

HONG KONG / JUDGMENT

HKSAR v. WONG KA LING

COURT

Court of First Instance

DECIDED

8 February 2007

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HCMA 601/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO. 601 OF 2006

HKSAR

and

WONG Ka-ling

Before: Hon Wright, J., in Court

Date of Hearing: 1 February 2007

Date of Judgment: 8 February 2007

JUDGMENT

The appellant appeals her conviction on two charges of managing a vice establishment. The offences occurred in premises operated under the name Big Spender Sauna in Tsim Sha Tsui East. She was convicted after trial in the magistracy. She has abandoned a further appeal against a sentence of 12 months imprisonment on each charge, the sentences to be served concurrently.

10 grounds of appeal appear in the Perfected Grounds of Appeal and Supplementary Perfected Grounds of Appeal. Eight encompass four aspects in which it is said that the magistrate fell into error: firstly, by finding that the premises in which the offences were committed were kept wholly or mainly for the purposes of arranging prostitution (Grounds 1 to 5); secondly, by reviewing his initial decision to convict (Ground 6); thirdly, by omitting to consider or erroneously applying the burden of proof (Ground 8); and, fourthly, by admitting evidence regarding identification by one of the prosecution witnesses, relating only Charge 1 (Ground 9). The remaining two, Grounds 7 and 10, contain the catchall suggestion that the convictions were unsafe or unsatisfactory.

On the hearing of the appeal leading counsel for the appellant pursued Grounds 1 to 5 jointly as well as Ground 9. The review complained about in Ground 6 was alluded to as

looking bad

but not further pursued. Ground 8 was not pursued: rightly so as it was a ground which should not have been advanced in the first place.

Leading counsel for the appellant accepted, sensibly, that the Magistrate was entitled to find that vice activities were offered and took place within the premises where the sauna operated.

Ground 9: The identification issue.

The issue of identification relates only to the evidence of the first prosecution witness and only to Charge 1. It is convenient to deal with this issue first for it involves consideration of events which set the scene.

As usually happens in matters of this nature, several police officers were sent on different occasions into the sauna posing as customers. On the first occasion, 24 May 2005, DPC 48919 [PW1] went to the sauna where, the magistrate found, the appellant offered to arrange sexual services for him in the premises. He received those services from another person. The operation remained covert.

On 13 June 2005 two other police officers, DPC 33095 [PW4] and DPC 54833 [PW5], went to the sauna posing as customers: they, too, were offered sexual services by the appellant. They received those services from other persons. That night the operation turned overt.

Shortly after midnight PW1 arrived at the sauna. An Acting Chief Inspector Lam [PW2] was conducting what he described in his evidence as being

"... not a formal identification... it was part of the investigation that was carried out at the scene on that day... at that time there was no single particular suspect... the purpose of this identification process was to allow the police officers to pick out the persons who were involved during an undercover operation."

There is no dispute about what occurred after PW1

s arrival. He was taken into an area of the sauna where, apart from the police, there were some 30 to 40 persons in various forms of clothing. PW1 was asked to see whether he was able to recognize any of the persons who had been involved in illegal activities upon his previous visit: he identified the appellant but was unable to identify the masseuse who the appellant had arranged to attend to him. He was then instructed to go into another room to wait as it was felt undesirable for him to come into contact with other police officers who had yet to attempt to make identification.

Each of PW4 and PW5 was also taken into the room where the 30 to 40 persons were and asked to perform a similar task. Each also identified the appellant as having been the person who had arranged for the provision of sexual services: each was also able to identify the masseuse who had dealt with him.

It is relevant to note that no objection was taken to the identification of the appellant by either of these two witnesses despite the circumstances of that identification being precisely the same as that undertaken by PW1, albeit that those two witnesses had dealt with the appellant more recently than had he. That, however, goes to weight and reliability of the identification by PW1, not to its admissibility.

