

HONG KONG / JUDGMENT

HKSAR v. SUNAR KAMAL

COURT

Court of First Instance

DECIDED

11 November 2011

CASE / FILE NUMBER

HCMA415/2011

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bjbj HCMA415/2011 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 415 OF 2011 (ON APPEAL FROM KCCC 3770 OF 2010)

BETWEEN HKSAR Respondent and SUNAR KAMAL (D2) Appellant

Before : Deputy High Court Judge Longley in Court Date of Hearing : 7 October 2011 Date of Judgment : 11 November 2011

J U D G M E N T

AUTONUMOUT The appellant, Sunar Kamal, appeals against his conviction by Ms Yang sitting at Kowloon City Magistrates Court of the offence of indecent assault. AUTONUMOUT The magistrate found that at a time after 12:30 a.m. on 1 January 2010 at the Why Club in Minden Avenue, the appellant (who was the 2nd defendant at the trial) had indecently assaulted the female victim, a 26-year- old student (PW1) by pressing her left breast for more than two seconds. AUTONUMOUT The prosecution case depended on the evidence of the alleged victim (PW1). It was her evidence that she had gone to the Why Club with a female friend (who was not called as a witness) at around 12:30 a.m. on 1 January 2010. Her boyfriend (PW3) who was a shareholder of the Club was already at the Club that night. After greeting her boyfriend, she and her female friend had gone to the dancing area of the Club and had chatted with friends. At around 3 a.m. her boyfriend had joined them and had then taken her by the hand and led her from the dancing area towards the bar area. She had taken the hand of her female friend and they had proceeded one after the other towards the bar area. This had involved them passing along a passageway about 3 to 4 feet wide. PW1 s evidence was that as they did so they had had to pass two South Asian men who were leaning against the wall to her left. As they passed, the first of the two men

who was wearing a black upper garment, and who she identified as the appellant, had pressed her left breast with his right hand. When she looked down, she saw his hand starting to leave her body. She was sure it was a deliberate rather than an accidental touching of her breast. She gave evidence that she had been about a foot away from the appellant when she first saw him and that the wall lighting enabled her clearly to see his face. She had identified the appellant at an I.D. parade on 14 July 2010. AUTONUMOUT Although it was this incident alone that formed the subject matter of the charge against the appellant, PW1 went on to describe subsequent events, some of which formed the subject matter of charges against the appellant's co-defendant (who was the 1st defendant at the trial). PW1 had not attended any I.D. parade at which the 1st defendant was present and therefore was not asked whether she could identify the 1st defendant at the trial. AUTONUMOUT PW1's evidence was that as she had passed the second South Asian man, he had used his arm to brush against her breast. She had immediately pulled her boyfriend's hand and told him what had happened and had turned to face the two men who were smiling at her. Her boyfriend (PW3) had then approached the men asking what the matter was. This had prompted the second male who was next to the appellant to slap her face and pick up a glass from the bar table and strike her boyfriend on the head causing it to bleed. While her boyfriend had struggled with the second male, the appellant had taken the opportunity to escape from the bar. AUTONUMOUT PW3 also gave evidence as a prosecution witness. He had not seen the assaults on PW1. Other prosecution witnesses included Dr Fai (PW2) who had examined both PW3 and the appellant's co-defendant (the 1st defendant) that night, and two police officers (PW4 and PW5) who had attended the scene. AUTONUMOUT Neither the appellant (D2) nor his co-defendant (D1) gave evidence at the trial. The appellant had however made a statement to the police (Exh. P2), the admissibility of which was not challenged, in which he admitted having been in the bar with his co-defendant that night. He claimed that he had been assaulted there by some Chinese men and had fled. He claimed that he did not know the reason for the assault and had not touched the breast of any woman there. AUTONUMOUT Panesar who appeared for the appellant at trial has put forward two grounds of appeal that she says render the appellant's conviction unsafe and unsatisfactory. AUTONUMOUT The first ground was that there were discrepancies and inconsistencies in PW1's account which was inherently incredible. The magistrate had failed properly to evaluate her evidence. AUTONUMOUT Secondly, she alleged that the magistrate failed properly to evaluate discrepancies between the accounts of PW1 and PW3 and considered whether PW3's version of events raised doubt about PW1's evidence. AUTONUMOUT In her Statement of Findings, the magistrate found that the alleged victim (PW1) was an honest and reliable witness whose evidence she accepted. In reaching that conclusion she considered the evidence of identification in the light of what was said by the English Court of Appeal in *R v Turnbull*. She considered the possibility of an accidental touching and ruled it out finding it must have been an intentional indecent assault on PW1's breast. Most importantly insofar as this appeal is concerned, she took into account the evidence of PW3 and the fact that there were apparent inconsistencies between his evidence and that of PW1. AUTONUMOUT She said this

