

HONG KONG / JUDGMENT

HKSAR v. WONG TAK KI

COURT

Court of First Instance

DECIDED

12 February 2007

CASE / FILE NUMBER

HCMA1030/2006

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bjbj HCMA1030/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 1030 OF 2006 (ON APPEAL FROM KCCC 2287 OF 2006)

BETWEEN HKSAR Respondent and WONG TAK KI (_&t) convicted after a trial in Kowloon City Magistracy of two offences of assaulting police officers while they were in the due execution of their duty and of one offence of possession of 0.13 grammes of heroin (being Charges 1 to 3 respectively). He appeals those convictions. AUTONUMOUT The prosecution case was that the then 16-year-old appellant was seen by two police officers, PC47586 and Sgt.48744 (PW1 and PW2 at trial), behaving suspiciously as he walked along a street in Kowloon. They intercepted the appellant, and when PW1 showed him his warrant card and revealed his police identity and said he wanted to search him, the appellant pushed PW1 away and ran into the entrance of a nearby MTR station. The two officers chased him, and PW2 caught him on a staircase inside the station. AUTONUMOUT The appellant struggled in an attempt to free himself from PW2 s grip, and when PW1 assisted PW2 in subduing the appellant, he continued to struggle and shouted out to by-standers, These are false police officers. Call the police quickly. PW1 told the appellant to stop struggling and shouting or he would be arrested for obstructing a police officer. The appellant however continued to struggle and was arrested. But as PW1 took out his handcuffs to place them on the appellant, the appellant used his feet to push PW1 s legs and PW1 fell to the ground (Charge 1). PW1 then managed to get up and place a handcuff on the appellant s left hand and PW2 held the appellant s right hand. The appellant then pushed PW2 against a wall (Charge

- 2) before both PW1 and PW2 finally managed to subdue and handcuff the appellant. AUTONUMOUT PW1 and PW2 then took the appellant to the entrance of a nearby laneway where PW1 formally declared the arrest of the appellant. Two other police officers then arrived. One was instructed to search for witnesses to the incident while the other, PC1359 (PW3 at trial) searched the appellant in the presence of PW1 and PW2. He found in the front trousers pocket of the appellant a small packet which contained the charged dangerous drug (Charge 3). The appellant was told he was arrested for possession of dangerous drugs and for

offences of obstructing and assaulting police and was cautioned. The appellant allegedly replied that he knew the officers had warrant cards, pistols and handcuffs but still did not believe they were police officers and that he had to push them away to prevent them arresting him. AUTONUMOUT The appellant was eventually taken back to Yaumatei Police Station where a post record of these statements was made by PW3 in his police notebook which was signed by the appellant. That notebook (Exh. P6) was admitted into evidence after a voire dire during which the appellant gave evidence to the effect that the post record was inaccurate and a fabrication and he had signed it as the result of oppression. AUTONUMOUT He gave evidence on the general issue also. His case was to the effect that he had been visiting his terminally ill grandmother in hospital and as he was in the street on his way home PW1, who was dressed in plain clothes, asked him what he had in his mouth. He ignored PW1 and kept walking. PW1 then grabbed him and pushed him against a wall and repeated the question. The appellant replied it was chewing gum in his mouth. The appellant then pushed PW1 and ran towards the MTR station. He then slowed to a walk. Immediately afterwards he was pushed to the ground by PW2 and there was a struggle. He did not think PW1 and PW2 were police officers and shouted out to that effect and asked people to call the police. PW1 and PW2 shouted back that they were police officers, but he still did not believe them and continued to struggle and shout out. He was not sure if he had kicked anyone. He was eventually subdued and taken to the entrance of a rear lane where PW1 searched him but found nothing. Two uniformed officers arrived and told him that the others were police officers and then left. He was then taken into the lane and saw a number of officers there. He was accused of buying drugs but denied this. Inside the lane another officer searched him and claimed to have found a packet of drugs in his trousers. He had never seen the packet before. AUTONUMOUT Subsequently, he was taken to the police station where Exh. P6 was made. In that regard, the appellant's case was that he had signed Exh. P6 as the result of oppression and intimidation by PW1 and PW3, and that it did not reflect the truth of these events. AUTONUMOUT The relevant part of Exh. P6 is the post recording of the statement of the appellant allegedly made at the scene, to the effect Ah Sir, I saw that they have police warrant cards, pistols and handcuffs, but I still did not believe that they were police officers. I still had to push them off. I refused to be arrested by him. However, I don't want to talk about the white powder. AUTONUMOUT The grounds of appeal advanced on behalf of the appellant by Mr Surman of counsel can be fairly summarized as follows : Ground 1 That there is a lurking doubt as to the conviction. Ground 2 The magistrate in admitting Exh. P6 failed to place appropriate weight on the failure of the police to comply with the Rules and Directions issued by the Secretary for Security for the Questioning of Suspects (the Rules and Directions). Ground 3 The magistrate failed to resolve discrepancies between the evidence of the prosecution witnesses. I will deal briefly with the 2nd and 3rd grounds. Ground 2 AUTONUMOUT The breaches of the Rules and Directions alleged are minor. The first breach involved the failure of the police officers to make a record of events while they were actually in the laneway with the appellant. Mr Surman pointed out they had ample time to do so. He alleges this is a breach of Rule II which is in these terms II. As soon as a police officer has evidence which would afford

reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions or further questions, relating to that offence. The caution shall be in the following terms:- You are not obliged to say anything unless you wish to do but what you say may be put into writing and given in evidence. When after being cautioned a person is being questioned, or elects to make a statement, a contemporaneous record shall be kept, so far as is practicable, of the time and place at which any such questioning or statement began and ended and of the persons present. AUTONUMOUT I note that Rule II does not require any more than a record being made of the time and place at which the appellant's statement began and ended and the person's present. It does not require, in its terms, a record of the statement itself being made. Further, I do not think any substantive complaint could often be made when a police officer regards the scene of an arrest as being an impracticable place to make a contemporaneous record of the time and place at which any such questioning or statement began and ended and of the person's present and elects instead to do so subsequently at a police station. AUTONUMOUT In the present case, although apparently no officer made a record of these matters in his notebook, I accept there was ample time to do so. But even if, for that reason, there was a breach of Rule II, as Mr Surman properly conceded that breach in itself did not result in any unfairness to the appellant and was not a matter therefore to which the magistrate needed to give weight. AUTONUMOUT The other complaint of Mr Surman regarding the Rules and Directions is that Direction 1(a) was breached, which states that police notebooks should only be used for taking statements when no other stationary is available. Again, there was no discernable prejudice suffered by the appellant in respect of PW3 making the post recording of the appellant's alleged statements at the scene in his notebook (in the event this Direction was breached) and it similarly was not a matter to which the magistrate had to give weight. But I have considerable doubt in any event as to whether this Direction was breached. In my view, this Direction relates only to a formal statement taking exercise undertaken between a police officer and a suspect and does not apply to the confirmation by a suspect of the accuracy of the content of a post recorded statement. AUTONUMOUT In any event, as I say, even if there were breaches of the Rules and Directions, no prejudice was suffered by the appellant and no unfairness resulted. Any breaches were therefore of little weight in determining the admissibility of the post recorded statement of the appellant and this ground had no merit. AUTONUMOUT As to Ground 3, in my view, the magistrate properly dealt with the perhaps run-of-the-mill inconsistencies evident in the police witnesses' evidence. She said 19. There were some discrepancies between their various accounts. But, in my view, these were minor and did not cause me to doubt their veracity. They were each cross-examined at great length, which affords opportunity to assess each witness. Much was made about the exact position the Appellant was at when he was intercepted by PWs 1 and

2. Both PWs 1 and 2 were referred to the photographs exhibited. It was suggested that the place of interception described by both of them was different. I did not find this. When one looks at all the photographs produced, it is quite clear what both PWs refer to as the place of

