

HONG KONG / JUDGMENT

HKSAR v. WONG CHI KING

COURT

Court of Appeal

DECIDED

21 December 2007

CASE / FILE NUMBER

CACC252/2006

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bjbj CACC 252/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 252 OF 2006 (ON APPEAL FROM HCCC NO. 301 OF 2005)

BETWEEN HKSAR Respondent and WONG CHI KING Applicant

Before: Hon Stuart-Moore VP, Yeung JA and Saunders J in Court Date of Hearing: 18 December 2007 Date of Judgment: 21 December 2007

REASONS FOR JUDGMENT

Saunders J (giving the reasons for judgment of the Court):

Background:

The Applicant, Wong Chi King, seeks leave to appeal against his conviction, on 16 June 2006, on one count of rape, one count of assault occasioning actual bodily harm, and one count of indecent assault, following a trial by jury before Deputy High Court Judge Pang. Mr Wong was acquitted on a fourth count of rape. The circumstances of the case: The case for the prosecution relied primarily on the evidence of the victim, Ms Pang, Mr Wong's former lover and girlfriend. Central to the whole trial therefore was the credibility of Ms Pang. However, on the issue of consent, and in relation to the assault charge, the prosecution relied, in addition to Ms Pang's evidence, upon the forensic evidence. The facts do not need to be described in any detail for present purposes. It is sufficient to say that Mr Wong and Ms Pang were together in Mr Wong's home in Yuen Long on the evening of 26 June, and in the early hours of 27 June 2005. Earlier on 26 June, Mr Wong had telephoned Ms Pang, saying that he was ill, and asking her to come to his home to look after him. A meal was cooked which they ate together. After dinner Ms Pang wished

to leave, but, according to her, Mr Wong refused to let her go. He wished to have sex with her, she did not. The case for the prosecution, accepted by the jury, was that she was subsequently raped, indecently assaulted, and injured by Mr Wong. There is no doubt that Ms Pang suffered a number of injuries during the course of the evening, and in the early hours of the following morning. The case for Mr Wong was that Ms Pang's allegations of lack of consent in relation to the sexual activities, and in the reason for her injuries being as a result of his assaults upon her, were a fabrication. Mr Wong's evidence was that Ms Pang had come to his home where, after a meal, there had been consensual sex. He said that the injuries suffered by Ms Pang were the result of a combination of his defending himself against her assaults on him during a dispute during the early hours of the morning, and further when he tried to prevent her from climbing up to the window sill, when she was upset after they had had an argument. According to Ms Pang, at about 6 a.m. next morning, while Mr Wong was still asleep, she took \$800 from Mr Wong's wallet and left the premises. She said that she had spent most of her money buying food for their dinner, and that she needed money for transport and the doctor. At about 7 a.m. Ms Pang was telephoned by her cousin's wife and told that Mr Wong had phoned and said that Ms Pang had stolen his money. The cousin's wife telephoned again and told Ms Pang that policemen were looking for her. The forensic evidence as to Ms Pang's injuries included evidence of:

- (1) Scanty reddish fine petechial haemorrhaging of both upper eyelids and both lower eyelids, typical of strangulation by ligature;
- (2) a series of linear or line like interrupted intradermal bruises on the right and front of Ms Pang's neck, consistent with marks caused by strangulation with a thin ligature;
- (3) certain injuries which could be caused by curtain cloth straps, but only the second and reinforced image, and not the softer parts, all as though the entire piece of cloth was twisted into a narrow stricture;
- (4) abrasions on the inner surface of the lower lip that were consistent with someone using fingers to prise Ms Pang's mouth open;
- (5) generally, injuries consistent with a violent and forceful struggle, injuries which were indicative of much forceful grasping suggesting the involvement of another person;
- (6) injuries consistent with violent and forceful sexual activity;
- (7) all of Ms Pang's injuries, except for one, were consistent with blunt force. Mr Wong gave in evidence that Ms Pang had attempted to cut herself using a broken ashtray. Ms Pang denied any ashtray had broken and no broken ashtray or other broken item was seized by the police, despite the police having attended at Mr Wong's home on the day of the events. It was an admitted fact at the trial that 8.15 a.m. on 27 June 2005, Mr Wong made a complaint of theft to the police, which he confirmed in person at Sheung Shui Police Station at 9:23 a.m. on the same day. It was also admitted at the trial that at 9 a.m. on 27 June 2005, Ms Pang made a complaint to the police in respect of Mr Wong's conduct towards her, and then, on 6 April 2006 Ms Pang was granted immunity from prosecution in respect of the alleged offence