59. In respect of PW3 s evidence, I have carefully considered his evidence and the submissions of Defence Counsel. Having carefully considered PW3 s evidence, I found him to be an unreliable witness for the following reasons :
- (1) It is obvious from the medical report (Exhibit P8) and the photos of PW3 (Exhibit P6) that the injuries sustained by PW3 were on the left side of his head. However in Court, PW3 said he was injured on the right side of his head.
 - (2) PW3 conceded that he had drunk alcohol that night. He was initially arrested for drunk and disorderly conduct. PW4 and PW5 confirmed PW3 was behaving emotionally and had even vomited in the police van.
60. Hence by reason of the above matters, I am uncertain as to whether PW3 had remembered the events of the night in question clearly and accurately since he was under the influence of alcohol.
61. I therefore did not place weight on his evidence.
62. I therefore treated the case against the Appellant as a one-on-one case and reminded myself that I should be extra cautious in assessing PW1 s credibility and reliability. AUTONUMOUT In the light of these findings, the magistrate did not simply disregard the inconsistencies between the evidence of PW1 and PW3 but said this
64. Although I have not placed weight on PW3 s evidence, I noted that there were inconsistencies between his evidence and PW1 s evidence. I have considered whether these inconsistencies would cast doubt on PW1 s credibility or reliability. Having considered the evidence I noted that PW1 and PW3 were consistent in that PW1 had complained to PW3 that she was indecently assaulted. I noted that PW3 had not witnessed the assault. Having considered all the evidence and for reasons I had already given as to why I did not place weight on PW3 s evidence, I found PW1 s credibility and reliability was unaffected. AUTONUMOUT It is the second ground of appeal relating to the manner in which the magistrate dealt with the inconsistencies between the evidence of PW1 and PW3 that has founded the principal attack by Ms Panesar on the magistrate s findings. AUTONUMOUT Panesar has submitted that magistrate erred in finding that PW3 was under the influence of alcohol that night. This submission runs contrary to the defence case at trial when Ms Panesar had suggested to PW3 that he was very drunk at the material time. Although PW3 disagreed, I am satisfied that there was ample evidence for the magistrate to reach the conclusion that she did, which was not that PW3 was drunk but that he was under the influence of alcohol rendering his recollection of events unreliable. PW3 admitted that he would drink alcohol while working and that he had been drinking something like whisky that night. It is apparent from the evidence of the police officers that after the arrival of the police, PW3 s conduct was both highly emotional and agitated. His conduct attracted a crowd of 20 onlookers. He persisted in rushing at the police despite two warnings. As a result he was arrested of being drunk and disorderly. PW5 (PC58015) said that PW3 smelled of alcohol. In the police vehicle he resisted the police by waving his hands and stamping his