interception and they are each referring to the same place. The Appellant in his testimony also indicated that he was intercepted by PW1 in more or less the same place. The Appellant was intercepted by PWs 1 and 2 because they found him to be suspicious. They were both in the due execution of their duties at the material time, and had properly identified themselves as police officers to the Appellant. AUTONUMOUT Assessment of such inconsistencies and the weight to be given them relates to the determination of the credibility of witnesses and is pre-eminently a task for the trial court. In my judgment, there was nothing to suggest the magistrate was in error in this regard and there is no merit in this ground. Ground 1 AUTONUMOUT The first ground, as Mr Surman concedes, is a difficult ground to establish. But perhaps a strong point which can be made in support of this ground is that for 65 minutes the appellant was detained in the vicinity of the laneway (i.e. at its entrance or within it) when there was no evidence given by any of the three prosecution witnesses PW1, PW2 or PW3 as to why this was so. AUTONUMOUT On the face of the evidence given by PW1, PW2 and PW3 (the only prosecution witnesses) there was no apparent need for the appellant to be detained at or in the laneway for that period of time. During that time, according to PW1, PW2 and PW3, apart from the two searches of the appellant and his arrest and caution, nothing else was done except that PW2 asked the appellant whether he was at school or had a job and when the appellant replied he was at school further asked him what grade he was in. There was no other evidence as to anything else being said and done to the appellant whilst he was at or in the laneway. The police evidence suggested he was just guarded there for the balance of that period of time and when he said he was tired was allowed to sit down. AUTONUMOUT On the face of it, it is somewhat unusual for a 16-year-old boy to have been detained for that period of time when the evidence strongly suggested that the events the police witnesses described as having taken place during this period of over one hour, would have occupied no more than 10 minutes or less. That compares with the defence case at trial which alleged that a series of allegations were put to the appellant in the laneway all of which were denied by him. AUTONUMOUT In cross-examination of the police officers, it was put to them that their evidence of the few things that had occurred in the laneway could not be correct given the time period that the appellant had been detained there. AUTONUMOUT It is true that at no time was anyone of PW1, PW2 or PW3 asked specifically why the appellant was detained at or in the laneway for that period of time. But even allowing for that, and particularly considering that one of the issues in the case was the voluntariness of the signed post record of the statements of a 16-year-old schoolboy, it seems to me that some steps should have been taken at trial by prosecution counsel or even the court itself to determine why it was necessary for the appellant to have been detained in the vicinity of the laneway for so long. AUTONUMOUT But in addition to the period of the detention of the appellant in the laneway being perhaps relevant to the voluntariness of his signing the post record of his statements, it was plainly relevant to his allegation that the drug packet found on him was planted while in the laneway by PW3. AUTONUMOUT This is an issue which should have been resolved at trial but was not. During defence counsel's submissions, this was put This young boy was banged up in an alley for over an hour by these police officers. Why? Why is he there over an

hour? There has been no explanation for that at all. Your Worship, I would suggest that regardless of all the other discrepancies that I have touched on, that incontrovertible, accepted and agreed period of time, which is subject to a lot of confusion and different allegations about what happened to the alleyway, but he was there. And he was there for an hour and five minutes, and what happened? And why? Nobody has told us why. That alone should give us pause for thought and for all of us to say, You know, I am really not very comfortable with this and I can't be sure. AUTONUMOUT But the magistrate's reasons for her findings made no mention of the matter. It may well be that there was a simple reason for the delay in taking the appellant to the nearby Yaumatei Police Station. There may have been no available police vehicles, or the police team may have been instructed to wait in the lane. But there was simply no such evidence. AUTONUMOUT In my judgment, the lurking doubt Surman relies upon really concerns the failure of the trial process to have properly addressed this quite obvious issue. I appreciate that it is only in comparatively rare circumstances that such a basis for an appeal succeeds, but after considering this matter quite carefully I have concluded, that the failure in the trial process I have referred to does lead me to have a lurking doubt as to the safety of the conviction of the appellant of the 3rd charged offence of possession of the heroin packet. AUTONUMOUT The question which then arises is whether the remaining convictions of assaulting the two police officers, PW1 and PW2, can survive the doubt evident in the appellant's conviction in regard to the 3rd charged offence. AUTONUMOUT The appellant's own evidence was that he had seen the handcuffs carried by the arresting officer, but had not been shown a police warrant card or seen that both officers carried guns. He did not believe they were policemen until their identity was confirmed by two uniformed policemen. AUTONUMOUT It is true that the events of the first two charges, i.e. the assaulting of PW1 and PW2 by the appellant occurred before the appellant was taken into the laneway. But viewing the case as a whole, I do not think it right that the first two charges should stand separately from the 3rd charge. That is because the events in the laneway and the detention in the laneway of the appellant occurred prior to the making of Exh. P6 and the appellant's signing of that notebook entry. His admissions in that document, which were disputed at trial, formed an important plank in the case against him on the first two charges because by admitting in the terms contained in Exh. P6 that he knew the two people carried police warrant cards, pistols and handcuffs he was effectively admitting, as the magistrate found, that he knew the people he was struggling with were police officers. Further, the unusual length of time he was detained in the laneway for no explained reason casts an overall pall on the general credibility of the evidence of the officers involved, sufficient in my view to extend the doubt concerning his conviction on the 3rd charged offence to the remaining two convictions on the 1st and 2nd charges also. AUTONUMOUT For these reasons, the appeal is allowed, the convictions are quashed and the fines imposed on the appellant are set aside. I do not propose to order a retrial, as it would be inappropriate in the circumstances to do so. (M.A. McMahon) Judge of the Court of First Instance, High Court Ms Rosaline S.Y. Leung, SGC of the Department of Justice, for the Respondent Mr Giles Surman, instructed by Messrs Ellen Au & Co., assigned by DLA, 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

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