

HONG KONG / JUDGMENT

HKSAR v. WONG LOK FU MICHAEL

COURT

Court of First Instance

DECIDED

26 March 2007

CASE / FILE NUMBER

HCMA1063/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj HCMA1063/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 1063 OF 2006 (ON APPEAL FROM ESCC 1937 OF 2006)

BETWEEN HKSAR Respondent and WONG LOK FU MICHAEL (j+Y) F O R J U D G M E N T

AUTONUMOUT On 6 March 2007 I allowed the appellant s appeal against sentence on the 2nd charge by setting aside the Community Service Order () and substituting therefor a recognizance to be of good behaviour for 12 months in the sum of \$1,000. I also reduced the period of disqualification from driving from 15 months to 9 months. I also awarded the appellant \$5,000 costs of the appeal to be paid by the respondent. I said I would give my reasons on a later date and that I now do.

Background

AUTONUMOUT On 26 September 2006, the appellant pleaded guilty to one charge of crossing a continuous double white line on a road and to a 2nd charge of failing to provide a specimen of breath by a person suspected of having committed a traffic offence, contrary to section 39B(1)(a) of the Road Traffic Ordinance, Cap.

374. After the magistrate heard litigation advanced on behalf of the appellant, he remanded the appellant in custody for 14 days to obtain a community service order report. AUTONUMOUT On 28 September 2006, counsel appeared on behalf of the appellant and sought a review of the order remanding him in custody. The application for the review was rejected and this was what Mr Willam Lam, the magistrate, said when giving reasons for declining the review On the last occasion I have already remarked that a custodial sentence was appropriate. Only because the defendant had pleaded guilty, thereby saving public money and witnesses time, was I willing to see if he might be suited to do community service, but did not, nor was it proper for me to give any indication that whatever happens, I would eventually send or

not send him to jail. AUTONUMOUT On 10 October 2006, the magistrate fined the appellant on the 1st charge \$1,200 and on the 2nd charge he imposed a community service order for 80 hours and disqualified the appellant from driving for 15 months. AUTONUMOUT In his Reasons for Sentence, the magistrate quoted the case of HKSAR v. Ko Kwong Shing, HCMA665/2006, where the penalty imposed was a fine of \$6,000 and 18 months disqualification for failing to provide a specimen of breath having been suspected of committing a traffic offence. The appeal against that sentence was dismissed. The magistrate in his Reasons for Sentence said The Defendant has a clear record. Having heard the mitigation and read the letter written by the Defendant himself, the Court noticed that nobody was injured or killed in the traffic accident. However, (the purpose of) failing to provide specimen of breath for a screening breath test without reasonable excuse is obviously to avoid (being charged with) the offence of drink driving . Therefore, it is very serious. If the court of Hong Kong deals with the case by just imposing a lenient sentence, all the drink drivers in Hong Kong will refuse to do the screening breath test, as a result of which they can always avoid being charged with the offence of drink driving. Therefore, on the last occasion, the Court was aware that custodial sentence was inevitable. However, only because of the Defendant s frank admission of the charge, which has saved the public money and the time of the witnesses, was the Court willing to see on the last occasion if (he could be dealt with) in any other way. Grounds of appeal AUTONUMOUT The grounds of appeal against the sentence advanced by Mr Bell appearing for the appellant were that the sentence was too severe in the circumstances of the case and the sentence passed was dissimilar and more severe than the sentences normally passed in the courts for the offence. Counsel also advanced the ground that the remand of the defendant in custody for a period of two weeks between conviction and sentence was a further reason why the sentence eventually passed was too severe.

