

HONG KONG / JUDGMENT

HKSAR v. WONG CHI HUNG

COURT

Court of First Instance

DECIDED

22 March 2007

CASE / FILE NUMBER

HCMA1137/2006

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bjbj es of criminal intimidation. There was a total sentence of 3 months imprisonment which is also the subject of appeal. The incident that gave rise to the two charges occurred as long ago as 14 June 2004. It occurred in the Eastern Law Courts Building on the 5th floor, in the public hall outside the courtrooms. On that day, the Appellant, who was at the time a serving police officer, was to stand trial in Court No. 4. He had attended there as a defendant and he was accompanied by his younger brother. He was on trial for something described as telephone nuisance . A man called Mr Man Wai-lun was present to be a witness against him. Also present that day were a married couple who were PW1 and PW2 in this case, called Miss Leung Yuen-ki and Mr Ng Siu-tung. The marriage of that couple had been marred by frequent quarrels and punctuated by periods of separation. PW1, Miss Leung, had come to know the defendant in 1998 and they had cohabited as lovers during the periods of separation which occurred in her marriage. Mr Man had been a frequent visitor to the home where the Appellant and PW1 cohabited. PW1 and the Appellant broke up at the end of 2003. The magistrate put it this way: All of those people knew each other very well and they had very complicated love and hate relationships, with Miss Leung in the centre. Taking up the story of what happened at Eastern Law Courts on 14 June, PW1 and PW2 were there as spectators. It was the evidence of PW1 that the Appellant approached her near the lavatories and said these words: I will beat you as well . That was at about 10.20 that morning. Then later on, at 11.05, he said the words to PW1: Slit to deface your face, and he accompanied the words with a gesture of sliding his finger along his cheek. PW1 reported both incidents contemporaneously. Mr Man, in a witness statement, claimed to have heard the first threat and PW2, her husband, claimed, in evidence, to have heard the second threat. What had occurred also on the day in question was that, whilst the Appellant was actually in the courtroom which he was due to attend, four men also went in and they were conspicuous by reason of their dress and the exposure of tattoos upon their arms. The Appellant was later to relate, in an interview he gave to the police, that he saw what he believed to be pictures of himself in their possession, and he claimed, in that interview, that he deduced that they had been supplied by PW1. It was evidence in the trial that he made such a complaint there and then to a sergeant who was the officer involved in the trial that was progressing, or due to start that day. There was also a claim that a mobile telephone had been used to take a photograph of the Appellant in the lobby outside the court. The result of this is that when the four men went to leave, they were detained by the

sergeant and there was a disturbance outside Court No. 4 - where, incidentally, PW1 was sitting, waiting, on a chair - with voices raised and hard things said. That is but a brief summary of the events that occurred that day. At the trial, they were gone into in much greater detail. Mr Man did not attend the trial despite being invited to do so. The Defendant did not give evidence. His younger brother did. The younger brother described in detail the events concerning the tattooed men and he also gave evidence about the fact that neither he nor his brother went to the lavatories at the time when the first prosecution witness claimed they did, thereby denying the existence of the opportunity to utter the relevant threat. The magistrate, in a very careful statement of findings, assiduously dealt with the case and came to the conclusion that he believed PW1 and PW2 and he did not believe the Appellant's younger brother. He convicted accordingly, being sure that the words were said and that they were not wild and whirling words. A number of points are taken. Mr McGowan says that the matters in the grounds of appeal really attack the magistrate's assessment of the credibility of the witnesses to an extent that I should not rely on his assessment of them, even with the advantages he had of seeing and hearing them live, and that if this Court has doubts about that assessment, it will obviously have doubts about guilt. The first ground of appeal claimed that the magistrate failed to pay sufficient consideration to the undisputed evidence that PW1 had made many unsubstantiated complaints or accusations against the Defendant in the past. This was at the forefront of the attack upon her credibility. It was the case that there was no dispute but that she had, during her periods of cohabitation with the Appellant, made as many as ten complaints to the police about him. She agreed that they were of no consequence. One can perhaps imagine the sort of complaints made. The evidence, as far as I am aware, gave no further details about them, save that one of them was an allegation of assault she made against the Appellant which, however, resulted not in his arrest, but hers. She agreed that it was the intervention of the Appellant that brought the potential proceedings to an end. The magistrate dealt with this topic in this way. He said this: It is admitted by Miss Leung that during the times of cohabitation with the Defendant, she had made as many as 10 complaints to the police against the Defendant and they were of no consequence. It is also admitted that Miss Leung had been arrested by police for assault of the Defendant but the Defendant bailed her out of this trouble. It seems to suggest by this evidence that Miss Leung was used to making false or groundless allegations against the Defendant and, in this case, she did it again. Miss Leung points out that her times with the Defendant were not always happy and that there were many quarrels. On Miss Leung's complaints to police, I could not draw any inference that she was making false or groundless complaints from the fact that the police did not take any follow-up action. To do so, I would have to accept the hearsay opinions of the police. That no actions have been taken on Miss Leung's complaints by police might be due to the fact that the Defendant was a policeman and the matters were treated as domestic disputes. Of course, the magistrate was not in a position in relation to any of those previous complaints to say whether they were true ones or false ones, and he was right to point out that if he had taken the lack of action by any policeman charged with making the decision, he would have been acting on their hearsay opinion if he were to treat the lack of any action as being evidence of the fact that the complaint was not true. That is all the magistrate said about the topic. To me, the topic was one of vital importance. Not because it mattered whether the lady made true or false complaints to the police, but because she

