

HONG KONG / JUDGMENT

HKSAR v. WU CHI KEUNG

COURT

Court of Appeal

DECIDED

6 July 2007

CASE / FILE NUMBER

CACC76/2006

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Before : Hon Stuart-Moore, VP, Stock JA and Beeson J in Court Date of Hearing : 6 July 2007 Date of Judgment : 6 July 2007

J U D G M E N T

Hon Stock JA (giving the judgment of the Court): The Charges AUTONUMOUT The applicant was one of two defendants convicted by Judge Yuen in the District Court on 27 January 2006 of administering a drug to facilitate an unlawful sexual act, contrary to section 121 of the Crimes Ordinance, Cap.

200. He was sentenced to a term of four years imprisonment and he now seeks leave to appeal against conviction. There is on file an application for leave to appeal against sentence but we are informed today that it is not pursued. AUTONUMOUT There were three defendants, of whom this applicant was the second (D2) and there were two charges: that all three on 30 May 2005 inside Room 28 of a karaoke club in Mongkok caused a girl to take a drug with intent to stupefy or overpower her so thereby to enable anyone to do an unlawful sexual act with her; and that all three, inside the same room, indecently assaulted that girl. AUTONUMOUT The second charge was stated on the charge sheet to be an alternative to the first. On the facts presented it is difficult to see how that was an alternative. Be that as it may, no verdict was returned on the second charge and that was left on the file. D2 and D3 were convicted upon the first charge; D1 was acquitted.

Background

AUTONUMOUT The facts revolve around seven personalities, all of whom, save for this applicant, were teenagers. The complainant (PW1), aged 14 years at the time of these events, was in the company of a girlfriend and schoolmate, PW2, also aged 14 years, on the evening of 29 May 2005 when she was invited by a young male aged 16 years, PW4, to go to a karaoke session. PW4 and D1 (aged 15 years) met the two girls who had been joined by PW3, another young male aged 17 years, a former boyfriend of the complainant. D1 told them that they would be joined at the club by his uncle, this applicant, and there it was that the applicant, then aged 26 years, and D3 (aged 18 years) joined them. AUTONUMOUT Whilst at the club, the group was first accommodated in room 22 and later in room

28. They played games and drank beer. A CCTV camera was located in the corridor outside room 28 and the trial court had the advantage of the video images showing who, throughout the period of the group's sojourn at the club, went in and went out of the room.

AUTONUMOUT A substantial part of the detailed Reasons for Verdict is devoted to an analysis of the movements of members of the group, as shown by the CCTV record but, for present purposes, the following facts suffice: At some stage before midnight, according to the evidence of PW3, the applicant gave him a packet containing a substance and told him to lace the drink of a girl with it. He refused to do so and, according to his evidence, gave the packet to D3. He later saw D3 put something in the applicant's shirt packet. Not long thereafter D3 told him that he, PW3, was required by the applicant to leave the premises, which he did, although he was concerned about what might happen to the complainant and he stationed himself nearby at a 7-Eleven store and contacted the complainant's girlfriend, PW2, to try to have the complainant leave the karaoke bar. The tape recording showed the complainant walking steadily in the corridor outside room 28 at about two minutes before midnight but when she was shown five minutes later, her gait was unsteady. The tape shows that at 1.11 a.m. D3 walked the complainant back into the room, she still in an unsteady condition. The applicant was then in the room. D3, PW2 and PW4 left the room at about 1.15 a.m. with the complainant and the applicant inside. It is evident from the film that D3 then kept guard outside the door, occasionally peeking through the glass into the room and occasionally preventing others from entering. In due course, he, D3, also entered and it was not until some considerable time after that D3 and the applicant exited, to be followed by the complainant who staggered out. The complainant was then taken out of the club building by her friends but in the company of D3. D3 wanted to take her on board a taxi but she refused to go with him alone, and insisted that she be accompanied by one of her friends. It is apparent that by the time she came to be outside the building, she had lost control of herself and was being argumentative and talking nonsense. She banged her head against a wall. She was eventually taken to the Queen Elizabeth Hospital. At the hospital, she was examined and apart from the bodily injuries upon her, the consequence of her own conduct in banging herself, a substantial quantity of methamphetamine was detected in her blood. The police visited the home of D2. There, from his bedside, they seized a bottle containing 17 mg of methamphetamine. When this bottle containing liquid was seized, a police officer asked the

