

HONG KONG / JUDGMENT

# HKSAR v. WAI SZE LIM

## COURT

Court of Appeal

## DECIDED

12 December 2007

## CASE / FILE NUMBER

CACC442/2006

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Before : Hon Stuart-Moore VP, Beeson and McMahon JJ in Court Date of Hearing : 15 November 2007 Date of Judgment : 15 November 2007 Date of Reasons for Judgment : 12 December 2007

## REASONS FOR JUDGMENT

McMahon J (giving the reasons for judgment of the Court) : AUTONUMOUT The 22 year old applicant was convicted on one count of rape, contrary to section 118(1) of the Crimes Ordinance, Cap. 200, after a trial before Deputy Judge Line and a jury. He was sentenced to six years imprisonment and sought leave to appeal his conviction. On 15 November 2007, we dismissed that application and now give our reasons. AUTONUMOUT The prosecution case was that the applicant and the complainant, a 21 year old girl, had known each other for a number of years, since their school days, and more recently had become partners in a business together. On the night in question, they had attended a school reunion dinner. After dinner, the applicant and the complainant together with some of their friends had gone to a bar in Yuen Long where they drank beer until about 4 a.m. AUTONUMOUT The complainant lived in a flat with her boyfriend which they shared with the applicant and some others. She had come with the applicant in his car to the reunion dinner and they left the bar together to drive home. AUTONUMOUT The applicant offered also to drive another man home ( ) and dropped him off on their way. The complainant was by that time asleep in the back seat. After leaving PW3, the applicant continued to drive home. The complainant remained asleep in the back seat of the car, but awoke to find the vehicle stationary in a car park with the applicant apparently interfering with or rearranging her clothing. She suspected she had been molested and jumped out of the car and took a taxi to their flat. She telephoned her boyfriend while in the taxi, but her phone was breaking up and she could not tell him what happened. She then fell asleep again. When she arrived home, she recounted her story to her boyfriend. She said she wanted to jump off their building s roof. Her

boyfriend subsequently spoke to the applicant by telephone and asked him to come to their room in the flat. The applicant did so and the complainant heard them talking. The applicant denied anything had happened. The complainant then did try to jump out of the window of the flat but her boyfriend and the applicant restrained her. AUTONUMOUT She then locked herself in the toilet of the flat and, after speaking to a girlfriend, called the police. AUTONUMOUT She was subsequently medically examined by a Forensic Pathologist and was found to have an injury to her vagina consistent with forcible entry. AUTONUMOUT The applicant gave evidence at trial to the effect that the complainant had not been drunk, had not fallen asleep in the car on their way home and that she had behaved outrageously by removing her clothes and effectively demanding sex from him. In those circumstances, he had complied and had mutually consensual intercourse with her. Grounds of appeal AUTONUMOUT The amended perfected grounds of appeal advanced on the applicant's behalf by Mr Whitehouse, who also appeared for the applicant at trial, are as follows :

- (1) that the trial judge's directions to the jury concerning recklessness were not clear and were confusing to the jury;
- (2) that the evidence of the Forensic Pathologist went beyond that which was contained in his witness statements;
- (3) that the judge misdirected the jury on the burden of proof; and
- (4) that the conviction was unsafe or unsatisfactory. The recklessness direction AUTONUMOUT The judge gave both oral and effectively identical written directions to the jury on the subject of recklessness so far as it applied to the offence of rape. In his oral directions, he said What does reckless mean? The definition of what constitutes recklessness in these circumstances is this. The defendant would have been reckless as to whether or not [the complainant] was consenting to the sexual intercourse if he was aware at the time of a risk that she was not consenting to it and it was in the circumstances known to him unreasonable to take that risk and yet he took it. In other words, the defendant must actually have foreseen the risk of [the complainant] not consenting in order to be reckless. If he did not appreciate the risk of it he could not be reckless as to it. AUTONUMOUT Whitehouse argues essentially that use of terminology referring to an awareness of risk on the part of the applicant and as to whether the risk was foreseen rendered the direction so unclear that it must have been confusing to the jury. He suggests that a preferable course would have been the time honoured direction derived from R. v. Kimber 77 Cr.App.R. 225 and R. v. Satnam and Kewal 78 Cr.App.R. 149 as formulated by Lord Lane in R. v. Taylor 80 Cr.App.R. 327 at the end of the following analysis. In the leading case of D.P.P. v. Morgan (1975) 61 Cr.App.R. 136; [1976] A.C. 182, Lord Hailsham, if one may precis the way he put it, put it in this way: Did the defendant intend to commit the act of having intercourse without the consent of the woman? Or alternatively, did he intend to have intercourse wilfully, not caring whether the woman consented or not? Another way of putting it, and another way in which it has been put, is, Was the defendant's attitude one of I could not care less whether she is consenting or not, I am going to have intercourse with her regardless? Finally, it can be put even more