Conclusion

AUTONUMOUT In my view the sentence is manifestly excessive. In HKSAR v. Lau Shu Wing, HCMA1124/1998, Stock J, as he then was, said that first offenders who pleaded guilty to offences of this kind were normally fined and suspended from driving for 12 months and that this was as a matter of statistics and known practice AUTONUMOUT Lee appearing for the respondent pointed out that on 1 October 1999, the legally prescribed alcohol limit was tightened from 35 ug of alcohol per 100 ml of breath to 22 ug of alcohol per 100 ml of breath. In Lau Shu Wing (supra), a drink driving case, the appellant was involved in a traffic accident, he had 87 ug of alcohol/100 ml of breath, which was more than twice the then prescribed level of 35 ug/100 ml, the penalty was a fine of \$7,000 and disqualification from driving for 18 months. In HKSAR v. Law Man Lok, HCMA602/2002, another drink driving case, where the defendant had 90 ug of alcohol in 100 ml of breath (four times the prescribed level of 22 ug/100 ml), the defendant s car had hit a wall, the penalty of 240 hours of community service was reduced on appeal to 80 hours. In HKSAR v. Wong Man, HKMA1088/2006, the defendant had an alcohol level of nearly four times the prescribed level, she had collided with another vehicle but no one was injured, she had a clear record. On

appeal, the original sentence of 200 hours of community service was reduced to one of 100 hours.

AUTONUMOUT In the instant case, the appellant was aged 32, he was a university graduate and was employed as a property manager. He had no previous traffic or criminal records. On the application for the review it was mentioned that the appellant was the sole project manager of his company and was in charge of some 30 projects. He was the only project manager and was in charge of coordinating the works. By the time the appeal was heard by me, the appellant had already completed 64 hours of the total of the 80 hours community service passed on him. He had, of course, been remanded in custody for 14 days before he was sentenced. In drink driving cases where there are no fatalities or injuries caused to other persons, an immediate custodial sentence is extremely rare. This appellant was effectively sentenced to 14 days immediate imprisonment but the order was to remand him in custody pending a CSO report. This effectively deprived him of the chance to appeal against the 14-day sentence. As is well known, a CSO report could have been obtained without revoking the appellant's bail. Remands in custody pending the obtaining of reports

AUTONUMOUT In addition to what I have said above, I echo what Carlson DJ said in *Raymond Yan Kai Yip v. HKSAR*, HCMA95/2005. Calson DJ said I would wish to observe that a remand in custody should not be made before sentence unless it is very much on the cards that some form of custodial sentence is to be imposed, particularly in the case of someone of good character. If a remand in custody is ordered in cases where a custodial sentence is not likely then this may give the impression that the court is wanting to punish a defendant on an interlocutory basis without ever having the intention of ultimately imposing a custodial sentence.

AUTONUMOUT In *HKSAR v. Wong Chi Hung*, HCMA171 of 2005, Line DJ also expressed the same sentiments about remands in custody. In that case, for a charge of resisting a police officer in the due execution of his duty, the appellant was remanded in custody for two weeks pending a background report. When the report was to hand, he was released. Line DJ said this He had served his sentence [of two weeks imprisonment] but was effectively denied the prospect of appealing it and was obliged to serve it whatever the merits of his appeal against conviction or sentence. There is nothing on the transcript or in the papers before me that made a remand in custody for a background report appropriate. There is certainly nothing that justified the taking of such a course without giving the appellant or his lawyer the opportunity to be heard on the matter : yet that is what occurred.

AUTONUMOUT In the *Raymond Yan* (supra) case, Carlson DJ had observed that even though in theory a remand in custody pending sentence could result in an application for bail from the High Court, experience shows that the High Court will be less ready to interfere where the sentencing process is not yet complete, save in the clearest of cases. While in that case he was not prepared to criticize the magistrate, he remarked that remanding a defendant in custody pending reports could be a misuse of the process of remands.

AUTONUMOUT The practice of remanding defendants in custody pending the obtaining of reports which can be obtained whilst he remains on bail is to be deprecated. It is a short, sharp shock and has the effect of making the defendant hear the clang of the prison gates but it is a misuse of the court's power if the offence is one which on its merit does not call for an immediate custodial sentence. (Peter Nguyen) Judge of the Court of First Instance, High Court Mr Robert Lee Shiu Keung, SADPP, of the Department of Justice, for HKSAR Mr Adrian Bell, instructed by Messrs 1udk 1udk T U V &`#\$ i\$&`G & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft

Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=56501

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-wong-lok-fu-michael-2007>

Prepared on 28 October 2026 · Esheria