the suggestion that the defence of genuine belief that the victim consented was only available if the jury first found that the accused was reckless in not caring whether the victim consented. If he could not care less, how could he at the same time hold a genuine belief that the complainant was consenting? This was a point made by Mr Donald for the defendant in the course of submissions that interrupted the summing-up, where he suggested to the judge that recklessness precludes honest and mistaken belief . The same illogicality was posed moments later in the summing-up (page

- 28) where the judge said to the jury: if, in the course of [cheating the women], he conducts himself in such a way which amounts to his having sexual intercourse without the victim's consent and he knew about that, or he was reckless about that, then he committed the offence of rape, unless he can show that he genuinely believed that the victim consented ; a direction that carries the added disadvantage that it suggests that the burden of proving genuine belief was upon the defendant; although that latter misdirection was shortly thereafter put right. The error as to the condition precedent for honest belief was repeated in written directions given by the judge to the jury. Distress In relation to each complainant, there was evidence that shortly after the events in question a recent complaint was made and that the complainant was in a state of obvious distress. Criticism is now advanced about the judge's directions as to distress. It is said that he erred in three respects: that he failed to direct the jury that before they could rely upon distress as having any probative value, they had to be sure that the distress was genuine; that he failed to direct the jury that before they could rely upon distress as having any probative value, they had to be sure that the distress, if genuine, was exclusively referable to the suggested violence leading to non-consensual sexual intercourse, rather than to some other cause; and that he failed to warn the jury to attach little weight to evidence of distress especially since it was so closely allied in time in each case to the recent complaint. The last of the three complaints has no merit. It is based on an outdated statement of the law, and finds no support in the Court of Final Appeal's analysis of the law in this regard in *Leung Chi Keung v HKSAR* (2004) 7 HKCFAR

526. See also a relatively recent statement of the position in England: R Romeo [2004] Crim 302. However the first two of the three complaints have merit. It is conceded that nowhere in the summing-up has the judge given those particular directions although the suggestion is made that their sentiment has nonetheless come through. In Leung Chi Keung, the Court of Final Appeal, at pp 542-543, included in its summary of the essentials of the proper approach to be adopted by a jury upon the direction of the judge that: The jury must be satisfied beyond reasonable doubt: (i) that the complainant's distressed condition was genuine; and (ii) that there was a causal connection between the distressed condition and the sexual offence. In other words, they must be satisfied that: (i) the distressed condition was not feigned; and (ii) was only referable to the alleged sexual offence and not to any other cause. In this case there were other causes specifically suggested, in particular the fact that the applicant in each case utilised the sexual services of these women but absconded without paying them; and that, further, he stole their mobile telephones. The proviso It follows that in two regards, namely, the issue of honesty and recklessness and the issue of distress, there were material misdirections or non-directions. The question that arises is whether in the circumstances of this case we are satisfied that the jury would inevitably have convicted had the appropriate directions been given. In addressing the jury on the question of lack of consent and knowledge thereof, the judge repeatedly invited the jury to assess the mental state of the applicant at the relevant times and in this regard he suggested that they should look at all the circumstances with realism and common sense, and one is bound to say that the whole suggestion of honest belief or the need to prove recklessness has about it, in this particular case, an air of unreality. True it is, for example, that Ms Chan said she moaned during intercourse and chatted with the applicant, but concessions of that kind were not made in a vacuum. As the judge himself pointed out to the jury (appeal bundle page
- 49) whilst Ms Chan said that she complied with the applicant's demands and chatted with him about her personal background: This suggests he said that she may be consenting On the other hand Miss Chan's evidence, if you accept it is that all along she was crying . In relation to the issue of the applicant's knowledge of lack of consent in respect of each of the counts alleging sexual offences, the judge repeatedly told the jury (pages 51, 77, and 98 appeal bundle) that the issue arose only if they accepted the testimony of the relevant complainant. If there was doubt about the truth of a complainant's account or if the applicant's testimony was or may be true, then the issues of honest belief and recklessness were non-issues. It follows from the verdicts delivered that the testimony of the applicant was rejected and that the testimony of the complainants was accepted. That being so, it is difficult to see on what logical basis the jury could have concluded that the applicant may have nurtured an honest belief in the consent of any one of the complainants and on what basis it could be said that the recklessness at the least may not have been proved to the jury's satisfaction: The testimony of Ms Chan was that she was crying throughout, even when she performed the cooperative acts; this in addition to begging him to release her and his refusal to do so. As the judge pointed out, when dealing with the issue of knowledge of lack of consent, the evidence was that he had gripped her neck and that all along she had been crying and that

