

HONG KONG / JUDGMENT

HKSAR v. THAPA BINAYA

[2018] HKCFI 1295

COURT

Court of First Instance

DECIDED

7 May 2018

CASE / FILE NUMBER

HCMA77/2018

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bjbj HCMA 77/2018

[2018] HKCFI 1295 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO 77 OF 2018 (On appeal
from ESCC 2948/2017)

BETWEEN HKSAR Respondent THAPA BINAYA Appellant

Before: Deputy High Court Judge V Bokhary in Court Date of Hearing: 3 May 2018 Date of
Judgment: 7 May 2018

J U D G M E N T

The Appellant was convicted after trial in the Magistrates Court on a charge of inflicting grievous bodily harm, contrary to Section 19 of the Offences Against the Person Ordinance (Cap 212) and was sentenced to 11 months imprisonment. He appeals against conviction and sentence. He initially did so on the pro forma grounds of appeal against conviction and sentence set out on Forms 101 and 102 respectively. But by a document dated 13 April 2018, he put forward six perfected grounds of appeal against conviction. He has not put in any perfected grounds of appeal against sentence, but his written and oral arguments covered both conviction and sentence. I have of course considered all his arguments. The perfected grounds of appeal against conviction reads as follows:

- (1) Magistrate failed to consider the PW1's aggression towards appellant was unreasonable and illogical;

- (2) PW1 lied in her evidence to the court, which affects her credibility as a reliable witness;
- (3) Magistrate was wrong to accept that appellant rushed when the evidence had discrepancy between rushed and marched ;
- (4) Although medical examiner being listed among the prosecution witness, Magistrate failed to instruct prosecution for his evidence when there was discrepancy on whether it was a full-fist punch or half-clenched fingers;
- (5) Magistrate failed to consider the evidence of PW2 that the defendant might have been trying to defend himself;
- (6) Conviction was not safe. At the hearing before me, he abandoned all his perfected grounds of appeal against conviction except for the fifth one which relates to self-defence. But I will also consider the other five perfected grounds of appeal against conviction since each of them does touch upon the matter of self-defence. It was an admitted fact that upon medical examination following the incident, it was found that the alleged victim Ms Cheung Wing-yan had swelling/haematoma on her forehead and that her nasal bone had been fractured. The Magistrate said that there was no dispute that the Appellant s hand came into contact with Ms Cheung s face, the issue being whether such contact was attack upon her or was for self-defence. The prosecution s case is summarised as follows in the Magistrate s Statement of Findings:
 3. Prosecution called 4 witnesses to give evidence. The incident happened during a boat party organised by Mr Vongtontip. Ms Cheung, Mr Reynolds and Mr Sasportas were on board the boat. At the time when group photo was to be taken at the upper deck of the boat, Ms Cheung found her bikini loosen from her back. She turned around and saw the defendant standing behind her making a funky face. Ms Cheung was angry and confronted him. She also wanted to hit him but was separated by her friend. Ms Cheung then went to lower deck with her friends.
 4. Later on, the defendant went to the toilet at the lower deck. Ms Cheung was upset and angry. She pulled the toilet door and found it unlocked. She confronted the defendant and wanted to kick him but was pulled away by her friends. The defendant then rushed from the toilet for some distance and punched Ms Cheung on her face between the forehead and the nose. As a result, Ms Cheung sustained swelling on forehead and fracture of nasal bone. She received surgery for the fracture. This is how the defence case is summarised in the Magistrate s Statement of Findings:
 5. The defence had no half time submissions. After I ruled a case to answer, the defendant elected to give evidence but did not call other defence witnesses.
 6. The defendant testified that he was accused by a drunk girl, Ms Cheung, of taking off her bikini from the back. They were respectively separated by their own friends. He calmed down while Ms Cheung remained aggressive.

