

HONG KONG / JUDGMENT

# HKSAR v. SO OI KWAN

## COURT

Court of First Instance

## DECIDED

24 September 2004

## CASE / FILE NUMBER

HCMA482/2004

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj HCMA482/2004 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.482 OF 2004 (ON APPEAL FROM TMCC 1109 OF 2004)

-----

BETWEEN HKSAR Respondent and SO OI KWAN ( appellant, a single lady of 40 years of age, was convicted of four charges of criminal damage, contrary to section 60(1) of the Crimes Ordinance, Cap.200, following upon her pleas of guilty before Mr T S Jenkins in Tuen Mun Magistrates Courts on 14 April 2004. AUTONUMOUT By the summary of facts, the appellant accepted that on four successive days commencing on 15 March 2004, she damaged a total of 37 Octopus card readers positioned at light rail stations at Tin Yiu and Locwood Stations in Tin Shui Wai, Yuen Long. On the final occasion, the appellant accepted that she had used a stone to scratch the Octopus card readers. The cost of repairing the Octopus card readers was some \$21,250. AUTONUMOUT The learned magistrate ordered the production of a probation report and two psychiatric reports. Those reports disclosed that the appellant was a single, unemployed woman of 40 years of age with no criminal conviction. She had been in employment for more than 20 years until she was forced to give up her employment because of some impairment to her hands. The psychiatric report of Dr K.C. Tso indicated that she suffered from chronic pain in her hands, which necessitated follow up by orthopedic doctors. Dr S.H. Lui described her as of limited intelligence and not a resourceful person . Dr Tso described her as being of borderline intelligence . Both doctors were visiting psychiatrists at the Siu Lam Psychiatric Centre. AUTONUMOUT It was accepted before the magistrate that the offences had been committed by the appellant by way of revenge against the Light Railway Company for the perceived rudeness of their staff in declining to deal with complaints lodged by the appellant. Sentence AUTONUMOUT In his Reasons for Sentence, the learned magistrate acknowledged that the appellant had a clear record and noted that the commission of the offences was of a bizarre nature and irrational. However, he went on to note that the psychiatric reports indicated that the appellant was not suffering from any psychiatric illness. In the result, having regard to the multiplicity of offences, the number of readers damaged and the cost of repair to this sensitive equipment , he stated that he took a starting point of four and a half months imprisonment which he reduced to three months

imprisonment, which sentence he imposed upon the appellant on each of the four charges. He ordered each sentence to run concurrently, one with the other. Accordingly, the total sentence of imprisonment imposed by the magistrate was three months. Ground of appeal AUTONUMOUT On behalf of the appellant, Mr John Dunn, who appeared at the first hearing, submits that the learned magistrate was in error in imposing immediate custodial sentences for the offences of which the appellant was convicted. In support of that submission it is contended on behalf of the appellant that the magistrate failed to give adequate weight for purposes of determining the appropriate sentence to the following matters :

- (i) the appellant's previous good character; (ii) borderline intelligence; expressions of remorse and regret to the probation officer; (together with that probation officer's assessment that the remand of the appellant in custody pending the preparation of the reports, that is, for a period of 14 days, had exercised a deterrent effect on the defendant with a result that no counselling was recommended or required); (iv) that the appellant could not have known at the time of causing the damage that the repair to the Octopus card readers would be so great ; and
- (v) that the learned magistrate had failed to consider alternatives to an immediate custodial sentence as a means of dealing with this middle aged first offender, namely, a Community Service Order or a suspended sentence of imprisonment. AUTONUMOUT Dunn's complaint is not that the magistrate was not aware of factors of good character and her borderline intelligence because the magistrate states his cognizance of those matters in terms in his Reasons for Sentence, rather, it is said that in determining sentence he had not given those factors adequate weight. Similarly, there is no doubt that the magistrate was aware of the probation officer's assessment that the Defendant's present transgression of law is a single incident and the current remand has already exercised a deterrent effect on the Defendant . AUTONUMOUT At the first hearing before the magistrate after the appellant had pleaded guilty to the four charges, the issue of the imposition of a Community Service Order was raised in terms by those representing the appellant. However, the magistrate dismissed the matter at that stage stating Certainly not Community Service, not if she's got psychiatric problems. I'm going to get a probation report and two psychiatric reports, see whether or not a hospital order is appropriate here, or not. AUTONUMOUT In the result, both psychiatrists found her to have no mental, or psychotic symptoms nor cognitive impairment. She was said to be childish in her demeanour and display of emotions. AUTONUMOUT At the adjourned hearing when passing sentence, the learned magistrate did not avert to the possibility of a Community Service Order being imposed upon the appellant. The probation report provided that the magistrate with the information that whilst the appellant had been unable to continue in her long term employment because of the conditions of her hands which had required orthopedic treatment, nevertheless it was noted that in dealing with the ensuing problem of boredom : Recently, she enjoyed taking part in a voluntary work required by the Yuen Long (West) Social Security Field Unit. In answer to enquiries of the court, Mr Dunn informed the court that the appellant was required in those circumstances to work eight hours a day, three days a week. AUTONUMOUT Dunn informed

