

HONG KONG / JUDGMENT

HKSAR v. U (A Minor)

COURT

Court of First Instance

DECIDED

31 August 2017

CASE / FILE NUMBER

HCMA137/2017

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HCMA 137/2017

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO 137 OF 2017

(ON APPEAL FROM KCCC NO 700091 OF 2016)

BETWEEN

HKSAR

Respondent

and

U (A Minor)

Appellant

Before: Hon Yau J in Court

Dates of Hearing: 20 April and 6 July 2017

Date of Judgment: 31 August 2017

JUDGMENT

The appellant was convicted after trial of an offence of indecent assault, contrary to section 122(1) of the Crimes Ordinance, Cap 200. The particulars of offence are that the appellant on the 13th day of July 2016, at the staircase of Tsz Oi Court Multi Storey Carpark, No. 120 Tsz Wan Shan Road, Wong Tai Sin, Kowloon, in Hong Kong, indecently assaulted another person, namely girl X. He was sentenced to Rehabilitation Centre.

He now appeals against the conviction.

Evidence of the Prosecution

The first prosecution witness (“PW1”) was X named in the charge and she gave evidence by means of video link. Her examination-in-chief was in form of a video-taped interview conducted in the presence of a social worker.

On 13 July 2016 at about 5 pm she left the home of her schoolmate, the second prosecution witness (“PW2”), after going there to get back her school uniform. When she walked down 2 flights of staircase, the appellant grabbed her neck from behind and squeezed her neck once. PW1 was in great pain. The appellant lowered his hands and brushed both sides of her chest for 4 to 5 times, lasting for about 2 to 3 seconds. PW1 was terrified and furious. She pulled the hands of the appellant and pushed him away. She looked at the face of the appellant. She shouted and screamed and the appellant ran upstairs and left.

PW1 called PW2 and told her what had happened. PW1 could not remember the exact words she used but was to the effect that she had been wrapped around the neck by a boy who had then moved his hands to her chest to indecently assault her. She also told PW1 that she had almost been unable to breath when the appellant wrapped his hands around her neck and he had taken his hands off when she tried to bite his hands.

After they met up they walked along the bridge of Tsz Wan Centre and they came across the appellant. PW1 was terrified and she screamed while pointing at the appellant. When PW2 confronted the appellant, the appellant ran away. The case was reported to the police.

According to PW2, PW1 was emotional and crying when they met up. PW1 told her that someone had wrapped his arms around her neck from behind and she had almost been unable to breath. She had wanted to bite his hands and he had taken his hands away. They came across the appellant and PW1 pointed at the appellant saying it was him. PW2 approached the appellant and talked to the appellant in Chinese which the appellant did not seem to understand. She asked the appellant in English what he had done to her friend. The appellant replied that he had accidentally fallen onto her. She told the appellant that he had made her friend very scared and they intended to report to the police. The appellant asked them not to and left in quick steps in the direction of Tsz Oi Court.

PW1 telephoned her father to discuss whether a report should be made to the police. PW2 heard PW1 telling her father that she had been touched on the chest.

PW1 did not remember if it had rained that day but insisted that it was not raining when the assault took place. She did not remember whether the staircase was wet at time of the incident. PW2 insisted that it was not raining at the time and the staircase was dry.

Defence Evidence

The appellant elected not to give evidence nor did he call any witnesses.

Grounds of Appeal

The grounds of appeal are:

the magistrate erred in relying on the distress and the recent complaint of the PW1 in finding her an honest and reliable witness;

the magistrate erred in the approach to the case of the defence;

the magistrate misdirected herself on the issue of the case.

Wrongly Relying on Distress and Recent Complaint

The appellant complains that the magistrate, in accepting the evidence of PW2, must have relied on the recent complaint and distress of PW1 as disclosed in the evidence of PW2. It is true that PW2 gave evidence to the effect that PW1 had told her what had happened to her and PW1 had been emotional and crying at the time. The court, however, does not see the logic of the argument of the appellant.