At trial PW1 was asked whether the appellant was present in court and he duly pointed her out to the magistrate. Thereafter, objection was taken to the admissibility of the evidence relating to her identification at the sauna as well as that in court. The first ground of objection was said to be that there had been a failure to comply with "... well recognised police procedures and guidelines as to identification of suspects by potential prosecution witnesses..." whilst the second was that the appellant was not given an opportunity of electing to participate in an identification parade or to seek legal advice before participating in the events at the sauna in addition to which the "other safeguards" regarding the carrying out of an identification process were absent.

The magistrate agreed to determine the admissibility of the identification evidence by way of a voir dire, rather than the alternative procedure, during which cross-examination of PW1 was also directed to the reliability and accuracy of his identification. With respect, there seems to have been some confusion on the part of those then representing the appellant as to the precise nature of the objection to admissibility as well as whether it was to admissibility or simply related to weight which, in truth, was the issue.

This is illustrated by an exchange, one of several, between the magistrate and the appellant's then leading counsel during submissions being made on admissibility on behalf of the appellant:

Court: What's the difference between the officer visiting the sauna on the same day and two weeks prior to that?

Mr Wong: Well, to be fair, visiting on the same day means the memory of a face, the memory of the description would be much fresher in their minds whereas someone who has been there or who was there two weeks prior; that is all... We are saying that how is it fair for you to bring back some officer who was there two weeks ago, to come and confront someone, and when the police wasn't even treating this as an identification. It was such - a confirmation of the suspect.

The magistrate was addressed, at remarkable length, on behalf of both the prosecution and the appellant and was referred to numerous previously decided cases. The magistrate received scant assistance from the prosecutor.

Much of the appellant

s argument revolved around individual words used by the prosecution witnesses to describe the process at the sauna. Whether what happened was described as an "identification process", "confirmation", "confrontation", or any of the other expressions used by the witnesses and counsel involved in this exercise the reality of the situation is that PW1 was doing nothing more nor less than indicating his ability to recognise the appellant as being a person with whom he had dealt as little as two weeks previously: this was but another step in the investigation process.

Although the judgment deals with the issue of whether photographs may be shown to a witness I am mindful of the observations of Mortimer

JA in *R. v. Hoang Duc Hoa and others* [1997] HKLRD

12 when he said

If the identity of any person to be charged is known, unless it is intended to hold a structured identification by means of the photographs, no photograph of any person held for the offence should be shown to a witness. Of course, in the course of investigation, in order to find or identify the person responsible for an offence, witnesses may be shown photographs as part of the investigation. It is important, therefore, that those who show photographs to witnesses should first determine whether the purpose is to provide evidence in the case, or whether it is to further the investigation.

[Emphasis supplied]

The course followed to see whether PW1 was able to recognise any of the persons with whom he had had dealings, not just the appellant, was an entirely understandable and proper procedure to have followed in the circumstances of this matter.

Internal police guidelines were shown to the witnesses who testified on this issue. It was suggested to the witnesses during cross-examination that those guidelines had been breached. However, the guidelines did not express themselves to be of any applicability in circumstances such as these. Moreover, even where guidelines, or rules, are applicable to a given situation, it is well settled that their mere breach does not render evidence inevitably inadmissible.

There was a submission on the issue of fairness, that in the circumstances the magistrate should exercise his discretion to exclude the evidence. He declined to do so.

The magistrate was plainly alive to the varied nature of the objections before him but ruled, quite correctly, that the pointing out of the appellant at the sauna on 14 June 2005 was unobjectionable. The magistrate also ruled, again correctly, that there was no valid objection to the identification in court. The evidence as a whole laid a proper foundation for that identification. The magistrate was correct in exercising his discretion in regard to identification.

Ground 6: The review.

Although this ground of appeal was not taken any further, it was not formally abandoned on behalf of the appellant. It will be helpful to look briefly at how this trial progressed. The appellant pleaded not guilty to the two charges when they were put to her on the morning of 23 February 2006. There was discussion concerning facts which were to be agreed. The magistrate had a part-heard matter that day. In the event this matter commenced shortly before 4 p.m. that day with the reading into the record of a set of agreed facts. There was discussion with counsel on both sides regarding production of exhibits, the number of witnesses to be called and the length of the trial.

