

HONG KONG / JUDGMENT

# HKSAR v. TAM WING KUEN

## COURT

Court of First Instance

## DECIDED

17 October 2007

## CASE / FILE NUMBER

HCMA185/2007

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Before: Hon Beeson J in Court Date of Heading: 10 October 2007 Date of Judgment: 17 October 2007

## J U D G M E N T

This Appellant was convicted after trial in the Magistracy of one count of theft, contrary to section 9 Theft Ordinance, Cap. 210 and was fined \$2,000. He appealed against conviction only. On the 10th October 2007 the appeal was heard. The Appellant had been represented at trial by Senior Counsel but represented himself on this appeal. After hearing submissions, I reserved my decision and advised that judgment would be handed down at a later date. My judgment follows. The facts, which were not in dispute, revealed that the Appellant left a grocery store, triggering the shop alarm. The store security guard shouted at him, and the Appellant ran, but was stopped after a short chase. He was taken back to the store and asked to empty out the contents of the plastic bag he was carrying. Inside was a container of face cream minus its packaging and an intact package of cosmetic lotion. There was no sales record for either product. A report was made to the police. The Appellant did not give evidence at trial, but called a psychiatrist, Dr Chan, who had seen him in once 1998, but had not seen him thereafter until two months after the date of the alleged offence. In the interim, the Appellant had seen another psychiatrist, Professor Wing, who, as reported by Dr Chan, had diagnosed him as suffering a recurrent mood disorder . Professor Wing believed that it was probably Bipolar Affective Disorder Type II. Drugs were prescribed, which, with a few relapses, effectively controlled the disorder. However, the Appellant reportedly told Dr Chan, that around the time of the offence he had reduced the dosage of his own volition, because of adverse side-effects, relating to sexual dysfunction. This reduction reportedly caused other problems. As recounted in Dr Chan s evidence, the Appellant had given him an elaborate account of what he said happened. He had not slept well; had examined the

stolen items out of curiosity; abandoned his attempt to buy bread as the checkout queue was too long; left the shop; was frightened by the shop alarm sounding and the guard shouting at him so he ran, thinking he was being attacked (he having suffered an attack whilst working as a health inspector). He believed he had put the two items back on the shelf and could not account for them being in his bag. Dr Chan, having read inter alia a medical report by Professor Wing, gave it as his opinion that the Appellant might have been forgetful, rather than having had a genuine intention to steal. Grounds of Appeal Perfected grounds of appeal were submitted and prepared by the Appellant's counsel at trial, who, initially, had been instructed to conduct his appeal. The Appellant relied on those grounds, which in essence were that :

- (1) The Magistrate erred in ruling there was a case to answer when the prosecution evidence revealed only an omission to pay. The evidence fell short of establishing the requisite mens rea. The Magistrate erred in drawing an inference of guilt, when it was not the only reasonable inference to draw from the evidence. The Magistrate failed to adhere to the rule in *Brown v Dunn* (1893) 6 R 67, because the evidence of the psychiatrist as to the Appellant's state of mind had not been challenged when he gave evidence. The Magistrate erred in inferring that the Appellant could not have been forgetful at the material time, because of the detailed account he had given to the psychiatrist some two months afterwards; this overlooked the possibility of transient forgetfulness and ex post facto rationalisation. The Appellant based his submissions on the perfected grounds of appeal and at the hearing also went into some detail about the psychiatric reports of Dr Chan and Professor Wing. The report of Professor Wing had not been exhibited by the defence. Such material from that report, as was before the Court, was contained in the evidence given by Dr Chan, whose own report was produced as Exhibit 9. In addition to the perfected grounds filed in May 2007, the Appellant made further submissions filed on 5 October 2007. These amplified and in some instances overlapped the perfected grounds already before the court. The first additional submission alleged that the Magistrate had forgotten to consider the possibility of transient forgetfulness. He submitted further that the Magistrate had overlooked expert evidence which showed that his blood contained a sub-therapeutic level of the drug that he was supposed to be taking. This was a reference to a laboratory test result which was recorded in Professor Wing's report, which was not before the court. The Appellant submitted presumably on the aspect of transient forgetfulness, that once he had resumed his correct medication regime he could give a detailed account of events on the day in question. He considered he was in a position to tell what happened to Dr Chan in the series of interviews which he had with him. The Appellant complained that although the Magistrate apparently rejected the evidence of his expert witness, Dr Chan, he had failed to mention that in court at the time. For this reason he considered that the Magistrate did not have a well-balanced view of the evidence and that this had been to his disadvantage. He pointed out that the Magistrate had not recorded whether the expert was telling a lie or telling the truth. He contended there were 4 scenarios relating to the expert witness; That his evidence was accepted. That his evidence was rejected. That the witness was telling the truth. That the witness was telling a lie. From these submissions, it appears that the Appellant may have