applicant what kind of liquid it was, and he replied: Several drops were dripped for the girl to drink last night. AUTONUMOUT The complainant's testimony was that after PW2 and PW4 left room 28, she played some game with the applicant but then began to suffer a headache and to feel dizzy and became, as she described it, powerless. She sat on a chair and the applicant then lifted her and carried her to a corner of the room where he tried to touch her private parts but she pushed his hand away. He nonetheless lifted her clothes and inserted his hand into her private parts and then fondled her breasts. At that stage, according to this testimony, D3 came over and forced open her mouth, whereat the applicant placed his penis in her mouth, moving it back and forth. As for her own reaction, she was unable to move. Nonetheless, she insisted, she was conscious and was aware of what was happening. AUTONUMOUT PW2, PW3, PW4 gave evidence, as did an expert about the effect of methamphetamines. AUTONUMOUT None of the defendants gave evidence at trial. Grounds of Appeal (1) The effect of the methamphetamine consumed. AUTONUMOUT The first ground of appeal is an attack on the judge's conclusion about the reliability of the complainant's evidence as to what took place in room

28. That reliability is said materially to have been undermined by the expert evidence of Professor Kenneth Lee, a professor of pharmacology at the Faculty of Medicine of the Chinese University of Hong Kong. AUTONUMOUT Professor Lee's testimony was to the effect that the substance consumed by the complainant was a powder readily soluble in water and alcohol; that for oral ingestion it would normally take between 15 to 20 minutes for its effect to be felt; and that its short-term effect after consumption would be one of several hours, about five to six. He concluded from the amount of the drug discovered in the blood of the complainant upon examination at Queen Elizabeth Hospital, the complainant's weight and age, and the time between ingestion and sampling, that there had been an intake in the region of 500 mg of the drug. This far exceeded the normal dose of about 20 to 25 mg; so much so, that he referred to the 500 mg in fact ingested as a mega dose. AUTONUMOUT Almost all of the cross-examination of the Professor was intended to elicit from him that so great had been the consumption of the drug that the complainant must, at the time of the suggested indecent assaults, have been hallucinating in the sense that she could not distinguish fact from illusion. The judge was satisfied, we see from her Reasons for Verdict, that at the material time the complainant was not hallucinating at least not in that sense and the contention advanced on behalf of the applicant is that the conclusion cannot sit rationally with the Professor's evidence. AUTONUMOUT In her Reasons for Verdict the judge said: I accept PW1 was not under hallucination throughout the time when she was inside the Karaoke. The acts of indecency were in fact practised on PW1 only shortly after the drug was administered on her. PW1 gave a clear and vivid recollection of the events. I find no sign nor symptom of confusion nor hallucination on PW1 during her indecent assault attacks. At the time when acts of indecency were being performed on her PW1 was simply experiencing the loss of her physical strength to put up normal resistance against the invasion. (Emphasis added). It is the first sentence of those passages which is said to be at fault. AUTONUMOUT The testimony of the Professor included the following: I think 500 milligrams is enough to

cause an individual to indulge in such a level of hallucination that he or she would be totally unaware of the environment. the individual would be in such an intense hallucination that he or she would not take any assault as dangerous events. He could be hallucinating that the person who is performing all the acts [was] one that she likes or someone she knows very well. Court: But she still has the sensation. She s realized that she s either being touched or whatever, but her feeling . A: Yes, because this not an anaesthetic and therefore she would still have a consciousness, but her perception would be entirely altered That means if someone is trying to have sexual activities with her, she would know. (pp. 744-745 Emphasis added). Q. And what about a person who is under the influence of [methamphetamine]? Their perception pf what others might be saying or doing around them if they are indeed hallucinating at the time, is it likely to be distorted? Well, I suppose if somebody is trying to attack her sexually then . Q. Well, I didn't say that. . All I m saying is if I, for example, am under the influence of [methamphetamine] and I m suffering from some degree of hallucination and someone ... is trying to tell me to do something or indeed prevent me from doing something. Is it possible that I wouldn t have a clue what it is that they are trying to do? A. Yes, you would you would be aware of what people are doing. . [if we are talking about a mega dose of 500 mg] it would be a very, very deep level of hallucination. This mega dose would get her into a hallucination that she would not be aware of or she wouldn t be able to distinguish people around her. She may be aware of what things are happening. (pp 760-761; emphasis added). Q. What is an abuser likely to get confused about? A. For example, she wouldn t know exactly what sort of environment she was in although she may be still alert . She may not be exactly recalling what s the name of the disco, for example. before she took the methylamphetamine, she would be fully conscious and she would be fully aware of what sort of environment that she is in. And then after taking the methylamphetamine, she would develop some confusion but then this impression of what environment she is in is originally there. It doesn t make an individual become forgetful. . [With a mega dose, the confusion] would develop faster than usual. I think I state in my report that it takes 15 to 20 minutes if methylamphetamine is... ingested. And so if you take a mega dose, then this time period would be shorter. (page 763). this mega dose would produce an intense hallucinating effect . Q. Is it fair to say that because she is hallucinating, anything said by the victim is likely to be based upon those hallucinations but perhaps unreliable? A. Well, if she could recall what happened, yes, she could be telling what actually she subjectively had experienced ... She could be recalling what she hallucinated. Q. And it s quite possible that what she hallucinated never happened. A. Yes, that could be the case, yes. (page 765). [In re-examination] A. the problem is I m not a psychiatrist and I have never been trained in psychiatry before. So my interpretation of the word [hallucination] is simply a distortion of the message you receive from the external environment. But as I said, you don t imagine something that does not exist and assume that it is happening. So my limited knowledge of the word is there indeed is something happening but then the events that follow or even the other party can be interpreted as something else. . Q. That is, hallucination does not equate to imagination. A. Hallucination is not illusion. Q. You don't hallucinate something out of the blue. A. Yes illusion is something you create totally out of the blue. That something may or