The matter was then adjourned to the following day and commenced with the prosecutor indicating that she had prepared a list of exhibits as well as a set of what were described as "amended admitted facts" which was designed to replace the admitted facts read into the record, and admitted by the appellant, the previous day. Remarkably, neither the prosecutor nor leading counsel appearing for the appellant saw fit to include in either set of admitted facts any reference at all to the fact that the appellant was of previous good character. After discussion concerning the effect of the admitted facts the prosecutor indicated that there was "... one more thing" and informed the magistrate that the appellant had a clear record.

PW1 was then called and gave his evidence up to the point of identification in court at which stage the whole identification issue arose. That occupied the rest of that day. The matter was then adjourned to 14 March 2006 when there was further argument on the identification issue which occupied, effectively, the whole of that day. The matter was then adjourned to the following day for the magistrate to deliver his ruling but he was unwell. The trial resumed on 16 March 2006: this time after three questions were asked of PW1 another objection was taken to admissibility of evidence concerning exchanges between the police officers and masseuses which occurred out of earshot of the appellant.

The matter was adjourned to 29 March 2006. Again, there were extensive submissions, this time by the prosecutor which resulted in the appellant's counsel seeking and obtaining an adjournment. The matter was adjourned to the 31 March 2006 when further submissions on the same issue were heard. That day the magistrate gave his ruling and the trial proceeded with PW1 resuming his twice-interrupted evidence. He was not to finish testifying that day. He resumed on 3 April 2006. The prosecution evidence concluded that day. The magistrate found that there was a case to answer on both charges. The appellant elected not to give evidence. There were to be no defence witnesses. The matter was then adjourned to 10 April 2006 for final submissions. On that day the magistrate heard the submissions and adjourned to 27 April 2006 to deliver his verdict.

On 27 April 2006, more than two months after the first day of trial and after having sat on eight separate days, the magistrate convicted the appellant. In the course of doing so he made no reference to character. Before mitigation could commence the prosecutor said "I think the clear record has been informed to the court in advance" [my emphasis]. Indeed it had, but in such a throwaway manner as to make it entirely unsurprising for the magistrate to have overlooked that fact. The magistrate immediately indicated to then leading counsel for the appellant that he would have to "... reconsider the verdict in the light of that."

Then leading counsel's response is worth noting:

"Mr Wong: Oh no your worship. That would only be necessary if she gave evidence. Since you have no credibility to talk about - I mean, propensity, of course, is another thing.

Court: Yes

Mr Wong: We take no point on that

...

Mr Wong: But might I assure your Worship that no point will be taken on this at all, and there is no necessity of your Worship...

Court: But the propensity, propensity.

Mr Wong: Even on propensity, your Worship. If it was to be made a point, then certainly we would have made it during the trial and during our submission. We are obliged your Worship, for giving us the opportunity, but I can assure your Worship that point is going to be taken on that.

This notwithstanding, the magistrate, entirely correctly, took the view that it was necessary for him to review his decision and to consider whether the fact of the appellant

s clear record would properly make any difference to the conviction. He followed that course, rising to do so. He returned to court and indicated that having taken that factor into consideration he "...still reached the same verdict with the same reasons".

The complaint made in the perfected grounds of appeal is twofold: firstly, that when reaching the [first] verdict delivered on 27 April 2006 the magistrate failed to take into account the fact that the appellant had a clear record and failed to bear in mind the proper directions regarding propensity; secondly, that instead of discharging himself from further hearing the matter due to the

apparent unfairness or undue prejudice

as a result of the failure, he proceeded to review his decision, set aside the verdict and take just 36 minutes to convict the appellant anew for the same reasons, with the result that justice was not done or seen to be done.

I regard the two-pronged attack launched on the magistrate

s approach as being entirely devoid of merit.