briefly than that, in rape the defendant is reckless if he does not believe that the woman is consenting and could not care less whether she is consenting or not but presses on regardless. AUTONUMOUT Recently, the direction urged upon us by Mr Whitehouse was reaffirmed by this court (differently constituted) in HKSAR v. Li Kim Ching (unreported), CACC208/2006. In that case, the trial judge had directed the jury in the terms suggested by the last sentence of the above excerpted passage from the judgment in Taylor. It was argued that as a result of the House of Lords decision in R. v. G & Another (2004) 1 AC 1034 as adopted into Hong Kong Law by the Court of Final Appeal's approval of the reasoning in that judgment in HKSAR v. Sin Kam Wah & Another (2005) 8 HKCFAR 192, the formulation by Lord Lane of the meaning of recklessness in rape was no longer correct. The applicant in Li Kim Ching argued that a direction should have been given based on that part of the judgment in Sin Kam Wah where Sir Anthony Mason NPJ said in giving the reasons of the court

44. Henceforth juries should be directed in terms of the subjective interpretation of recklessness upheld in R v G & Another [2004] 1 AC
1034. So juries should be instructed that, in order to convict for an offence under s.118(3)(a) of the Crimes Ordinance, it has to be shown that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. Conversely, a defendant could not be regarded as culpable so as to be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions. [Emphasis added] AUTONUMOUT It was held by this court in its decision in Li Kim Ching that the formulation of recklessness, such as was proposed by Lord Lane in R. v. Taylor based as it was upon the decisions in R. v. Kimber and R. v. Satnam and Kewal was already a subjective test for the purposes of the requirements of Sin Kam Wah. Stuart Moore VP in delivering the judgment of the court said
52. It is important to emphasise that the test adopted by the English Court of Appeal in Satnam and Kewal's case for recklessness in rape was subjective and not objective. The conclusion in Satnam and Kewal (at
- 155) was that if the jury came to the conclusion that [the defendant] could not care less whether she wanted to or not, but pressed on regardless, then he would have been reckless and could not have believed that she wanted to, and they would find him guilty of reckless rape. AUTONUMOUT It should be pointed out that the trial the subject of the present appeal took place in October 2006, whereas the judgment in Li Kim Ching was handed down on 12 July 2007 and that in Sin Kam Wah on 26 May 2005. AUTONUMOUT No doubt, therefore, the judge in the present case in directing the jury on recklessness sensibly couched his directions in terms designed to comply with the comments of Sir Anthony Mason NPJ in Sin Kam Wah. That is understandable. He may well have been concerned that the classic direction based on Kimber, Satnam and Kewal and Taylor should have been altered so as to

more closely comply with the comments we have referred to contained in Sin Kam Wah. As it transpired, given the judgment in Li Kim Ching, any such concern was unnecessary. But that is far from saying that a direction on recklessness is flawed unless it is in the classic terms of Lord Lane's formulation in Taylor. It is not. Indeed, Lord Lane in arriving at that formulation obviously regarded it as one of other possible approaches to a recklessness direction in rape. AUTONUMOUT That part of the judge's direction we have set out above, in our view, complied with the comments of Sir Anthony Mason NPJ in Sin Kam Wah and cannot be criticized in its terms. Nor do we think it was unclear or confusing as Mr Whitehouse suggests. AUTONUMOUT It was immediately followed by a further direction You may think that both knowledge and recklessness as to her consent here, both depend on whether she was asleep and if so whether he was aware of it when he put his penis inside her. Whether it was unreasonable to take that risk if it was foreseen by him is a question of fact for you. But you may think that this again turns on whether or not she was asleep and whether he was aware of that at the material time, since you may think it would be difficult to say that it was reasonable to penetrate a woman for the first time when she was unconscious and when you had foreseen that there was a risk of a lack of consent. That particular part of the judge's direction was plainly tailored to the facts of the case and was designed to assist the jury in applying the earlier direction to circumstances where they had accepted the evidence of the complainant that she had been asleep at the time she had been molested by the applicant. Given the jury's familiarity with those issues, we do not think that these directions either in their totality or individually were so unclear as to confuse the jury as Mr Whitehouse complains. AUTONUMOUT We are, however, concerned as to whether a direction as to recklessness was necessary on the evidence before the court. The complainant's evidence was that she was asleep at the time of the offence. The applicant's evidence was that she was wholly awake and had initiated intercourse. It is difficult to see how recklessness was, on that evidence, a live issue at trial. AUTONUMOUT It is an increasingly emphasized principle by this court that a direction on a particular matter need not be given unless that matter has become, or could become, a real issue for the jury to resolve on the evidence at trial. Directions should not be given on the basis that a jury's considerations may go beyond the evidence before them and into the realm of speculation. AUTONUMOUT In the present case, the direction as to recklessness was given only after discussion between the judge and counsel. We have seen the transcript of that discussion which occurred at the end of the evidence and before counsel's speeches. The judge initially and quite properly raised the matter with counsel so as to inform them he did not intend to leave recklessness to the jury. Counsel at that stage agreed. But over the intervening weekend Mr Whitehouse changed his mind on the basis he thought it possible that the jury may reject the applicant's evidence and accept that of the complainant to the effect she did not consent to any sexual intercourse because she was asleep. In those circumstances, as he told the judge, he thought it best for a recklessness direction to be given in case the jury may have thought the applicant may have had intercourse with the complainant without his being sure whether she was consenting or not. AUTONUMOUT But any such possibility would have been quite contrary to the evidence in the case. Even had the jury rejected the