of theft of \$800 from Mr Wong. The primary ground of appeal relied upon by Mr Fenton was that the judge's direction in relation to the immunity, and in relation to an enquiry made by Ms Pang to the police as to the consequences should she withdraw her complaint, constituted a misdirection. The relevant evidence: In the course of her cross-examination by counsel (not Fenton, who did not appear below), Ms Pang was cross-examined as to the reason why she had taken the \$800 from Mr Wong's wallet. It was not suggested to Ms Pang in cross-examination that she was not telling the truth in this respect in order to preserve her immunity on allegation of theft. Ms Pang was cross-examined as to an enquiry she made of the police. It is appropriate to set out the transcript in this respect, which reads: Q. I suggest to you, see whether you agree or disagree the following, at some stage after 27 June you went to Yuen Long Police Station telling the police officer there that you wish to withdraw the complaint against Wong Chi King, but the police officer there told you if you withdrew the complaint against him then you are liable to be charge or charged with the offence of giving false information to the police, do you accept that or not? A. I did not go to the police station. Q. Approached a police officer in this matter. A. How to approach? Court: Listen to the question. Counsel is suggesting, well they are saying that it is possible that after the 27th you have gone to the police, be it in a police station or McDonald's, right, and told them that you wanted to withdraw your complaint against the defendant. The crux is you approached the police to request to withdraw your complaint against the defendant? Did that happen? A. I just asked them what effects I had to face if I withdraw my complaint. Q. When .. Court: I just asked them what effect on me? Interpreter: What effects I have to face. Court: I have to face if I withdraw the complaint? Q. When was it? A. When I was asked to add information on the second occasion, I did so in passing. Q. At that time you were told that if you withdraw the complaint you would be liable to be prosecuted, is that correct? A. Right. Q. So at the time, may I say, you had no alternative but to proceed with the allegation that you had earlier laid against the defendant, do you accept that? A. I think he should admit what he did. Q. I'm talking about you, m m? A. Yes. Q. Thank you. Court: Yes, what? No, let me clarify. The question is you felt you had no alternative but to proceed with your allegations? Your answer is yes. Counsel: Earlier allegation, yes. Court: Is that right? A. Yes. Ms Pang was re-examined about this matter. Again it is appropriate to set out the transcript. Q. Now, you told us that when - - at the time of the second statement, when you came back - - when police wanted to clarify questions from you, you told us at that time you went back to the police station to make that second statement you have asked the police what effect you would have to face if I withdraw the complaint. Do you remember you said that? A. Yes. Q. Now, why did you ask this question? A. Because I was not familiar with Hong Kong law. Q. Yes. A. I thought the police officer could provide me with an answer if I ask them. Q. What was the purpose in asking this question? A. No purpose, just to understand the laws of Hong Kong. The arguments open on this evidence: From all this evidence, there were accordingly two bases upon which defence counsel might address the jury as to the credibility of Ms Pang. First, it would be open to him to say that as a witness giving evidence under immunity in relation to the theft charge, Ms Pang may have been tempted to insist upon a false story, in order to preserve the immunity. Second, it would be open to him to say that Ms Pang may