habitually involved the police in complaints which she admitted were of no consequence. It is clear that she had done so against a background of domestic turbulence. That seems to me a piece of history that should have weighed very heavily in the scales when considering her credibility, because people who make - even if they are true - inconsequential complaints about their lovers to the police on numerous occasions, reveal something about their characters, and those bare facts tell me, I believe, a fair amount about the character of this lady. They tell me enough that I would have taken the view that when it came to assessing her evidence about things said, unattractive things said between the two of them, I would look for some firm support before feeling confident to act upon her word. One must remember the substance of the complaints against this Appellant are things said, not bruises, not punches, not conduct of that nature, but things said. It is thus that Mr McGowan is able to make the powerful point, Look, the magistrate has looked at this history, dismissed the part that deals with truth or falsity, but then is completely silent about a matter that was vital to his case. Let me move on next to Ground 3, because I did not think Ground 2 was a good one. Ground 3 complained that the learned magistrate erred in failing to understand and/or to give effect to the established fact that the Appellant and DW1 complained that they had been threatened first and that PW1's first complaint followed subsequently, some significant time thereafter. The magistrate dealt with it in this way. He asked What is the relevance of this incident to the charges or the defence? I interpose, this incident is the matter complained of by the Appellant on the day concerning the tattooed men, and then wrote: The Defendant could utter threats to Miss Leung and Miss Leung could frame up the Defendant without the happening of this incident. I have asked this question many times in the course of trial when so many details vivid and minute were led and asked but no satisfactory answers are forthcoming, either by counsel or Mr Wong Chi-tat, I must say. However, I myself could regard this incident in favour of the Defendant as an issue of credibility and am inclined to acquit him if there is evidence that Miss Leung sent, or even was connected with, these four men. Mr McGowan agrees there is no such evidence independently, although this is a retrial. However, I find this incident could have other implications. Mr McGowan, who appears today, points out that he did not make that concession below and he had pointed to the evidence of PW5, a police officer, who said that he had seen the four tattooed men come bursting out of court, making a noise, along with PW1. In fact, the defendant's younger brother had not said that PW1 had been in the courtroom. The significance of the point was that she was geographically close to the action. It seemed to me that the point that the defence was seeking to make was this, that the timing of a false complaint by PW1 would sit happily with a perception by her that the Appellant was complaining about her, or her side, and that by reason of her being there, being able to hear the things shouted and said at the time, the probabilities are that she got wind of what the Appellant was complaining about, whether or not it concerned her directly by name. I judge that to be an important consideration in a case like this because so many defences fail and so many prosecutions succeed because the question is posed, Why on earth would the complainant suddenly invent this against a defendant? The defence point did not depend upon firm proof of any link between the four men and PW1. Even if there was no such link, it was PW1's perception that mattered. What the Appellant says is that PW1 would have been aware, because she was there, that the Appellant was making a fuss about the pre-trial antics of the other side

and so would indulge in some herself. I know magistrates cannot mention everything in their statements of findings, but the paragraph that I have read out from the statement of findings on this topic really shows that the magistrate was only prepared to use the evidence if he thought there was a proven link between PW1 and the tattooed men. So Mr McGowan says, I have lost my history point, or I may have done, I've lost my motivation point, or may have done. I then move to Ground 5 which claims that the learned magistrate failed to take into account adequately, or at all, PW2 and Man's behaviour after the incidents when both were allegedly material witnesses. PW2 claimed that his wife told him of the first threat and he told her to go and report it to the police, which she went and did by herself, and that he did not bother to get up from his seat and accompany her, despite the fact that she was allegedly distressed. He stayed at court through that day, even though his wife went off to the police station to make a statement about the matters that she claimed. It was an admitted fact that there was an attempt by the police to identify any potential witnesses at the court on 14 June 2004 and that the attempt was unsuccessful. PW2 eventually made a statement on 18 June, four days later. He explained that he stayed at court because he was a witness in the telephone nuisance trial. That explanation was not true; he was not a witness. He said that the delay thereafter was because he had planned to go on a business trip to China but that was then cancelled. The point Mr McGowan makes is that if his wife had been treated in the way she claims, he would have shown much greater interest on the day and, in particular, when police officers were there on that floor of the court building, looking for material witnesses, he did not come forward. The officer who directed the inquiry gave evidence and Mr McGowan has been able to point to me parts of the evidence which demonstrated the steps that he took. It was not a quiet affair; uniformed officers were going around asking everyone on the floor about what had occurred. So somehow PW2 did not come into contact with those police officers looking for people like him. Of course, I am conscious that Mr Man was not a witness at the trial, but I cannot but help note a coincidence between the fact that he is said to have witnessed one of these very quick, short verbal statements made by the Appellant, and that he stayed in the building through the day as a witness in the trial to which the Appellant was attached, and that the same team of police officers searching for material witnesses, of which he was one if he was telling the truth in his witness statement, somehow did not manage to find him either. He did not make a witness statement until 21 June. His explanation for that had been - and this was an admitted fact at trial - that he had to go to a conference in Macau, but that was cancelled. So what Mr McGowan says is, Look, the magistrate, having to deal with a witness with a history that's really significant, is bound to look for support for her. And he did and he says he found it in PW2. Mr McGowan says look at the quality of PW2. It is the fact that his behaviour and those coincidences I have pointed to do cause me disquiet. Obviously, I look to how the magistrate dealt with the matter. The magistrate said this: Regarding Mr Ng Siu-tung, Mr McGowan points out that he was not asked to go to the police station to give a witness statement that morning while his wife was. Miss Leung testifies she had told police what had happened, including her husband's role, but only she was asked to go to the police station to give a statement. Her husband was never asked until a couple of days later. I take the view that this was purely a matter for the police to decide. It might be decided to have a statement from the primary complainant first for efficient use of manpower. I do not see any significance in this fact. An

