

HONG KONG / JUDGMENT

HKSAR v. TSUI CHI YUNG

COURT

Court of First Instance

DECIDED

30 March 2007

CASE / FILE NUMBER

HCMA1051/2006

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bjbj HCMA1051/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 1051 OF 2006 (ON APPEAL FROM ESCC 2424 OF 2006)

BETWEEN HKSAR Respondent and TSUI CHI YUNG (hnnny Chan sitting in Eastern Law Court of the offence of behaving in a disorderly manner in a public place, contrary to section 17B(2) of the Public Order Ordinance, Cap.

245. The particulars of the charge are that on 10 March 2006 at the escalator going up to Supreme Court Road, Pacific Place, being in a public place, the appellant behaved in a disorderly manner, namely taking photos under the skirt of a female whereby a breach of the peace was likely to be caused. The appellant was sentenced to 25 days imprisonment and, by the time the appeal was heard, had served the sentence. The appeal was only against the conviction. AUTONUMOUT The evidence shows that on the day in question, the victim was together with her boyfriend going up the said escalator. The victim was standing one step higher than her boyfriend on the escalator. She had turned around and was talking to her boyfriend. After she got to the top of the escalator, she heard her boyfriend asking the appellant What are you doing? and grabbing hold of his hand. AUTONUMOUT The magistrate found that the defendant was intending to use a camera to take photographs under the skirt of the victim, that this was in a public place, and that the act was outrageous so that there was a likelihood of a breach of the peace because the people who were at the scene might react and take the law into their own hands. AUTONUMOUT The 1st ground of appeal advanced by Mr Cheung for the appellant was that the magistrate had not mentioned the mens rea of the offence. He submitted that proof of the disorderly conduct was required and that the prosecution had to prove an intent to commit the disorderly act, in other words, had the prosecution proved that the defendant foresaw the breach of the peace being caused. AUTONUMOUT Hung appearing for the respondent accepted that the offence was not one of strict liability and that the prosecution had to prove that the appellant had the necessary mens rea. He submitted that the prosecution need not prove a basic or specific

intent. He submitted that it was an objective exercise of whether an average Hong Kong citizen would feel so outraged by the conduct of the appellant that he might take the law in his own hands whereby a breach of the peace was likely to be caused. AUTONUMOUT The evidence of the boyfriend was that he said that the appellant attempted to leave the scene and he (the boyfriend) had to prevent him from leaving. AUTONUMOUT In my view, the mens rea for this offence is that the appellant must have intended to commit the disorderly act, namely that he intended to take photographs with the camera under the skirt of the female victim. Whether a breach of the peace was likely to be caused is a matter of evidence in each case and is something which the magistrate was entitled to draw an inference on. AUTONUMOUT In the Statement of Findings, the magistrate did say that a person taking photographs under the skirts of women in a public place was most likely to cause members of the public present at the scene to feel angry and that might lead to a breach of the public peace. In the instant case, the magistrate found that that was indeed what happened. He said that in the instant case at the scene, the passers-by in fact did not take any action against the appellant and that was clearly because, by the time his actions were discovered, he had already been stopped by the boyfriend. As the appellant was being questioned by the boyfriend, the members of the public did not feel it necessary to intervene. AUTONUMOUT The magistrate noted that it was fortunate that the boyfriend was a person of gentle personality. He noted however that the scene was a busy public place linking Pacific Place to Hong Kong Park. He noted that if the boyfriend's personality was not so gentle, the situation could have deteriorated thereby causing a breach of the public peace. It was fortunate that the passers-by at the scene did not take any drastic action against the appellant including resorting to physical violence. But it was clear that the appellant's conduct was most likely to cause a breach of the public peace. The magistrate followed the decisions of Cheng Siu Wing and Yip Tak Ming. The law AUTONUMOUT There have been three decisions of the Court of First Instance on the charge which is under discussion in the present appeal. The first case is that of HKSAR v. Cheng Siu Wing, HCMA619/2003, a decision by Beeson J on 5 September 2003. This decision was followed by Fung DJ (as he then was) in HKSAR v. Yip Tak Ming, HCMA727/2004, in September

2004. M. Poon DJ in HKSAR v. Wong Wing Hong, HCMA307/2006, also followed the two previous decisions in July
2006. Mr Cheung's submission is that these are all decisions of the Court of First Instance and therefore are not binding on me. He submitted that these decisions were wrongly decided and invited me not to follow them. Alternatively he submitted that those decisions were made on their own facts and I should not follow them. AUTONUMOUT In Cheng Siu Wing's case, the charge was the same as in the instant appeal. The facts were similar, namely taking photographs under the skirt of a girl with a camera. Having reviewed all the previous decisions on this point, both in England and in Hong Kong, Beeson J concluded that the incident had occurred in a public place and that the appellant's action was likely to cause a breach of the peace. She said that the magistrate was correct in finding that if such disorderly conduct became known to passers-by (as indeed occurred there) then a breach

of the peace was likely to result and did result. In that case three men came to the aid of the witness and a citizen's arrest involving violence was effected. She said it would be easy to envisage other circumstances in which a general fracas might, or does, occur, because citizens are enraged by some form of disorderly conduct and decide to seize or punish the perpetrator, without bothering to call the police. Beeson J dismissed the appeal against conviction. AUTONUMOUT That case was followed in 2004 by Fung DJ in Yip Tak Ming. The facts in that case were similar to the present case and Cheng Wing's case. Fung DJ repeated what Beeson J had said in Cheng Siu Wing that disorderly conduct meant behaviour in the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. There needed not to be any element of violence, whether present or threatened. It covered conduct which was not necessarily threatening, abusive or insulting. The conduct of an attempt to photograph or photographing under the skirt of a female was properly categorized as disorderly conduct AUTONUMOUT In the event Fung DJ agreed with the magistrate that there was a real likelihood of the appellant's disorderly conduct provoking someone else to resort to an act of force or violence against the appellant. He said that the fact that there was no actual violence in the detention of the appellant by PW2 or anyone else at the material time was fortuitous and non sequitur. The appeal against conviction was dismissed. AUTONUMOUT Those two cases were followed in July 2006 in Wong Wing Hong which was heard by M. Poon DJ. The facts of that case were similar to the instant appeal. In following the previous two cases, the judge said, inter alia The test is not whether any actual breach of the peace was caused but rather whether a breach of the peace was likely to be caused, i.e. whether an average Hong Kong citizen is likely to be outraged by such conduct. The appeal was also dismissed. AUTONUMOUT I respectfully agree with the reasoning adopted by the judges in the three cases mentioned above. I agree with the opinion that when a defendant commits an act such as taking or attempting to take photographs under a woman's clothing in a public place, that amounts to disorderly conduct and the disorderly conduct is such that a breach of the peace is likely to be occasioned because the victim herself or the people accompanying her or passers-by may react very strongly to such obnoxious behaviour and may take the law into their own hands and resort to physical violence. I believe that effectively disposes of all the grounds of appeal relied upon by counsel. The appeal against conviction is therefore dismissed. (Peter Nguyen) Judge of the Court of First Instance, High Court Mr Hung Hing Fong, Henry, GC, of the Department of Justice, for HKSAR Mr Adonis K.W. Cheung, instructed by Messrs Louis K.Y. Pau & Co., for the Appellant. ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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