applicant's evidence it is difficult to see, without more, how the applicant could have thought a sleeping woman was consenting to sexual intercourse. In our view, in the circumstances of this case, the recklessness direction strictly speaking was unnecessary. AUTONUMOUT It should be borne in mind that the direction itself provides another avenue for conviction. It does not provide any form of exoneration for a defendant. Without the direction, if a jury were unsure as to whether a defendant knew the victim was not consenting, they would acquit. With the direction, even if they were unsure of the defendant's knowledge in that regard, they may still convict if they were satisfied that the defendant knew of a risk the victim was not consenting but took that risk. AUTONUMOUT Nevertheless, we are satisfied that the direction did no harm. It was effectively a direction on a non issue, but it was a direction specifically requested by defence counsel to cover a line of reasoning he somewhat speculatively thought the jury might adopt. AUTONUMOUT Whitehouse argues also that the judge should have given the jury a direction to the effect that if they thought it possible that the applicant genuinely believed that the complainant was consenting then they should acquit. AUTONUMOUT The judge in his directions to the jury as to what the prosecution had to prove said this So before you could convict the defendant you have to be sure of these things: (1) the defendant had sexual intercourse with [the complainant]; (2) that at the time of that act of sexual intercourse [the complainant] did not consent to it; (3) that at the time of the sexual intercourse either the defendant knew that [the complainant] did not consent, or he was reckless as to whether she consented or not. AUTONUMOUT That direction was repeated in written directions subsequently handed to the jury. The judge then went on to say in expanding on the third element of the offence The prosecution says you can be sure the defendant knew she was not consenting, because he achieved the sexual intercourse knowing she was not conscious. If you are not sure of that, the verdict is one of not guilty and the case is over. [Emphasis added] AUTONUMOUT On the basis of that direction the jury must have been well aware that if they were not sure the applicant knew the complainant was not consenting they had to acquit. AUTONUMOUT We might add that in the circumstances we have already outlined it was never the defence case that the applicant may have mistakenly believed the complainant to have been consenting. That being so, we are satisfied the direction given by the judge was more than sufficient. AUTONUMOUT This ground had no merit. The pathologist's evidence AUTONUMOUT Whitehouse's complaint is that when giving evidence the pathologist, Dr Lai, went beyond that which was contained in his committal deposition and a subsequent witness statement provided to the defence under a notice of additional evidence. AUTONUMOUT In accordance with his witness statement provided as additional evidence Dr Lai gave evidence concerning a calculation of the complainant's blood alcohol level at the approximate time of the offence, which was determined from a sample of her blood provided after she made a report to the police. He also gave evidence as to the general effects of various levels of intoxication upon the behaviour and perception of persons. AUTONUMOUT Two aspects of this evidence caused Mr Whitehouse concern. Firstly, whether Dr Lai, as a Forensic Pathologist, was entitled to give evidence at all as to the calculation of the amount of alcohol in the complainant's blood at the time of the offence, and secondly, his expertise as to

whether she would be less likely to be aware of physical contact if in a drunken sleep.