It is trite law that the evidence of the recent complaint of PW1 was not evidence of the facts of the allegation PW1 made against the appellant, but was admissible only as evidence of the consistency of PW1's conduct with her testimony. As for distress, according to the Court of Final Appeal in *Leung Chi Keung v HKSAR* (2004) 7 HKCFAR 526, the magistrate could only take it into account if it was proved beyond a reasonable doubt that PW1 had actually displayed such distress and that it was referable to the alleged sexual assault and not to any other cause.

PW2 gave evidence about the recent complaint and distress of PW1. The appellant submits that PW2's evidence did not amount to recent complaint and was not admissible because, according to PW2, what PW1 told her was that someone had wrapped his arms around her neck from behind, without saying anything about touching of the sides of her chest. PW1 gave evidence that she had told PW2 what the appellant had done to her right after she had been indecently assaulted by him. This was clearly a recent complaint, only that there was a discrepancy in the evidence of PW1 and PW2. The magistrate was well aware of this discrepancy as well as another discrepancy in the evidence of the 2 witnesses. She succinctly dealt with the matter:

“29.

I found the inconsistencies were all immaterial which did not undermine PWs' credibility and reliability. All the events happened in a short span of time. Having considered the young age of PW1 and the traumatic experience that she had gone through, it was totally understandable that she could not relate the incidents to PW2 in a calm and coherent manner shortly after the event."

What PW1 told PW2 was clearly admissible in evidence and the question is how the magistrate had treated such evidence. She carefully considered and analysed the evidence of the 2 witnesses before coming to the conclusion they were honest and reliable witnesses. Although she did not specifically refer to the legal principles of recent complaint and distress set out above, being a professional magistrate it is of no doubt that she must be well-versed in such principles. There are ample authorities saying that a magistrate is not required to set out in small details the process of his thinking in coming to a conclusion.

In the whole of the Statement of Findings there is nothing to the effect that the magistrate had treated the recent complaint of PW1 as evidence of the facts of what had happened between PW1 and the appellant.

There is also nothing to the effect that she had relied on the distress of PW1 in her consideration of the credibility and reliability of PW1 and PW2, although she was perfectly entitled to give whatever weight she considered to be appropriate in the circumstances to such evidence.

Ground of appeal (a) fails.

Wrongful Approach to the Case of Defence

The appellant complains that the magistrate failed to direct herself according to the Berrada directions in assessing the credibility of the appellant in his record of interview and when he was questioned by PW2. The appellant argues that the present case is not one in which the magistrate can be presumed to know about the legal principles of the Berrada directions, thus not being required to express them in her findings. The basis of his arguments is that the magistrate chose to make reference only to the propensity limb of the Berrada directions, showing that she was under the wrongful apprehension that there was no need to remind herself of the credibility limb of the directions because the appellant had elected not to give evidence.

When the magistrate referred to the clear record of the appellant she indeed only said that it was relevant to his propensity in committing the offence. Although she did not specifically refer to the credibility limb of the Berrada directions, as rightly pointed out by the respondent, the decision of the magistrate has to be scrutinised in full to see how the magistrate dealt with the issue.

The magistrate carefully analysed and evaluated the evidence of the prosecution witnesses and the case of the appellant and came to the conclusion that the prosecution witnesses were honest and reliable. She also rejected the contention of the appellant that it was an accidental touch. As pointed out above a magistrate is not required to set out in small details the process of his thinking in coming to a conclusion. How the magistrate dealt with the record of interview of the appellant is discussed in detail below. Judging from the way the magistrate dealt with such

evidence it is of no doubt that she did apply the credibility limb of the Berrada directions when she considered the credibility of the appellant's assertion of innocence.

The magistrate set out the defence of the appellant as advanced in the cross-examination of the prosecution witnesses and as disclosed in the record of interview of the appellant which was to the effect that it had been raining on the day in question and the staircase had been wet and slippery. He had slipped many times. When a girl was in front of him he had slipped again and in order to prevent himself from falling he had grabbed both shoulders of the girl with his 2 hands. He had apologised to the girl, but the girl had ignored him and left. He had not touched the girl's breasts. After careful analysis and consideration the magistrate rejected such contention.