may not be in existence. AUTONUMOUT The effect of this evidence, as we read it, is that it was highly likely that shortly after ingestion of the methamphetamine, the complainant would have been hallucinating, but that hallucination in this context is not to be equated certainly not necessarily so to an illusion of what had happened, although that was a possibility. AUTONUMOUT In the face of this evidence, in combination with all the other testimony, the judge might have reached one of three conclusions: that the evidence demonstrated that the suggested sexual assault took place shortly after ingestion of the drug, before the inevitable onset of its hallucinatory effect; that whenever the hallucinating effect commenced, it was not such an effect as to derogate from the reliability of the complaint of sexual assault, and this so especially in the light of the strong circumstantial evidence suggesting that such an assault did in fact take place; or that the hallucinatory effect may have taken root at the time of the suggested sexual assault and that its nature was or may have been such that no reliance could be placed upon the complainant's assertion of assault and that in determining whether such an assault was proved, her testimony to that effect was to be ignored. AUTONUMOUT It would appear that it is the first of these possible conclusions at which the judge arrived. The suggested problem with that finding is that the judge concluded that the complainant must have ingested the drug about 15 to 20 minutes before she was seen at 1.04 a.m. to be unsteady, that PW2 and PW4 left room 28 at about 1.15 a.m., so that the sexual assault, if it took place, must have been inflicted about half an hour, on this analysis, after ingestion of the drug. If that is so, then the testimony of the expert, on its face, would suggest hallucination by the time of the suggested assault. AUTONUMOUT A number of factors must be remembered. The testimony of the expert was testimony as to what, generally, he would expect to happen, this including estimates of timing. In this regard, the complainant described an assault that took place immediately after she was left alone with the applicant in room

28. But, importantly, her evidence did not stand alone. There was a great deal that supported what she had to say. That she was given a drug unbeknownst to her was beyond doubt. That she found herself shortly after the administration of the drug, in room 28 alone with the applicant, and thereafter alone with the applicant and D3, was also beyond doubt. There was testimony, accepted by the judge, that the applicant himself had suggested putting drugs in the girl's drink; and one has to ask what possible purpose in the circumstances there could be for so doing other than to take sexual advantage of whomsoever was thus drugged. There was evidence, which the judge accepted as she was bound to, because it was there on the video recording that whilst the applicant and the complainant were alone in room 28, D3 was preventing others from entering the room. There was evidence that upon arrest, D2 admitted, when methamphetamine was found by his bedside, that the selfsame drug had been administered to the girl. AUTONUMOUT Given all the supporting evidence, overwhelming in its effect, all of which was noted by the judge in the course of her Reasons for Verdict, and given too the clarity of the complainant's testimony, and her conduct immediately after her exit from room 28, conduct that was consistent with her complaint, to all of which the judge expressly referred, the judge was, in our opinion, entitled to conclude

that the girl's testimony about the sexual assault was not illusory. The judge chose to suggest that it followed that at the material time, hallucination could not have set in, and in support of this conclusion she noted that the conduct of the girl after her emergence from the room seemed reasoned and not confused. In her conclusion that the complainant was not hallucinating whilst in the room with D2 and D3, the judge may or may not have been correct; but in our judgment it matters not, for she could equally have concluded that such a hallucination as had set in did not affect the reliability of the complainant's testimony.