AUTONUMOUT As to the first matter, this was said during Dr s evidence chief both parties agree that later on when those samples were taken for toxicological examination, alcohol the blood alcohol was 21 milligrammes per 100 millimetres and the urine alcohol was 92 milligrammes per 100 millimetres. What do you have to say about these findings, Dr Lai? A. Well, I took the samples at around 11.20, so if one wants to know what was the level sometime earlier, then one have to do some calculations. Q. Have you done that calculation or those calculations? A. Yes. MR WHITEHOUSE: Yes, I m not being obstructive, I m sure, I want this evidence in, but this may be a point which your Lordship makes, is Dr Lai an expert in this field? I m not trying to challenge his expertise but maybe that COURT: The answer is that of course he is, it s exactly what pathologists do, but I will ask him to make sure, if you like. MR WHITEHOUSE: Yes. COURT: This is part of your expertise, is it, Doctor? A. Yes. MR WHITEHOUSE: Very well, very well, thank you. AUTONUMOUT As to the second matter, this was said Q. Dr. Lai, I may be asking the obvious, but would a person who has fallen asleep not be aware of bodily contact made with him or her? A. Yes. MR WHITEHOUSE: Sorry, I don t want to be obstructive and, indeed, I might explore this myself, but I wonder is this within Dr s field? COURT: Are you going to explore it yourself? MR WHITEHOUSE: Yes, yes, COURT: You are, so why are you objecting then if you re going to ask the question? MR WHITEHOUSE: This is new evidence, I hadn t expected that question to be asked, so I didn t want any answer to go in without properly considering it. COURT: Pause and consider what you want. MR WHITEHOUSE: Yes, this is new evidence. I have never seen this in any statement of Dr Lai. All right, I ll withdraw that objection, my Lord. MS PANG: I suppose I could continue, my Lord, then? MR WHITEHOUSE: Yes. Q. Your answer is yes. Then may I ask you this next question: would it be more likely, even more likely that this person would be unaware of the contact if his or her alcohol level is as that found in [the complainant s] situation? A. Definitely more likely. AUTONUMOUT We note that on both matters Mr Whitehouse advanced no argument expanding upon his expressed concerns. In respect of the first matter we can see, given the extensive qualifications of Dr Lai, no basis for any real dispute as to the witnesses expertise in this area. It is noteworthy that the subject matter of his evidence in this regard came from what he described as a rather popular reference book in forensic pathology AUTONUMOUT As to the second matter the effect of alcohol on a person s actions and perceptions is, on the face of it, also something within the field of expertise of a forensic pathologist. We note in any event that Mr Whitehouse withdrew his objection in this regard and allowed the evidence to continue. Nothing further was advanced before us to suggest that Dr Lai could not properly deal with this subject matter which indeed, so far as his conclusion was concerned, seems in any event only marginally more than common sense. AUTONUMOUT In our view the final question and answer of the extract above quite obviously followed on from the earlier evidence of Dr Lai which was contained in his witness statement and so could not be said, in any real sense, to have been a new area of evidence. The dividing line between that which is evidence on a matter which plainly arises from or is ancillary to the served materials and witness statements, and that which is a new area of evidence outside the materials served

on the defence so that the prosecution is effectively leading evidence without notice, is plainly a matter of degree. But in any event, even had the evidence complained of been in the category of new evidence, it was relevant and therefore admissible. The proper course available to the defence, if taken by surprise, was to seek an adjournment. No such application was made and the trial continued. AUTONUMOUT This ground must necessarily fail. Burden of proof AUTONUMOUT The complaint of the applicant is that where the complainant's evidence was in direct conflict with that of the applicant, it was wrong for the judge to put the matter to the jury in the following way at the commencement of his summing You may think that it must be the case that one or the other of them has lied to you about the central issue of consent, and that deciding which one it was will be one of the most important steps in deciding your verdict. AUTONUMOUT Whitehouse argued that this direction effectively undermined the proper onus and standard of proof required of the prosecution. AUTONUMOUT A judge must be careful to avoid putting the issues of credibility of witnesses in a trial to a jury so as to suggest that the task of the jury was simply to choose or select which of the prosecution version or defence version of events the jury prefers. Any such suggestion would endanger the proper onus and burden of proof. AUTONUMOUT But we do not think the comment of the judge in the present case went so far. The judge said no more than what was common sense in the circumstances of the evidence given. The complainant's version of events and that of the applicant were diametrically opposed. There was no common ground. At the end of the day the jury had to determine whether or not, in the context of the directions they were given, they accepted the complainant's version so that they were sure she was telling the truth. AUTONUMOUT They can have been in no doubt that was the proper approach to the complainant's evidence as the judge subsequently fully and properly directed them, in the terms of the standard direction, that the prosecution bore the onus of proof and had to prove its case against the applicant so that the jury were sure of his guilt and further that the applicant had to prove nothing. The judge directed the jury as follows Let me turn to the law and I start with two important directions. The first, in this case, as in every case, every criminal case, the prosecution must prove that the defendant is guilty of the offence charged against him. He does not have to prove his innocence. In a criminal trial the burden of proving the defendant's guilt is always on the prosecution. The second of those important directions concerns what the prosecution must do to succeed in proving the defendant's guilt? The answer to that is this, by making you sure of it. That is the same thing as saying, being satisfied beyond a reasonable doubt of his guilt, and nothing less than that will do. and later The defendant then chose to give evidence, he was not obliged to do so. As I told you, he does not have to prove his innocence, he does not have to prove anything. He elected to give his version of events and obviously you must take into account what he says when considering the issues of fact that you have to decide. But it is for you how much weight, if any, to give to the defendant's evidence. You must always remember this, that even if you were to decide that you did not believe what he told you, that would not relieve the prosecution of its burden of satisfying you, by evidence, so that you are sure, that the defendant is guilty of the charge he faces. If you judge he lied in whole or in part about the