the court on that occasion, and Mr Ching repeats that assertion today, that if found suitable to be the subject of a Community Service Order, the appellant is willing, indeed anxious to be made the subject of such an order. AUTONUMOUT In light of that intimation by Mr Dunn and in all the circumstances of this case, this court ordered the preparation of a report by the Probation Service as to the suitability of the appellant to be made the subject of a Community Service Order. AUTONUMOUT That report is available to the court today. It notes After her last detention at Siu Lam Psychiatric Centre, the Accused expressed that she had learnt a hard lesson and would not dare to transgress the law again. The Accused was willing to repent her guilt by performing unpaid Community Service. She begged the court to grant her a non-custodial sentence. Judging from the remorseful attitude of the Accused, she is assessed to be a suitable candidate to be placed on a CSO. AUTONUMOUT The report concludes with the recommendation that the appellant be placed on a Community Service Order subject to some additional requirements. In determining whether or not the imposition of a Community Service Order would be appropriate, regard must be had to the guidance given in R. v. Brown [1981] 3 Cr.App.R. (S) 294, approved of by the Court of Appeal in the judgment in HKSAR v. Wong Yiu Kuen [2001] HKC 486. AUTONUMOUT In R. v. Brown, the Court of Appeal in England of Wales were addressing the circumstances of the particular appellant before them : But this case is tailor-made for a community service order. We have here a first defender indeed the position would have been the same if he had had what I might call a light criminal record; he came from a stable home background with a wife and a young child; he had a good work record; and it now appears a job is available to him. There is apparently genuine remorse and the risk of re offending appears slight. AUTONUMOUT Clearly, this appellant fits those criteria, save that whilst she had a good work record having been employed for more than 20 years in various factories, she is not now in employment . However, she does work three full days a week at the direction of the Social Security Field Unit. AUTONUMOUT Miss Lam, for the respondent, at the request of the court has drawn the court s attention to the decision of Madam Justice Bokhary in HKSAR v. Choy Yau Pun [2002] 4 HKC 309, in which Madam Justice Bokhary considered the statement made in the judgment of Mayo VP in the judgment of the Court of Appeal in HKSAR v. Wong Kuen. All the factors must be satisfied . That was a reference by Mayo VP to the guidance given in R. v. Brown. However, Madam Justice Bokhary made this observation That is not to say that a community service order can never be made unless precisely those factors are present. For example, it can be the case that a young man cannot rely on having a wife and child or a job being available to him, but can rely just as strongly on his youth and a university place being available to him. AUTONUMOUT With respect to Madam Justice Bokhary, in my judgment those observations are apposite. The guidance set out in R. v. Brown is just that, not a strait-jacket. AUTONUMOUT In all the circumstances of this case, I am satisfied that the appellant does satisfy the criteria to be made the subject of a Community Service Order. In my judgment, whilst it was perfectly proper, indeed understandable, for the learned magistrate to have ordered the preparation of psychiatric reports, he fell into error in not having considered the option of imposing a Community Service Order once those psychiatric reports revealed that the magistrate s suspicions as to the psychiatric well being of the

appellant were ill founded. He was in error to have imposed a sentence of three months imprisonment upon the appellant on each of the four charges. AUTONUMOUT Accordingly, the appeal against sentence is allowed. The sentences of imprisonment imposed in respect of each of the four charges are quashed. Order AUTONUMOUT The appellant having indicated her consent to being made the subject of such a Community Service Order and the provision of section 4(5) of that ordinance having been explained to her, I order that the appellant be made the subject of a Community Service Order and I stipulate 160 hours as the total number of hours of such service. That work has to be completed within 12 months. AUTONUMOUT In addition, I order that the appellant comply with the following conditions during the currency of this order : that she shall obey all lawful and reasonable directions from her probation officer in respect of her residency and work, and that she attend psychiatric and psychological treatment if deemed desired by that probation officer. (Michael Lunn) Judge of the Court of First Instance High Court Miss Vinci Lam, GC, of the Department of Justice, for the Respondent Mr John Dunn and Mr Ching Wan Fung, instructed by Messrs Benjamin Au & Co., assigned by DLA, for the Appellant PAGE - PAGE A B C D E F G H I J K L M N O P Q 1udk 1udk B C D E F G H I J K L M N O P Q R S T U V (#p# &`#\$ u)4q& u)4q & 6" CACV Jeannie MY MokSo ABC.dot setup Microsoft Word 9.0 Judiciary CACV Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

|                 |                                                                                                                                                     |
|-----------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|
| ORIGINAL SOURCE | <a href="https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=43465">https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=43465</a> |
| CASE PAGE       | <a href="https://chat.esheria.ai/case-law/hong-kong/hksar-v-so-oi-kwan-2004">https://chat.esheria.ai/case-law/hong-kong/hksar-v-so-oi-kwan-2004</a> |

Prepared on 28 October 2026 · Esheria