he saw that. Before the second act of intercourse he had gripped her neck forcefully, made as if to hit her and threatened to cut her hair. How the judge asked, might it be concluded in such circumstances that he, the applicant, was not fully aware of her lack of consent? In relation to cooperative acts on the part of Ms Law, suggested as the basis for a possibly mistaken belief in consent, the judge reminded the jury (page 78) that, according to her testimony, the applicant had treated her with violence and threats of violence: ... serious threats about life. If a woman expressly said that she was not going to have sex with the man and if the man applied violence... and if, thereafter, the woman complied with the demand for sex, would not the man know that the woman's compliance was the result of submission to his violence and threat of violence? Would not the accused know, in the circumstances, that Miss Law's cooperation was brought about by his violence and threats of violence and that she was not consenting to have sexual intercourse with him? If he did not know, was he not reckless in proceeding to have sexual intercourse with her regardless, bearing in mind the earlier and serious threats he has uttered, and also bearing in mind that Miss Law had attempted to leave? In relation to Ms Liu, the judge made the same common-sense point, namely, whether it would not be obvious to the applicant, he having gripped her neck and threatened to cut her hair and gripped her until she fainted, and slapped her, that, at the least, there was a real risk that she was not in fact providing true consent. These intimations provide the answer in this case to the proviso issue. Given that the jury evidently accepted the testimony of the complainants, we fail to see where in reality lay the possibility of an acquittal on the footing of mistaken belief in consent or on the footing that the prosecution had failed to prove knowledge of lack of consent or, at the least, obvious recklessness on the part of the applicant. In relation to the non-directions on the question of distress, the trial judge drew the attention of the jury to the fairly acute form of distress witnessed in the case of each applicant and asked them to consider whether it was conceivable that the complainants had reached that condition merely because, for example, they had not been paid. The jury will have had the point but in any event the nature of this third party evidence of distress - obviously accepted by the jury was such that we are satisfied that they would not in this case have attributed it to any cause other than the sexual acts encompassed by the indictment. Accordingly, we are satisfied that this is an appropriate case in which to apply the proviso to section 83 of the Criminal Procedure Ordinance Cap. 221. We were not specifically addressed on the convictions for theft of the mobile telephones, but it would appear that the application for leave was directed at all the convictions. We see no basis upon which to interfere with those convictions.

Conclusion

The applicant is granted leave to appeal against conviction in relation to Counts 1, 2, 4, 5, 7, and 8 and we shall treat the hearing of the application as the appeal, but the appeals are dismissed. The applications for leave to appeal against the theft convictions are dismissed. (M. Stuart-Moore) Vice-President (Frank Stock) Justice of Appeal (C-M Beeson) Judge of the Court of First Instance Richard David Donald instructed by Messrs Andy Choi & Co., assigned by D.L.A., for the

Applicant Mr Kevin P. Zervos, SC, SADPP and Ms Ada Chan, SGC (Ag.) of the Department of Justice, for the Respondent. PAGE - A B C D E F G H I J K L M N O P Q 1udk 1udk H; < Yw/b jFen Yw/b & 6" Flora-template-ABC-Final (fair)1.dot setup Microsoft Word 9.0 v>yV lRZt lRZt Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 28 October 2026 · Esheria