As unfortunate as it may have been, it is understandable that the magistrate overlooked the issue of the appellant

s clear record in the circumstances which I have detailed. It is self-evident that the appellant's previous good character was a matter which the magistrate need take into account. Immediately he appreciated the position he set about remedying the oversight by invoking a procedure specifically provided to magistrates by section 104 of the Magistrates Ordinance, Cap. 227. He did so despite the enticing submissions made to him by then leading counsel.

Section 104 is designed to afford a magistrate, who sits on matters tried summarily, an effective method of dealing with issues that arise from a trial thereby avoiding the attendant prejudice to an accused or, come to that the prosecution, of further independent proceedings. In this matter what the magistrate found it necessary to consider was a matter that could only have redounded to the appellant

s benefit: the suggestion that to follow this course would in any way prejudice the interests of the appellant is baseless.

Equally baseless is the implicit complaint that he did not take long enough to reconsider his decision. In truth, all the magistrate needed to do was to review his decision and to ask himself whether he would have come to a different conclusion factoring in the propensity issue: that was a discrete exercise on a very simple point with which a magistrate of this experience could properly deal expeditiously.

Far from being subjected to criticism, this is a course which magistrates should be encouraged to follow.

Usage of the premises.

This aspect of the appeal is another example of an appeal being approached on the erroneous basis that if a magistrate is found to have erred in any way in arriving at his decision the accused is automatically entitled to be acquitted regardless of the state of the evidence.

The appropriate basis is as was explained by Bokhary PJ in *CHOU Shih-bin v HKSAR* [2005] 1 HKLRD 838 at

a 19

An appeal under section 113 allows the depositions before the magistrate to be "admissible as evidence of the evidence given" in the Magistrate

s Court (s. 118(1)(a)), authorises the reception of fresh evidence (s. 118(1)(b)) and empowers the judge on appeal to make whatever order the judge thinks just (s. 119(1)(d)).

In *Lam Kau v R* [1962] HKLR 234 Rigby, J., ... held that provisions similar to those now under consideration created an appeal "at large" and rejected a submission that the appellate court should not form its own independent judgement.... a rehearing in this sense is not rehearing de novo, being instead a re-hearing on the material before the magistrate supplemented by any fresh evidence which the appellate court may admit.

where the facts are concerned, the appellate tribunal will recognize that it does not enjoy the advantage of having received the evidence at first hand which the magistrate enjoyed.... while [the appeal tribunal will] bear in mind that [it] did not enjoy the advantage of having received the evidence at first hand, [it] was entitled, indeed bound, to come to [its] own conclusion...

In this matter I have received a full transcript of the evidence laid before the magistrate: the evidence of all the witnesses combined came to only 99 pages of the record which, excluding the magistrate's verdict and subsequent proceedings, totalled 278 pages.

In some instances it may well be open to an appellant to argue that because of errors occurring in a magistrate's reasoning or statement of findings, his assessment of the credibility of witnesses cannot be relied upon by the appellate court. Where that credibility is a real issue then, in accordance with what appears in *CHOU Shih-bin*, it may be that the appellate tribunal would be unable to safely arrive at its own conclusion. Such a consideration does not arise in this matter as there was no real challenge by the appellant

s then representatives as to the events which occurred in the sauna on the occasions of the visits by the police officers nor was there any real, or effective, challenge to the credibility of those officers.

The charges against the appellant were pursuant to the provisions of section 139(1)(b) of the Crimes Ordinance, Cap. 200. That section provides, in its relevant portions,

Any person who on any occasion... manages... any premises... kept as a vice establishment shall be guilty of an offence....

A vice establishment is defined, in negative terms, in section 117(3) of the same Ordinance, in its relevant portions

Premises... shall not be treated as a vice establishment for the purposes of this part unless... the premises... are... used wholly or mainly for or in connection with the organising or arranging of prostitution.

Both in argument before the magistrate and now on appeal reference has been made to numerous decisions in earlier magistracy appeals, particularly those in which appeals have been allowed on grounds relating to the issue of whether the premises concerned could properly be found to be vice establishments.