AUTONUMOUT One is in any event bound to question the relevance of the cross-examination of the Professor and the evidence thereby elicited to the conviction on Charge 1 with which we are concerned. The issue with which we are concerned is whether the evidence sufficed to establish beyond reasonable doubt that this application was party to the administration of a drug with intent to stupefy the complainant so as to facilitate a sexual act, and whether in arriving at the conclusion that the evidence did so suffice to establish that particular charge, the judge erred. The suggested illusion under which the complainant was said by the defence to have suffered was as to the alleged acts of indecency. That drugs were administered to the complainant was beyond doubt indeed, this cross-examination depended for its suggested efficacy upon that very fact; and there was overwhelming evidence, to which we have referred, that this applicant was party to that administration. In the factual circumstances which prevailed on the evening in question there could, we are satisfied, have been only one reason for administering the drug, which is the reason that was asserted by the first charge. Although we are satisfied that on the evidence in this case, there was ample from which to conclude that sexual acts took place, it was not a condition precedent to proving Charge 1 that an indecent act indeed took place; yet it is that to which the suggested hallucination issue has been directed. (2) Acquittal of D1 AUTONUMOUT D1 was acquitted; but D2 and D3 were convicted upon Charge

1. The complaint that forms the second ground of appeal is that the acquittal of D1 is incompatible with the judge's finding that the complainant provided an accurate account of events and with a further finding that she was not hallucinating in room 28 after ingestion of the drug. It is said to be inconsistent because the evidence of the complainant included the comment that D1 was sitting there, watching the whole course of incident; whereas the judge held that despite the complainant's evidence a possibility that D1 might not be inside room 28 during the 10 minutes of [the complainant's] indecent assault. I accord D1 the benefit of the doubt that it is possible for [the complainant] to have remembered wrongly about the time of D1's presence in the room. If D1 was not present during the indecent assault, one cannot infer D1 must have knowledge about the fact that the administration of the methamphetamine on [the complainant] must be for the purpose of practicing unlawful sexual act on her. AUTONUMOUT The point taken is, with respect, not a good one. The finding that the complainant might have been in error as to D1's presence throughout the episode does not, in logic, lead to the conclusion that the remainder of her testimony as to that episode was unreliable. It is clear from the testimony which we have read that, not surprisingly, the complainant's concentration was directed at those who were assaulting her,

namely, this applicant and D3. She never suggested that D1 took part in that assault. On any view of her evidence, D1 was, during that time, further from her than the others.

Furthermore, when asked in cross-examination whether whilst she was inside room 28 D1 was going in and out of the room, she responded: I have no idea ; and when it was put to her that D1 had not been in the room for a long time, she accepted that proposition. So the judge's conclusion is entirely supportable. The only comment of the judge in this regard with which we would respectfully disagree is her suggestion that if D1 had knowledge of the administration of the methamphetamine he might not have known that it was for the purpose of practising an unlawful sexual act: we fail to see what other inference there was to draw. (3) The possible culpability of others. AUTONUMOUT The judge came to the conclusion that the irresistible inference to be drawn from the testimony was that D2 and D3 acted in concert to cause [the complainant s] drink to be laced with methamphetamine, thus causing [her] to ingest the drugs in question. In this conclusion, the judge is said to have erred in that she failed, so it is contended, to consider the possible involvement of D1 and PW4. AUTONUMOUT PW4 was the person who originally telephoned the two girls to suggest the outing at the karaoke club. The judge said that she viewed his testimony with reservation . She had noticed him walking in the corridor outside room 28 at the material time and look through the door for a while but not enter. She viewed this as suspicious. She thought that he was more involved in the plan that had been laid for that night than he had been prepared to concede. In relation to D1, the point is made that he too was not excluded as the possible perpetrator of the drug administration. AUTONUMOUT Though the judge expressly excluded the involvement of PW2, and PW3, it was not necessary for the judge to exclude the involvement of all those at the club other than D2 and D3, before she could properly find that this applicant either himself administered the drug or was party to its administration for the illicit purpose alleged. All she had to do was to determine whether it was proved beyond reasonable doubt that he, whether alone or acting jointly with others, was responsible for that act. That is what she did, and, on the basis we have stated, there was overwhelming evidence that he was responsible. This point fails. Conviction: conclusion AUTONUMOUT Accordingly, the application for leave to appeal against conviction is dismissed. Sentence AUTONUMOUT The applicant also sought leave to appeal against sentence. That application is not pursued though no notice of abandonment has been filed. From what counsel has told us, we are satisfied that the applicant has for some considerable time not intended to pursue it. It is therefore dismissed. AUTONUMOUT We need however, for the benefit of future cases of this serious kind, to say something about the sentence imposed and the approach to it, and to draw attention to some of the material considerations when sentencing for section 121 offences. AUTONUMOUT The judge sentenced the applicant to a term of four years imprisonment. At the time of the offence he was aged 26 years; the complainant 14 years. He is not a person of previous good character, having been sentenced in 1996 for the offence of assault occasioning actual bodily harm. The judge had before her a probation report and it reveals that when interviewed by the probation officer he suggested that he had been framed for the offence by the police. AUTONUMOUT The judge took the view, as she was entitled to, that the applicant was the

