

HONG KONG / JUDGMENT

HKSAR v. WONG CHI KIT

COURT

Court of First Instance

DECIDED

9 February 2007

CASE / FILE NUMBER

HCMA769/2006

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bjbj HCMA769/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 769 OF 2006 (ON APPEAL FROM ESCC 92 OF 2006)

BETWEEN HKSAR Respondent and WONG CHI KIT (_pg) O N S F O R J U D G M E N T

AUTONUMOUT The appellant pleaded guilty to the charge of operating a massage establishment which was unlicensed and he was convicted by Mr Winston Leung sitting at Eastern Magistrates Court of the charge of employing a person not lawfully employable. He was sentenced by the magistrate to two months imprisonment on the 1st charge and ten months on the 2nd charge to be served consecutively. He now appeals against the conviction and sentences. Grounds of appeal against conviction AUTONUMOUT Andy Hung appearing for the appellant advances one main ground of appeal against conviction and that is that the learned magistrate erred in law in ruling that the first reaction of the appellant had no probative value at all and as a result, in evaluating the evidence given by the appellant, the learned magistrate failed to have regard to the undisputed fact that at the time the employee produced a two-way permit to the police, the appellant spontaneously scolded the employee on why when she had been in possession of a Hong Kong identity card, she only showed a two-way permit to the police. It was said that because the magistrate attached no weight to that reaction by the appellant, the magistrate wrongly did not find that when the employee sought employment from the appellant, she had shown him a Hong Kong identity card and he had checked the photograph on the identity card. This was the appellant's evidence which was not accepted by the magistrate. The magistrate also found that the identity card never existed at all because on the day of the employee's arrest by the police, she was unable to show the identity card and a photocopy of the identity card was never found on the premises of the appellant. AUTONUMOUT I find that there is nothing to this ground of appeal and I find that the magistrate was entitled to reject the appellant's evidence and draw the inference that the appellant was never shown a Hong Kong identity card by the employee. The appeal against conviction is therefore dismissed. The appeal against sentence

AUTONUMOUT On 1 February, I also allowed the appellant's appeal against sentence and substituted for the 2nd charge a sentence which would enable the appellant to be released immediately. I said I would give my reasons later and that I now do. AUTONUMOUT The appellant was sentenced on 9 August 2006 and remained in custody until he was admitted to bail pending appeal on 5 December 2006. That was a period of almost four months which would have been the actual term of imprisonment he would have had to serve if the sentence was one of six months, allowing for the remission for good conduct while in prison. AUTONUMOUT The reason for my allowing the appeal against sentence is because the magistrate had said in passing the sentence that the general tariff for the offence of employing an unemployable was 15 months. However, in *Secretary for Justice v. Ho Mei Wa* [2004] 3 HKLRD 270, the Court of Appeal laid down a new guideline of three months imprisonment after trial for the offence of employing a person not lawfully employable where there were no aggravating or mitigating circumstances. The Court of Appeal said that recognized aggravating features included an element of exploitation, multiple employment or that the offence was a repeat one. The presence of such aggravating features would, in most cases, substantially increase the guideline sentence. AUTONUMOUT Chan for the respondent queried whether, in the circumstances of this case, this appellant could bring himself within that guideline imposed by the Court of Appeal, and she relied on the fact that the massage parlour was unlicensed and the appellant, in addition to committing that breach, also committed the second breach of employing an employee who was not lawfully employable. AUTONUMOUT She also relied on a possible breach of section 17K of the Immigration Ordinance by the appellant in that he did not keep a record of the full name of the employee as shown in his identity card and the type of document held by the employee by virtue of which he became lawfully employable and the number of that document. AUTONUMOUT She also queried, relying on certain entries of records of names of people who had worked in the establishment on various dates, whether this particular employee was employed by the appellant on more than one occasion. AUTONUMOUT I agree with Mr Hung for the appellant that in relation to running an unlicensed massage parlour, the appellant had received punishment for that and so that should not be taken into account when assessing the sentence on the employing a person not lawfully employable charge. AUTONUMOUT As regards a possible breach of section 17K of the Immigration Ordinance, the fact is the appellant was never charged with such an offence and so I should not take that into account. AUTONUMOUT As regards whether the employee in question was only employed on one day or on more than one day, I can do no better than to rely on what the magistrate said when he sentenced the appellant. What the magistrate said was that the evidence showed that the employee only came to the premises on two occasions on the day of the offence. She had gone to the premises on the first occasion to serve a police officer working undercover and the reason why she went on the second occasion was because a second undercover officer went to the premises at a later hour and specifically requested that the massage be performed by that employee quoting her by name. AUTONUMOUT I find that, given the circumstances of this case, this appellant is able to come within the guidelines laid down by the Court of Appeal in *Secretary for Justice v. Ho Mei Wa* (supra). I did not disturb the order that on the 1st charge the sentence should be a consecutive sentence of two months imprisonment. It was taking into account the fact that the appellant had

been in custody for almost four months that I made the order that I did. (Peter Nguyen) Judge of the Court of First Instance, High Court Ms Ada Chan, SGC, of the Department of Justice, for HKSAR Mr Andy Hung, assigned by the Director of Legal Aid, for the Appellant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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