7. Later on, he went to the lower deck with his friends. Then, he went to the toilet and locked the door. He heard loud sound and opened the door. Ms Cheung was standing in front of him and using abusive language. Ms Cheung was held by her friends to DJ booth. The defendant then came out from toilet. Ms Cheung sat on a chair and blocked the way. He had to walk past her chair. When he walked towards his girlfriend, Ms Cheung kicked him on his back. He turned around and saw Ms Cheung trying to kick again. He therefore tried to push her away by raising his arm with palm facing Ms Cheung. His fingers were slightly clenched. He did not punch her, he just pushed her away. Evidence that the Appellant struck Ms Cheung was given by her and three eyewitnesses. The result included her nasal bone being fractured. There was evidence on which to convict. As to the first perfected ground of appeal against conviction, the Magistrate was obviously aware of how Ms Cheung had behaved. As to the second perfected ground of appeal against conviction, the Magistrate was obviously aware that she had to consider whether Ms Cheung had or might have lied. As to the third perfected ground of appeal against conviction, the Magistrate was obviously aware of what each witness has said. Whether how the Appellant moved towards Ms Cheung is described as rushing or marching, what matters is what happened when he reached her. As to the fourth perfected ground of appeal against conviction, there was no reason to try to see what the medical examiner could say on the question of whether it was a full-fist punch or half clenched fingers . It was a blow which fractured Ms Cheung s nasal bone. As to the fifth perfected ground of appeal against conviction, although PW2 was not sure if the Appellant had used a full fist , PW2 s evidence did not suggest that the Appellant had or might have acted in self-defence. That addresses the specific point expressly made in this ground as worded. But the Appellant s argument on self-defence was wider than that. I have of course considered it in its entirety. Ms Cheung launched a number of attacks on the Appellant. But the question is not whether he was provoked. The question is whether he was or might have been acting in self-defence when he dealt the blow which fractured her nasal bone. The Magistrate found, as she was entitled to find, that Ms Cheung having been pulled away by her friends, the Appellant moved some distance and dealt that blow. The Magistrate felt sure, and was entitled on the evidence to feel sure, that the Appellant was not acting in self-defence, that he launched an attack on Ms Cheung and that by that attack he inflicted on her really serious injury, in other words, grievous bodily harm. As to the sixth perfected ground, the Magistrate had the criminal burden and standard of proof in mind. She had taken the Appellant s clear record into account in his favour in respect of credibility and propensity. She had the advantage of seeing and hearing all the witnesses before coming to feel sure that the evidence of Ms Cheung and the three eye-witnesses was true and that the Appellant s evidence was not. There is no reason to doubt the safety of the conviction. Every element of the offence was duly proved, and found proved, beyond reasonable doubt. I turn now to the matter of sentence. The Appellant has addressed me on sentence. In her Reasons for Sentence, the Magistrate said as follows:

23. There is no sentencing guideline in respect of the offence for which the defendant was convicted. Nevertheless, all authorities indicate that an immediate custodial sentence is appropriate. From the authorities, the usual starting point is in the range of 9 to 12 months.
24. In considering the appropriate starting point, I took into consideration the fact that there was only one single blow which did not involve the use of a weapon. However, the nature and extent of the injury caused was significant in demonstrating that substantial force had been used.
25. Although the victim Ms Cheung's behaviour was aggressive at the material time, the fact remains there was no body contact between them as Ms Cheung was held onto by her friends. The defendant's reaction in punching Ms Cheung on the face was inappropriate and aggressive.
26. In the circumstances, I consider a starting point of 12 months imprisonment was appropriate. Given the defendant's clear record, I exercise my discretion and reduced the sentence by 1 month. Apart from that, I did not see any other mitigating factors warranting a further reduction. The defendant was therefore sentenced to 11 months imprisonment. Those sentencing remarks indicate an accurate understanding of the seriousness of an offence of this nature and the law's proper response to it by way of penalty. The Magistrate has taken a balanced view of the particular circumstances of this offence. She has given a reasonable discount for the Appellant's previous good character. There is no basis on which to interfere with this sentence. For the reasons which I have stated, the appeal against conviction and the appeal against sentence are both dismissed. (V Bokhary) Deputy High Court Judge Mr Prakash L Daryanani, SPP of Department of Justice, for the Respondent The Appellant appeared in person PAGE - 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 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 r`r`P`P>" gd5U gd5U gd5U gd5U p\K7 gd5U gd5U gd5U gd5U gdxK gdxK gdxK sfYlFY?YfY h&<D gd&<D gd&<D gdxK ziXiGiXi h&<D h&<D h&<D h&<D h&<D h&<D }pcVp h&<D h&<D gdJW h&<D h#wv gd#wv }p}p}c}p} h&<D h&<D h&<D h#wv [I: h&<D hKYC h&<D ucTLHLHLHLH> h&<D h&<D uqfW &`#\$ [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /,EE\} 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"/> &tBL H+|: Zf'u DCCJ643/2003 setup Normal.dotm Windows User Microsoft Office Word t~6- Judiciary Hong Kong SAR DCCJ643/2003 Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APASixthEditionOfficeOnline.xsl" StyleName="APA" Version="6"

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