prime mover in the offence. The judge commented that it was an aggravating feature of the case that the offence was premeditated; that whilst the daily dosage of methamphetamine was usually only 20 to 25 mg, a quantity vastly in excess of that had been administered. The complainant had had to be hospitalised for two weeks and had to be afforded psychiatric and psychological counselling thereafter. The evidence of the professor was that a massive dosage of that amount increased the chance of post-traumatic depression and subjected the victim to a possible risk of addiction to the drug and of psychological injury. The judge noted too that the girl was subjected to an act of oral sex. Although the conviction was throughout for the offence of administering drugs in order to facilitate an unlawful sexual act, the judge was perfectly entitled indeed bound to take into account the fact that an unlawful sexual act in fact took place. AUTONUMOUT The judge started with a sentence for the act of indecency. For those acts she adopted a two and a half years starting point and added 18 months to that because of the administration of the drugs. AUTONUMOUT In commencing with the guidelines, or a comparison with other sentences, for indecent assault and then using the administration of the drug as a mere aggravating feature, the judge, in our opinion, adopted an inappropriate approach. The prime offence, the offence for which the applicant and D3 were convicted, was the section 121 offence, a very serious offence in its own right and, importantly, one that carries a maximum term substantially in excess of the maximum for the crime of indecent assault. That is the offence, the drug offence, upon which she should in our judgment have commenced her analysis. Such an approach ought then to have taken full cognizance of the statutory maximum, the policy behind the legislation, the dangers and the particular iniquity of the act proscribed, and then the particular facts of the case, taking into account, of course, that on the facts of this case there was a sexual assault. Had such an approach been adopted, we rather think that the resulting sentence would have been materially different. AUTONUMOUT In our judgment, the sentence imposed by the judge was manifestly inadequate. The maximum term permitted by statute for the offence under section 121 of the Crimes Ordinance is one of 14 years imprisonment; more than the maximum offence of 10 years for indecent assault. That that is so should come as no surprise, the legislature obviously and understandably taking a particularly serious view of the premeditated and surreptitious act of undermining the will of an intended victim. The act thus proscribed has to it added pernicious elements, namely, the supply of a drug to someone who does not wish to receive it, let alone ingest it; the possibility of danger to the health or even life of the victim; and the additional possibility of triggering a taste for the drug. Each of those considerations apply in this case but this case bears the further particular aggravating features, first, that the person to whom the drug was administered was very young, administered by a mature adult; secondly, that the dose administered was great, thereby putting the girl at serious risk in the immediate term, and at long-term risk of psychological damage; and thirdly that the nature of the indecent act was particularly vile, going, as it did, significantly further than touching of her private parts. This offence was a bad one of its kind, and in our judgment warranted a term of at least six years imprisonment. AUTONUMOUT We wish, for future reference, to make a further point. It is a particularly unattractive feature of the trial and of this appeal that the applicant has sought

to use the debilitating effect caused by his own administration of a large quantity of the drug to the girl to undermine the reliability of her account of the sexual act performed upon her. Where a court is satisfied beyond reasonable doubt that a defendant is guilty of the section 121 offence, but the prosecution fails to prove that a sexual act in fact took place and that failure is attributable to the state of mind induced by the drug administration, the sentence ought not to be less than if an unlawful sexual act were proved. Were it otherwise, a person guilty of the section 121 offence would benefit from his own crime. (M. Stuart-Moore) Vice-President (Frank Stock) Justice of Appeal (C-M Beeson) Judge of the Court of First Instance Mr Francis M. B. Cheng, instructed by Messrs Littlewoods, assigned by DLA for the Applicant Mr IC McWalters, SC, DDPP of the Department of Justice for the Respondent PAGE - PAGE - A B C D E F G H I 1udk 1udk &`#\$ % ^,X v?\_. J[ 6 vx@n .l^L k1B[p "E)`r c@sH <~j6 f8&s J[6 .l^L k1B[v?_. "E)` f8&s & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title ke7d ke7d ke7d Microsoft Word Document MSWordDoc Word.Document.8

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