misunderstood the nature of an expert witness. However, he was represented by Senior Counsel at his trial and was certainly not at any disadvantage, because of this apparent misunderstanding. Defence Case Evidence about the Appellant's psychiatric condition was given not by the Appellant, nor by Professor Wing his psychiatrist for eight years, but by Dr Chan, who had seen the Appellant once in 1998, but not in the intervening period. The Appellant did not consult Dr Chan until two months after the incident. Dr Chan's knowledge of the Appellant's condition and of the incident which led to his arrest was obtained perforce from several interviews with the Appellant, various documents relating to the case and a psychiatric report dated 1 September 2006, prepared by Professor Wing. Dr Chan's opinion at the end of his own report was that the offence was more likely to have been due to forgetfulness than a genuine intention to steal, and he recounted in detail what the Appellant had told him about the incident. The Appellant agreed that Professor Wing's report was not produced at trial, but claimed that he had had no control over the documents that were put before the court, because he was represented. He submitted that the Magistrate might have been misled by this. He referred again to the results of the laboratory test in Professor Wing's report, showing that the medication level in his blood was much lower than normal. The Appellant took issue with the comment in Dr Chan's report, that he had reduced his medication dosage, causing him to become irascible and forgetful. He denied saying that. He confirmed that no application was made by the Respondent at trial to rule Dr Chan's evidence inadmissible. In his view the evidence of Dr Chan, and Professor Wing's report, contained crucial information about his state of mind. The Appellant could not understand why the Magistrate had not accepted Dr Chan's evidence. He felt the Magistrate should have believed what he said to Dr Chan. The Magistrate had erred, because he failed to say in court that he rejected Dr Chan's opinion. For this reason, the Appellant doubted the Magistrate had taken a balanced stance in assessing the evidence and referred to him as being evasive. There is no substance in this complaint by the Appellant. The Magistrate dealt with the evidence, that was before him, and assessed its weight before coming to his conclusions, or drawing any inferences. The Appellant contended that the Magistrate had overlooked the possibility that he had forgotten to pay for the items, and that he had no intention to commit any crime. When he consulted Dr Chan on 26 September 2006, he could recall the details of the day and related them. The Magistrate considered this degree of recall sharply contradicted the defence of forgetfulness. The sole issue, as the Magistrate recognised, was whether the Appellant had had the intention to steal at the relevant time. The Appellant exercised his right not to give evidence, the thrust of his defence being that he had been forgetful and had not formed the necessary intention. The forgetfulness claimed, was attributed as a side effect of the medication prescribed for his psychiatric condition; an effect that may have been exacerbated around the time of the offence, because the Appellant had cut down the dosage of his medication. There was no direct evidence before the Magistrate about the Appellant's state of mind on the day of the offence, because he had not given evidence and his account had not been tested before the court. The Magistrate had before him Dr Chan's evidence, which was an unsatisfactory composite of his own interviews with the Appellant; material that he had gleaned from the