feet. On board the ambulance which conveyed him to hospital he vomited. It is apparent from the nurses notes that he told the nurses at the triage station at Queen Elizabeth Hospital that he had vomited a few times. AUTONUMOUT As I have stated, the fact she found that PW3 was under the influence of alcohol did not lead her totally to disregard inconsistencies between his evidence and that of PW1. This distinguishes this case from the case of HKSAR v Fseil Sabri, HCMA1117/2008 to which Ms Panesar has referred me. The magistrate went on to consider whether those inconsistencies cast doubt on the credibility or reliability of PW1. She found that they did not. Those apparent inconsistencies were set out in the written submissions which Ms Panesar submitted to the magistrate at trial. AUTONUMOUT Those inconsistencies have been drawn to this court's attention again by Ms Panesar at some length. AUTONUMOUT I am satisfied that none of those inconsistencies were so significant as to call for specific reference by the magistrate. That is particularly so as PW3 was not a witness to the alleged indecent assault. AUTONUMOUT Such matters as to whether PW1 was still holding PW3's hand at the time of the assault (as PW1 appears to allege) or whether, (as PW3 alleged) he had released her hand two or three seconds earlier and proceeded 1 metres towards some friends when the indecent assault occurred, and whether the man in the black top, who was alleged to be the appellant had after the incident escaped through the door or been escorted to the door by a security staff appear to me to be simply matters in which human recollection and perceptions may well differ. In the latter case it is particularly so when PW3's evidence about the sequence of events was not clear, and in the light of PW1's evidence that after PW3 had been struck on the head, the situation in the Club had become chaotic and she had been led by her friend to another area and the appellant's own admission that after being assaulted he had run away. AUTONUMOUT Bearing in mind that the bar alongside which the indecent assault was alleged to have occurred was relatively short (3 metres), I consider that any difference between PW1 and PW3 as to location of the culprits pointed out by PW1 is likely to be more apparent than real. AUTONUMOUT The apparent discrepancy as to whether the two culprits were on their own, as PW1 alleges, or in a group of five, as PW3 alleges, may also be a question of perception, bearing in mind PW3's evidence that when he spoke to the two men whom PW1 had pointed out, the other three men did not listen to the conversation and gave the impression that they did not know the other men. AUTONUMOUT Although there was an apparent discrepancy between PW1 and PW3 as to the source of the light in the passageway, both were consistent as to the effect of the light, which was sufficient to see the faces of people clearly. AUTONUMOUT Insofar as these and other matters may have amounted real inconsistencies between the two witnesses, I am satisfied, bearing in mind her findings that PW3 may have been affected by alcohol, that the magistrate was entitled to find that they did not affect PW1's credibility or reliability. AUTONUMOUT I find no substance in the second ground of appeal. AUTONUMOUT Insofar as the first ground of appeal is concerned, Ms Panesar repeated the submissions she had made to the magistrate both orally and in writing. AUTONUMOUT The magistrate dealt with those submissions by saying

65. I do not propose to deal with each point raised by the Defence Counsel in her submissions but will deal with some of the important points as below :
- (1) Defence Counsel submitted that PW1 is not credible or reliable because she was unable to say which part of the Appellant's hand had touched her breast. I did not accept this submission. PW1 was clear in that the assault happened suddenly and by the time she was able to react, the hand was not longer touching her breast. However she did see the hand leaving her breast and she felt the Appellant's hand on her breast during the contact. At the time there was no one in between the Appellant and PW1. I therefore did not find PW1's credibility to be undermined by the mere fact that she was unable to see the hand on her breast. Defence Counsel submitted that PW1's description of the 1st Defendant's clothing to be inconsistent. In her witness statement, PW1 described the 1st Defendant's clothing as white. In Court, she described the 1st Defendant's clothing as grey white. I did not find this to be a material discrepancy as both colours are similar and not drastically different. I therefore did not accept Defence Counsel's submissions. AUTONUMOUT Depending on the evidence in a particular case there may be some submissions regarding that evidence that are so significant that justice requires a magistrate specifically to deal with them in his or her Statement of Findings. A magistrate is not however required in every case specifically to deal with every submission made by counsel provided there is nothing to suggest that he or she has not taken those submissions into account. The magistrate expressly said she would not deal with every submission made by Ms Panesar but specifically referred to two matters. AUTONUMOUT Having heard Ms Panesar's submissions, I find that the magistrate cannot be criticized for not dealing more specifically with the other matters raised by Ms Panesar. AUTONUMOUT I dismiss the appeal against conviction. (P.K.M. Longley) Deputy High Court Judge Mr Edmond Lee, SADPP (Ag.) of the Department of Justice, for HKSAR Ms Mahinder Panesar, instructed by Messrs Jal N. Karbhari & Co., 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 hss, hss, hss, hss, hss, hss, hss, hss, hss, hx[y hx[y hx[y hx[y hx[y hx[y &`#\$ {ri{r &`#\$ G H I J K L M N O P Q R S T U V "@AB [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%`#q x}r :TZA G I u3 L+M2 e\O* \$*c?)6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K&=al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> i8_5 hHZ0 i8_5 & 6" CACV Jeannie MY MokSo ABC.dot setup Microsoft Office Word Judiciary CACV Title Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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Prepared on 29 October 2026 · Esheria