analysis of the evidence here in Court today has revealed that Miss Leung, PW1, may well have said, or did say, at the police station, that her husband had heard the second threat, but there was evidence from a police officer, Sergeant 20627, PW6, that she had not revealed that at the scene, at court. The point Mr McGowan makes is that the magistrate does not deal with what he suggests - and I tend to agree with - is the curious behaviour and lack of involvement with the active police investigation by the husband and the close friend of the complainant on the day at court. The sixth ground of appeal claimed an inherent improbability in the evidence of PW1. This goes to the second threat. I have a plan that was marked by PW1, showing where people were. There are some big wide stairs that come up into the hall outside Court 4. The Appellant was said to have been leaning on the rails on one side whilst, on the opposite side of the stairs, beyond the rails that side, in a chair by a witness room, was PW1. It was not strictly in evidence in the trial because everyone had seen the stairs and knew the width of them, as did the magistrate, obviously, and so do I. A measurement subsequently taken puts it at 23 feet but, whatever it is, it is across a wide stairway. At the time of this threat, uniformed officers had arrived in answer to a 999 call made by the Appellant's younger brother concerning the tattooed men and were making investigation of people around the lobby. The tattooed men had quite long since departed; there is no question of the shouting and the hot temper still being current. PW1 acknowledged that there were police officers on the stairs at the material moment when she said that the Appellant made the remark about Slit your face. PW1 was sitting beside PW2. There was evidence that PW2 was hard of hearing. Whatever about that, the real thrust is to say that in a voice that would carry that distance across the hall, when there are police officers about, some of whom were investigating a related matter, would require a brazenness that would be verging on the unrealistic. Mr McGowan makes the obvious point, saying, Slit your face to a lady out loud in front of police officers is the sort of thing that attracts their attention, and yet, none of them heard it. It is a difficult point, this. It depends so much on the actual moment. One has to imagine the pitch of the voice and its volume that has to carry that far to a man who is hard of hearing. It would have had to have been delivered, as the witness PW1 said, in a loud voice. The magistrate said that the argument that it would be unlikely that a threat would be delivered like that in those circumstances was untenable because the hall was noisy, people were doing their own things and may not pay attention. The response to that is that if this was done not in temper but in a way that was meaningful such as to attract criminal liability, the Appellant would, presumably, have been aware of the risk he ran in taking the course suggested. I do not want to make too much of the point, but I think saying that the argument was untenable may be to put it a little high. I am very conscious that the magistrate did have the opportunity to see and hear the witnesses, and his conduct of the case and his expression and obvious concern in the statement of findings is not to be faulted. So it is with great diffidence that I, later, on paper, come to a different view. I find that the accumulation of the points that I have been through are sufficient to raise a doubt in my mind as to whether these convictions are good ones. Areas that I regarded as needing special treatment, in a difficult case, either, it seems to me, did not receive that treatment, or were dealt with in a way that I would not have dealt with them. Their treatment in the Statement of Findings has not been sufficient to dispel my disquiet. The Ordinance obliges me to judge on the material that it directs I shall have before me, together with the extra facts of which I have taken note - and

I add, without any objection from the Respondents today. I have looked at that material and I have given great weight to the findings of an experienced and respected magistrate but, on that material, I I have a reasonable doubt as to whether these convictions are good ones. The Respondents have not made me sure they are so. The result is that the appeals against these two convictions are allowed. (P Line) Deputy High Court Judge Representations: Ms Kathie Cheung, Government Counsel of the Department of Justice, for the Respondent Mr James H M McGowan and Mr Roy Lau, instructed by Peter W K Lo & Co., for the Appellant PAGE - PAGE - CRT19/22.3.2007/CC HCMA1137/2006/Judgment 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 & `#\$ JUDGE.DOT setup Microsoft Word 9.0 judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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