court papers and matters derived from Professor Wing's report by Dr Chan. In his Statement of Findings (para. 8) the Magistrate set out the details of the Appellant's account of events, as repeated by Dr Chan in court. He accepted (para. 9) the evidence of Dr Chan, that it was possible for persons, especially those suffering from mood disorders, to forget events or have lapses of memory. He assessed the weight of Dr Chan's evidence and concluded that he did not accept that this was such a case. He stated:- What the defendant had told Dr Chan, as set out in paragraph 8 above, contains remarkable and meticulous details. He had not overlooked or forgotten the most trivial matters as happened inside and outside the shop. It is in sharp contradiction to the main thrust of the defence case the claim that he is at the material time forgetful. (Para. 10) The Magistrate was satisfied on the prosecution evidence that the Appellant had known what he was doing and that he intended to steal the items. I have alluded to the difficulties which the Magistrate faced in relation to the defence evidence. The case of HKSAR v Au Yuen-wah Gloria [2005] 1 HKC 49, an application for leave to appeal against conviction for obtaining a pecuniary advantage by deception, was roughly similar on its facts to the instant case and presented similar difficulties. The Appellant, Miss Au, submitted an application form, when seeking employment with the Hong Kong Government, in which she represented that she had never been found guilty of a criminal offence. Some years later, fingerprints matching hers were found on a file relating to a shoplifting offence, although the name on the file was different. The trial court found that the appellant was the same person as the person who had been convicted of theft. The appellant did not give evidence at trial but had adduced medical evidence that she was suffering from dissociative amnesia, which rendered her unable to recall her own conviction. Counsel for the prosecution objected to the medical evidence being called initially, because there was no evidence from the applicant as to her state of mind in 1988 and so no weight could be placed on any conclusion reached by the doctors, because the evidence of the assertions she had made to her doctors was inadmissible, or of no weight. The judge heard argument and ruled that the evidence should be received, including the doctors' evidence as to the assertions that the applicant made to them, upon which they based the opinions. He said that the weight to be given to the applicant's assertions would be an issue in the trial. The doctors conceded that the only evidence that they had, upon which they based their conclusions that the accused suffered from dissociative amnesia, was her own assertion to them that she could not remember the conviction. On the application for leave to appeal against conviction, it was argued *inter alia* that wrongly the judge placed too much reliance on the fact that the applicant had not given evidence. In dismissing that argument the Court of Appeal held:- Statements made to an expert witness were admissible if they were the foundation, or part of the foundation, of the expert opinion to which he testified, but they were not evidence of the existence in fact of past sensations, experiences and symptoms of the patient. If the man whom he examined refused to confirm in the witness box, what he says in the consulting room the expert opinion might have little or no value, for part of the basis of it had gone. The most obvious problem with the medical evidence was that both doctors were doing no more than putting forward the applicants, entirely self-serving, and uncontested out-of-court assertion that in 1988 she had no

memory at all of the 1975 conviction. Similarly, Dr Chan's evidence amounted to a reporting of this Appellant's out-of-court and entirely self-serving account of what he said had happened; an account which was untested because the Appellant had not given evidence. Although the account relayed to him by the Appellant, might be admissible as forming part of the foundation for his expert opinion, in the absence of confirmation by the Appellant it was not factual evidence of what had or had not occurred, nor of what the Appellant had felt or experienced. To that extent the value of Dr Chan's opinion was limited, and the weight to be attached to his evidence was affected adversely. The Appellant complained (Ground 4) that the Magistrate erred in failing to adhere to the rule in *Brown v Dunn* (1083) 6 R 67. That rule, as encapsulated in the head note, provides:- If in the course of a case it is intended to suggest that a witness is not speaking the truth on a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have the opportunity of making any explanation which is open to him, unless it is otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story, or the story is of an incredible and romancing character. That rule deals with the position of a witness of fact at trial, but does not, nor is it intended to, cover the position of a witness like Dr Chan, who was not a factual witness but was purporting to give evidence as an expert, in particular as a commentator on the psychiatric history of the Appellant. He knew the facts of the incident only from the account the Appellant gave him, an account which he repeated to the court. In considering the evidence of an expert the Magistrate must assess it in the context of the evidence as a whole. He is entitled to rely on some, or all, or none, of that evidence just as he is entitled to do in respect of the evidence of any witness. The evidence of Dr Chan, accepting that it was admissible (although the Appellant had not given evidence at trial), was opinion evidence his credibility was not in issue. What the Magistrate had to decide was whether there was any basis for admitting Dr Chan's evidence and if it were admissible, what weight he should accord it. In considering the weight to place on Dr Chan's evidence, the Magistrate could take into account that he was not the consulting doctor for the Appellant at the time of the offence. After his initial and only consultation with Dr Chan in 1998 the Appellant had been treated by Professor Wing. The Appellant had consulted Professor Wing, in June 2006 and three days after the incident, but Professor Wing's report was not before the court, except to the extent that it was incorporated into Dr Chan's evidence. Dr Chan himself did not see the Appellant until 26 September 2006, some two months after the incident. The Magistrate assessed all the evidence and found he was sure that the Appellant had not been forgetful, but had had the requisite intention to steal. The very detail of the Appellant's account contradicted the Appellant's defence of being forgetful. The Magistrate examined the evidence properly and did not err in drawing the inferences that he did. None of the grounds of appeal has been made out, and accordingly this appeal against conviction is dismissed. (C-M Beeson) Judge of the Court of First Instance Mr Prakash L Daryanani, SGC of the Department of Justice, for the Respondent Appellant acting in person PAGE - A B C D 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 1udk 1udk fUU : HCMA.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word

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