Whilst an analysis of previous decisions may prove beneficial to extract legal principles that are applicable to an issue before the court, a proper reading of the cases referred to establishes, unsurprisingly, that it is a matter of fact in each case as to whether the premises concerned were so kept. See, for example, R v CHENG Sung-hin HCMA498/1985, HKSAR v WONG Ming-chu HCMA1127/2004, HKSAR v YEUNG Mei-ling HCMA1024/2005, and recently Lunn, J., in HKSAR v CHAN Ching-keung and Another HCMA314/2006

I accept that the phrase "wholly or mainly" applied to user applies to the premises itself and not merely to the activities of the first appellant. Like the magistrate I have been referred to multiple authorities where the application of the phrase has been considered in the particular circumstances established in the case from which the conviction was being appealed. However, clearly it is to the unique matrix of evidence established in the particular case to which regard must be had.

Grounds 1 to 5 and Ground 8, shorn of prolixity, all assert that the magistrate erred in finding that the premises were used wholly or mainly in connection with the organising or arranging of prostitution, that they were kept as a vice establishment. In argument on appeal that contention was reduced perhaps even further to the proposition that because of the way the magistrate had phrased his verdict and statement of findings he had failed to demonstrate that he had applied his mind to factual matters which, it was submitted, were favourable to the appellant in that they pointed away from the use of the premises wholly or mainly for the purposes of organising or arranging prostitution.

I reject that argument. The magistrate's reasons were short and to the point. It is appropriate to recall the words of O

Connor, J., in Lam King-ming, Cr App 601/1979, that:

The reasons for verdict should, in manner appropriate to the circumstances of the case, illustrate the salient points in the case and demonstrate that the evidence has been evaluated.

There is no simple formula for what ought to be in a judgment as it must be related to the circumstances of the particular case. The magistrate should state his reasons to such an extent as will inform the parties as to how and why the particular verdict was arrived at and furthermore will enable an appellate court to perform its duty.

In the context of the evidence and issues in this matter, the magistrate's reasons for verdict and statement of findings met that test.

He succinctly set out under a specific subheading "Wholly or mainly" his approach to his conclusion in this manner (I quote verbatim)

When I considered this area, I had taken into account that apart from their own experienced, none of the undercover officers witnessed other vice activities was going on there, also the price list which indicated decent services were available etc. which was something in favour to the defence. The concept of "wholly" or "mainly" is not based on mathematical formula or statistics, nor in proportion of how much of the area of the premises was used for the vice activities, nor how much time in proportion to a customer spent there was dedicated in vice activities. There is no legal principle to define "wholly" or "mainly", it is a question of facts from the finding of facts, the circumstances and common sense. The concept is the mode of running the business, in the sense that such offers were available for the customer's choice. Taking into account of all the circumstances, including on the three out of three visits by the respective undercover officers, among the types of services offered including vice activities, inside the massage rooms vice services were offered again and performed by various masseuses, PW4 and PW5 were even brought into a room for the purpose of choosing their potential partners etc., under such circumstances an irresistible inference was it must be such offers, if not to all, at least to most of the customers, not particularly or exclusively to the undercover officers.

as a result of which he concluded that

I was satisfied the premises was, at least, mainly used for that purpose.

Particular exception was taken to the fact that the magistrate use the term "et cetera" rather than setting out in full each of the matters which he had considered. There may be matters in which that would be a dangerous course to follow but in the context of this matter it is abundantly plain that the magistrate was fully alive to the fact that this issue was central to the decision he needed to make: indeed, he could not have failed to have been, given the length and detail of submissions made to him on this specific point at the conclusion of the evidence.

The evidence before the magistrate showed that upon each of two occasions when the three undercover police officers went to the sauna he was offered, unhesitatingly and in explicit terms, the provision of a variety of sexual services by other women, the offer being made by the appellant.

It is, of course, of particular significance that for each of the police officers this was the first visit which he had made to the premises: indeed, PW1 specifically told the appellant that this was so. I draw the irresistible inference, as did the magistrate, that such offers were made to all, or at least most, customers when they visited the sauna.