matter, it would be wrong just to assume that he was guilty thereby and later If you think the defendant may be telling the truth, that means that you must necessarily have a doubt about the truth of the prosecution's evidence, and again in those circumstances it would be your duty to return a verdict of not guilty in his favour AUTONUMOUT It is quite plain from the whole of the directions given by the judge that the jury cannot have been under any misapprehension that they could simply choose which of the complainant's and applicant's evidence they preferred in arriving at their verdict. AUTONUMOUT This ground had no merit. Unsafe or unsatisfactory AUTONUMOUT The final ground relied upon suggests that, even in the event that no one of the preceding grounds was successful, in total, the matters complained of rendered the verdict unsafe. Mr Whitehouse calls also in aid the evidence of PW3, the passenger who had been driven home from the bar and who had left the complainant and the applicant before the rape occurred. AUTONUMOUT PW3 gave evidence to the effect that whilst he was in the car he had exchanged telephone numbers with the complainant and that she did not seem to be drunk. But he also said that before he left the car the complainant had fallen asleep in the back seat. Mr Whitehouse also relies on the evidence contained in the witness statements which were read to the jury of two other persons who had been drinking in the bar with the complainant and the applicant who said the complainant had not appeared to be drunk when they, the statement makers, had left the bar. AUTONUMOUT In conjunction with his other grounds of appeal Mr Whitehouse argues that the chance of the complainant becoming so overcome by her earlier alcohol consumption as she was driven home by the applicant so as not to later notice him having sexual intercourse with her was so unlikely as to render the verdict unsafe. AUTONUMOUT We do not agree. These matters were all fairly before the jury. We note too that PW3 supported the evidence of the complainant at least to the extent that it was his evidence that shortly after exchanging telephone numbers with him she fell asleep and was asleep still when he later got out of the car. The point was one which was properly made by Mr Whitehouse on behalf of the applicant at trial and no doubt the jury considered this evidence in the context of the evidence as a whole, including the complainant's own evidence that she had not slept for two days and suffered from anaemia and awoke from sleep with difficulty. From their verdict, the jury ultimately accepted the complainant's evidence and rejected the argument made in this regard on behalf of the applicant. AUTONUMOUT That is far from saying their verdict was unsafe. The rejection of what may seem to be a favourable argument for either the defence or the prosecution is part and parcel of a jury's normal and proper discharge of its functions. We are satisfied the conviction in this case fell far outside the rare category of case where a jury verdict could be regarded as unsafe. AUTONUMOUT This final ground also must fail and the application was dismissed. (M. Stuart Moore) Vice-President (C-M Beeson) Judge of the Court of First Instance (M.A. McMahon) Judge of the Court of First Instance Mr John Reading, SC, DDPP and Ms Mickey Fung, SGC, (Ag.), of the Department of Justice, for the Respondent Mr Frederic Charles Whitehouse, instructed by Messrs Fairbairn Catley Low & Kong, as assigned by the Director of Legal Aid, for the Applicant PAGE - PAGE A B C D E F G 1udk 1udk &`#\$ 4or~ Rs~/ (Q\*<< ,DGpH ~ B; <(z&; NFaF4\ B[UN` ( BQ VhrLO ,7)a~D ^|r ~ B; ,7)a

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