have been tempted to insist upon a false story in order to avoid prosecution herself. Although it was not specifically said in the course of the evidence, it seems apparent that any prosecution she might face upon withdrawal of her complaint would be an offence of making a false report. All the parties dealt with the matter on that basis during the trial. The summing up: The judge dealt with these two matters in his summing up in the following way: Anyway, she denied wanting initially to report only about the assault, but admitted being angry upon learning that the defendant had reported her for taking his money. That happened when her cousin's wife called a second time saying that some policemen were looking for her. Either way, she denied reporting him for rape, assault and false imprisonment to avenge his reporting her for theft. She did not do so earlier, she said, because she was scared, confused and did not know what to do. That said, she conceded, asking the police about, I quote, The effect she had to face if she withdrew her complaint, and was told that she might be liable for prosecution for the offence of making a false report. That happened when she was asked to give a second statement in November. More importantly, she conceded thus having no alternative but to press on with her own allegations. In re-examination, she said she asked those questions because she wanted to know the law. Now, members of the jury, I urge you to consider these last concessions with care and also against the fact that she gave evidence in this trial under immunity. The fact that she gave evidence under immunity was made known to you at the end of Ms Pang's evidence in chief. The terms of that immunity if she gave full and truthful evidence in this trial she would not be prosecuted for theft. Well, it is not uncommon for individuals to give evidence under immunity, members of the jury, and like other witnesses the evidence can be perfectly reliable. That said these witnesses do have an interest in the proceedings, so it is customary for the courts to remind you of the status in case your assessment of them may not be totally informed. Although we have not been provided with a transcript of the speech of defence counsel to the jury, it is apparent that the arguments indicated in paragraphs 19 & 20 above were made to the jury by counsel for the defence. In the course of the summing up, the judge said this: Turning to the defence, they have raised a total of 21 points on Ms Pang alone. They include her confirmed willingness to stay overnight at the defendant's flat on the 26th, that had been in cross-examination. The delayed report on the 27th. Her motive to make false accusation against the defendant. Her highly suspicious act of asking about the consequence of withdrawing her complaints, and a large number of discrepancies in the statements. (The emphasis is ours.) In order to support the conviction, Ms Louisa Lai relies also upon the following further passage from the summing up: I should add this, experience has shown that people who say that sexual offences had been committed against them some times tell lies, they do so for a variety of reasons, as such false allegations are easy to make and frequently difficult to challenge even by an entirely innocent person. It follows that it is dangerous to convict on the evidence of the complainant alone, which is what you will do if you convicted defendant in this case. Putting it bluntly, it is Ms Pang's word against the defendant. The complaints in relation to the summing up: Two complaints are made of the passage of the summing up, set out in paragraph 21. The effect of the first complaint is that in the absence of any explanation as to why care should be taken by the jury in assessing