There was plainly in place an existing and organised system: the appellant would make the offer and explain to the customer what sexual services were available at what price. In the case of PW1, a masseuse was allocated to him and he met her in one of the massage rooms: sexual services were provided. Each of PW4 and PW5 was afforded the opportunity of selecting from a number of available women the masseuse whom he wished to serve him. In the privacy of the massage room sexual services were provided to each.

This demonstrates that upon 100% of the occasions upon which evidence was led concerning customers, albeit police officers, attending the premises the arrangement of sexual services was offered by the appellant. Whether, of course, that was so in respect of every single customer who ever walked through the door of the sauna is unknown - nor need it be for it is necessary to decide this matter upon the evidence before the court.

A large number of condoms were found in the premises, some 300 in all, although it is correct that they were found in lockers and not freely distributed about the massage rooms. In the light of this, it is not without significance that each of PW1 and PW4 refers to the provision of a condom by the masseuse serving him: PW5 called a halt to the services being provided to him before such a stage was reached.

Each of the police officers when cross-examined accepted, and sensibly so, that he did not know what was happening in any of the other massage rooms at any given time. But that is not a matter which goes to the benefit of the appellant

it is entirely neutral absent any evidence showing that other innocuous activities were also being carried on in the premises.

Each was asked whether he could say whether the premises were used "wholly or mainly" for the purposes of prostitution: that, of course, is a matter for the court to determine rather than the police officer to express an opinion upon and each said, understandably, that he could not. Once again this is not a matter which avails the appellant.

Although each of the police officers accepted in cross-examination that there were other customers in the premises at the time he was present and sexual services were offered to him, none estimated how many other customers were present.

There was no evidence, either from the prosecution witnesses in cross-examination or from evidence on behalf of the appellant, of the nature of any other activities that were carried out in the premises.

On appeal it was submitted that important factors in favour of the appellant were, firstly, the nature of the premises themselves; secondly, the fact that PW1 testified that he was offered a non-sexual massage in addition to forms of sexual conduct; thirdly, the presence of cards and notices displaying a list of non-sexual services; and, fourthly, the fact that prices quoted differed between those offered to PW1 and those offered to PW4 and PW5.

Great emphasis was placed on the fact that the premises themselves were licensed, were "substantial" and were not "seedy" in appearance. PW1 was asked in cross-examination whether he knew the size of the premises or the number of massage rooms available: he did not. The appellant did not see fit to lead such evidence whether orally or by way of further agreed facts.

When PW1 testified concerning the issue of identification he made reference to the fact that there were between 30 and 40 people, males and females, in different states of dress, in the main reception area of the sauna when he was called upon to make his identification. I have seen the photographs which were produced by consent and accept that such rooms as are visible in those photographs appear to be of a reasonable size and unremarkably furnished. They obviously were not poky premises.

The short answer to the point that PW1 was offered a non-sexual massage is that whilst such an activity may prevent the conclusion that the premises were used

wholly

for the purposes of prostitution, it does not prevent them being used

mainly

for that purpose.

There was, it is true, a price list (Exhibit D6) which was displayed in the premises as well as notices near the entrance of the premises which related to non-sexual services but there was no evidence led that the services set out therein were in fact provided in the premises.

Any difference in rates quoted by the appellant to the various police officers in respect of the two charges simply demonstrates that different prices were being charged to different customers at different times

albeit that the illicit nature of what was on offer remained unchanged.

None of these factors, individually or cumulatively, in my view detracts from the fact that the irresistible inference to be drawn by looking at the evidence as a whole is that the premises were kept if not wholly, then, on the evidence before the magistrate, at the very least, mainly, for the purposes of organising or arranging prostitution. That evidence also establishes beyond reasonable doubt that the appellant managed those premises.

In the circumstances the appellant was rightly convicted on each charge. The appeal is dismissed and the appellant is to serve her sentence.

(A R WRIGHT)

Judge of the Court of First Instance

High Court

Ms Anthea Pang, Senior Government Counsel of the Department of Justice, for the HKSAR

Mr Andrew Bruce, S.C., and Mr Bernard Yuen, instructed by M/s Anthony Kwan & Co. for the first accused.

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