

HONG KONG / JUDGMENT

HKSAR v. WARD DANIEL SCOTT

COURT

Court of First Instance

DECIDED

19 September 2007

CASE / FILE NUMBER

HCMA625/2007

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bjbj HCMA 625/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 625 OF 2007 (ON APPEAL FROM ESCC 4999/2007)

BETWEEN HKSAR Respondent and WARD DANIEL SCOTT Appellant

Before: Deputy High Court Judge E Toh in Court Date of Hearing: 19 September 2007 Date of Judgment: 19 September 2007

J U D G M E N T

The Appellant was charged with an offence of wounding under section 19 of the Offences Against the Persons Ordinance, Cap. 212 and he was convicted after trial. The Appellant now appeals against that conviction. This is a case which took place in the early hours of the morning near a 7-Eleven shop in Luard Road, Wanchai. The victim in the case is a Mr Fabrizio, PW1, who is a pilot by profession. His evidence was that he was sitting on a ledge of a shop, and chatting to three friends, of Pakistani, Nepalese and Chinese origins. According to PW1, he saw a group of people walk past and suddenly without any provocation whatsoever the Appellant came over to where he was sitting and punched him on the face, and someone had said hanging out not with both friends or Paki friend. The evidence was that the Appellant did not know PW1, they were total strangers. The Appellant gave evidence and he said that the day of the offence was actually a Sunday and was the weekend before Halloween. The Appellant testified that he had been drinking with friends in a Wanchai bar and some people were wearing Halloween costumes and he had with him a pair of devil s horns to put on his head. When he and his friends walked past PW1, who was at that time drinking, PW1 had taunted him about his devil s horns and there was an exchange of unfriendly words and suddenly PW1 with a bottle of beer in his hand, got up from

his sitting position and lunged at him and therefore in self-defence, he punched him. The defence also called a Mr Soederberg, one of the Appellant's friends who was in the group with him at the time. He confirmed that the Appellant was wearing a pair of devil's horns and he saw and heard the Appellant and PW1 engaged in an unfriendly exchange. He could no longer remember what was said and he saw PW1 with a bottle of beer in his hand lunge at the Appellant who punched him in self-defence. At the time of the incident, there were police officers patrolling in the vicinity and one of those police officer, a WPC, was called and she said that she saw the Appellant and PW1 standing face to face and then the Appellant punched Fabrizio, sending him a few paces backwards and so therefore she went up and stopped the incident. She said she did not see the Appellant wearing any devil's horns nor did she smell any alcohol on PW1. The learned Magistrate after hearing all the evidence had decided that there was no evidence of self-defence. He said that according to PW1's evidence, the attack was unprovoked and he was punched while in a sitting position. The WPC said that when she saw the Appellant punch Fabrizio, they were standing face to face and there was no lunging at the Appellant. So it seems that the learned Magistrate had accepted the evidence of PW3, the woman police officer and PW1, the alleged victim in the case. However, the learned Magistrate did not go on to resolve the material discrepancy about what PW1 said as against what the WPC saw. He reiterated that PW1 said he was sitting down when he was punched, whereas the WPC said PW1 was punched when he was face to face with the Appellant. This point not alone would be good enough to allow the appeal. The learned Magistrate, then, towards the end of his judgment, quite surprisingly, said provocation is not relevant in this case because the Appellant admitted that he did punch PW1, and he said this Provocation is a motive relevant only to a disputed attack. But once the attack is admitted, the motive is unimportant. I had failed to understand what the learned Magistrate meant by this because certainly the circumstances as alleged by the defence, was there was some provocation because there was an exchange of words, which were very provocative prior to the punch and also the defence raised the issue of self-defence, which prosecution had negative. This is a wounding case and mens rea is important, so the facts surrounding the punch is also important to assess the state of mind of the Appellant at the time. However, the learned Magistrate dismissed these factors as unimportant and, surprisingly, he went on at the second last paragraph of his Statement of Findings to deal with the credibility of PW1. He decided that the credibility of PW1 is unimportant on the point of whether the Appellant made the racist remarks and punched him because the punch was admitted. Again, it is important because it would show the Appellant's state of mind at the time of the attack as to whether there was provocation or self-defence. The learned Magistrate's attention seemed to be on the fact that once the Appellant had admitted that he did punch that was the end of the story. The learned Magistrate found that there were no self-defence and provocation, and then convicted the Appellant. But what is even more strange is that in the sentencing of the Appellant, the learned Magistrate had said this: I find there is no evidence to support a case of self-defence, but for the purpose of sentence, I am prepared to give the benefit to the defendant allowed in the circumstances. I take it that the defendant punched owing to provocation and under the influence of drink. Ms Chan had correctly pointed out that in a lot of cases, the Magistrate gives the benefit of the doubt to the Appellant in sentencing. That is true, but in this case, the learned

Magistrate had just convicted the Appellant and found that there was no provocation or self-defence and it was not important and therefore the credibility of PW1 was not important as to whether there were the racist remarks prior to the attack or after. But then in sentencing, he decided that that was important and therefore gave that benefit to the Appellant, and it made the learned Magistrate s reasons for sentence all the more difficult to understand. In the circumstances, I have no alternative but to allow the appeal because the conviction is therefore unsafe and unsatisfactory. So the appeal is allowed, the conviction is quashed and the fine and compensation if the Appellant has paid will be returned to him. I have asked counsel about the possibility of a re-trial, but I am told that there is difficulty locating the prosecution witness. In those circumstances, there is no application for a re-trial and I am told by counsel for the Appellant it had happened at the trial, there was some difficulty locating the prosecution witness. So in that event, I will order no re-trial. (E Toh) Deputy High Court Judge Ms Vivien Chan, Government Counsel of Director of Public Prosecutions, for the Respondent Mr David Boyton, instructed by Messrs Littlewoods, for the Appellant PAGE - 1udk 1udk 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 i\$&`G ,wC= ,wC= hcma.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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