The appellant complains that the magistrate rejected the exculpatory part of the record of interview of the appellant purely because the appellant had elected not give evidence, and although she had cited the case of *R v Sharp* [1988] 1 WLR 7 she did not seem to have applied it. The complaint of the appellant is clearly unfounded. The magistrate set out in detail and great length the legal principles in *R v Sharp* and only stated after careful consideration of the evidence that she attached no weight to the exculpatory part of the appellant's record of interview since the appellant had elected not give evidence. The magistrate was perfectly entitled to do that.

What the magistrate did in the present case is different from that in the case of *HKSAR v Singh Gurmail* HCMA 1199/2007 cited by the appellant in that she did not automatically reject and give no weight to the assertion of innocence of the appellant in the record of interview merely because the appellant had elected to remain silent, but did so only after careful consideration of the legal principles and the contents of the record of interview.

The appellant criticises the magistrate for rejecting the defence of accidental touch of the appellant by a standard of less than that of beyond a reasonable doubt. The criticism is based on the finding of the magistrate that the appellant's defence of grabbing the shoulders of PW1 due to loss of balance was implausible.

The magistrate carefully and independently considered the evidence of the prosecution and the defence raised by the appellant before coming to her finding of facts. She was satisfied beyond a reasonable doubt that the prosecution witnesses were telling the truth and accepted their evidence. In the present case the evidence of the prosecution and that of the appellant were completely at odd. The finding of the magistrate must necessarily mean that she found beyond a reasonable doubt that the appellant's contention of accidental touch was untruthful and unreliable.

The ground of appeal (b) fails.

Wrongly Identifying the Issue of the Case

The appellant submits that the magistrate misdirected herself that the key issue was about the credibility of PW1, failing to appreciate that the credibility of PW2 and the appellant was also for her to assess. The complaint of the appellant is misconceived. PW1 was the only witness who

could give direct and first-hand evidence on how she was indecently assaulted by the appellant. Nobody else was present or witness the incident. The credibility of PW1 was naturally the key issue of the case. The magistrate cannot be faulted when she said that “the case depended entirely on the credibility and reliability of PW1’s evidence”.

As can be seen in the Statement of Findings the magistrate pointed out at the outset the issue of the case:

“6.

The issue of this case was, therefore, whether the defendant had indecently assaulted PW1 as stated by PW1 or was it an unintentional accident touch by the defendant in order to gain his balance.”

It can be seen that the magistrate bore in mind that the credibility and reliability of the appellant’s evidence was also an issue she had to consider.

The appellant criticises the magistrate for making inconsistent assessment of PW1’s evidence in respect of whether the appellant wrapped around her neck with his hands or arms and whether the appellant touched the sides of her chest or breasts. The magistrate found as facts that the appellant used his hands to wrap around PW1’s neck. Although she did not specify which part of the hands this is not material since according to the evidence of PW1 the appellant used both of his hands and arms.

As regards whether the sides of the chest or breasts of PW1 were touched it is true that the magistrate in the verdict she delivered orally in court referred to the sides of the breasts while in the Statement of Findings she confined herself to the sides of the chest. The difference between “chest” and “breasts” is rather small and people often refer to the breasts as the chest. While it is desirable to spell out specifically whether it was the sides of the chest or the breasts which were touched, the parts of the body referred to were so close to each other that they are no doubt inherently sexual in nature. No matter it was the sides of the chest or breasts there was no significant impact on the findings of the magistrate.

Ground of appeal (c) fails.

Conclusion

The conviction of the appellant is neither unsafe nor unsatisfactory. The appeal against conviction is dismissed.

(Joseph Yau)

Judge of the Court of First Instance

High Court

Mr Wilson Choi, PP of the Department of Justice, for the respondent

Mr Douglas Kwok, instructed by Ho Tse Wai & Partners, for the appellant

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Prepared on 28 October 2026 · Esheria