evidence given under an immunity, the warning lacked significance. The second complaint is that the judge should have directed the jury that Ms Pang might not have been telling the truth because she might have been under pressure to avoid being prosecuted for the offence of making a false report. It is argued that simply telling the jury that they should consider the evidence with care was insufficient having regard to her admission that she perceived herself as having no alternative but to press on with the matter. Mr Fenton's concern was that the jury had not been told that Ms Pang might be a reluctant witness wishing to withdraw a false story, and who had, when enquiring of the police as to the consequences of the withdrawal of her statement, being impliedly told by the police that she must give evidence in accordance with her statement or she would be prosecuted for making a false complaint. To instruct a witness in this way would be wholly improper: see *HKSAR v Leung Kai Chung* 1 [2002] HKLRD 771. The law: Counsel was unable to put before us any authority as to the terms upon which the jury should be instructed when evidence has been given under an immunity. Mr Fenton argued the matter by analogy. In *R v Spencer* [1987] AC 128, a case in dealing with the warning that used to be required in respect of convicting on the basis of uncorroborated evidence, Lord Ackner said, at 140E: The warning to be sufficient must explain why it is dangerous so to act, since otherwise the warning will lack significance. In *R v Izard* (1992) 157 JP 58 Stuart-Smith LJ, when dealing with the corroboration warning in sexual cases, said: Furthermore, it is quite plain on the authorities that the Judge must not only give the warning but the reason for it. There are circumstances where the judge will give a very clear explanation to the jury as to the reasons for a particular warning. The best example is a lies direction where it is important that the jury understand precisely what it is they need to be careful about. Discussion: With respect to Mr Fenton, it appears to us that Ms Pang was not a reluctant witness wishing to withdraw a false story, but, as so often in sexual cases, a witness who might be embarrassed about giving evidence that would reveal intimate details of her life. That appears from her immediate response when it was put to her that she had no alternative but to proceed. Her response was: I think he should admit what he did. That is not the response of a witness seeking to withdraw a false story, but of a witness not wishing to undergo the embarrassment of having to repeat the circumstances in a trial. Furthermore, as Ms Lai pointed out, Ms Pang did not go to the police station in order to make this enquiry. She merely made the enquiry in passing, having been invited to the police station to give a further statement concerning the matter. Ms Pang had not gone to the police station with a view to withdrawing her complaint. Mr Fenton relied also upon the fact that the judge dealt with the question of the immunity immediately after referring to the discussions which had taken place at the police station. He submitted that the effect of the statement by the police officer was to effectively neutralise the immunity. It is right, as was pointed out by Ms Lai, that Ms Pang was not under immunity from prosecution for making a false report. It does not even follow that if she had withdrawn her complaint, that it would have been thereby, a false report. But it is clear that the judge specifically referred to the immunity only being in relation to the theft charge. The judge dealt with the reason for the warning by the use of the following two sentences: Well, it is not uncommon for individuals to give evidence under immunity,

members of the jury, and like other witnesses their evidence can be perfectly reliable. That said, these witnesses do have an interest in the proceedings, so it is customary for the courts to remind you of the status in case your assessment of them may not be totally informed. We are satisfied that on the whole of the circumstances, with the credibility of Ms Pang being at the forefront of issues in the trial, the warning and the explanation of the warning given by the judge was sufficient to alert the jury to the danger that they ought to take into account in assessing her evidence. That warning was reinforced subsequently in the summing up when the judge referred to the argument of defence counsel as set out in paragraph 22 above. The judge reminded the jury that of the contention that Ms Pang may have a motive to make a false accusation, and that her act of asking about the consequence of withdrawing her complaints was highly suspicious. In addition, virtually at the end of the summing up the judge gave the usual warning about false allegations in sexual offences. That is set out at paragraph 23 above. In the whole of the circumstances we are satisfied that the reasons why the jury of they needed to take particular care in assessing Ms Pang's evidence would have been quite plain to them. No further direction was needed in the circumstances. This ground fails. The discrepancies argument: Mr Fenton sensibly recognised that by itself, there was nothing in the alternative argument which relied upon contradictions and discrepancies in Ms Pang's evidence and the way in which they were dealt with by the judge. It is sufficient for us to say that the jury were plainly aware of all of the matters raised and it was for them to assess those matters. Mr Fenton sought to strengthen his argument on the lack of explanation of the warning under the first ground of appeal, by referring to the discrepancies, and arguing that the need for a more detailed explanation was greater in the light of the discrepancies relied upon because the prosecution case depended to such a very great extent on Ms Pang's evidence. We are satisfied from our review of the summing up that it was abundantly plain to the jury that Ms Pang's credibility was at the heart of the matter. That was for them to assess in the light of the evidence, the speeches, and the judge's summing up. We are satisfied that the overall effect of the directions was to convey the right message to the jury as to the dangers in relying upon Ms Pang's evidence. For these reasons, the application is dismissed. The appeal against sentence: Mr Wong did not seek to pursue an application for leave to appeal against sentence. Accordingly this application is also dismissed. (M. Stuart-Moore) (Wally Yeung) (John Saunders) Vice-President Justice of Appeal Judge of the Court of First Instance High Court Ms Louisa Lai, SADPP, of the Department 1udk 1udk 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 hca.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 26 October 2026 · Esheria