

HONG KONG / JUDGMENT

HKSAR v. YIP SIN WAH

[2024] HKCFI 139

COURT

Court of First Instance

DECIDED

11 January 2024

CASE / FILE NUMBER

HCMA253/2022

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HCMA 253/2022

[2024] HKCFI 139

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO 253 OF 2022

(ON APPEAL FROM KCCC 35/2022)

BETWEEN

HKSAR

Respondent

and

YIP SIN WAH

Appellant

Before: Deputy High Court Judge Woodcock in Court

Date of Hearing: 12 October 2023

Date of Judgment: 11 January 2024

J U D G M E N T

The appellant was found guilty after trial of one count of criminal intimidation contrary to section 24 (a)(i) and 27 of the Crimes Ordinance, Cap 200. The particulars of the offence were that on 22 February 2020, in Hong Kong, the appellant threatened Miss X with injury to her reputation, with intent to alarm her.

The appellant pleaded not guilty and was tried before deputy magistrate Chan On-ting. On 27 May 2022, the magistrate found the appellant guilty and on 24 June 2022, the appellant was sentenced to 80 hours community service.

The appellant now appeals against her conviction only. Mr Andrew Bruce, SC leading Mr David Khosa represents the appellant.

Prosecution Case

The appellant was married to a Mr Yip. Mr Yip and Miss X had an extramarital affair. Both Miss X and Mr Yip were members of a WhatsApp chat group, which had more than 40 participants called Legacy Sharing Group (“Legacy”). Miss X was the only prosecution witness.

On 22 February 2020, a WhatsApp message sent from Mr Yip’s phone number to the “Legacy” group read, “Being a wife, I have given 4 chances; the cheating couple continue to be shameless, still lying even until last night, pushing people over the edge.” Seven photographs then followed this message to the whole group. One photograph was with Miss X and Mr Yip kissing whilst five were of Miss X in the shower naked; her upper body can be seen.

These photographs were followed by three more messages to the “Legacy” group from Mr Yip’s phone number. Exhibit P3 and 3A are screenshots of those messages and photographs.

The administrator of that “Legacy” chat group removed all members and recreated same chat group using a different name but added the same members.

Miss X within 15 minutes of the last messages called Mr Yip’s phone number. The prosecution’s case is that the appellant answered Mr Yip’s phone and it was during this phone call she threatened Miss X; threats which are now the subject of this charge.

The appellant said words to the effect that “Bitch, you are finally calling” and after hearing Miss X ask the appellant to delete the photographs from the “Legacy” group, she said she wanted her dead even if it meant the appellant ended up in prison. She said she would not spare Miss X and wanted her reputation and credibility ruined. She would keep sending photographs. Other swear words were said during the phone conversation that lasted 128 seconds. Within 10 minutes of this phone call ending three more photographs were sent from Mr Yip’s phone number to the new and renamed chat group with a message naming Miss X.

Defence Case

The appellant elected not to give evidence. The defence case was that the appellant was not the person who sent messages on Mr Yip's phone to the "Legacy" WhatsApp group either before the phone call or after it. When Miss X called Mr Yip's phone number after finding out about the messages and offending photographs and was threatened, it was not by the appellant.

Miss X was cross-examined about her evidence that she recognised the appellant's voice. Her evidence on voice identification was an issue. It was the defence case that this identification of the appellant's voice was unreliable, incredible, fabricated and a figment of her own imagination.

Reasons for Conviction

The magistrate identified the issues. The first issue was whether the appellant was the person who spoke to Miss X on the phone when Miss X called Mr Yip's phone number. The second issue was whether the words uttered by the appellant during a phone call amounted to threats with injury to Miss X's reputation. The third issue was whether the appellant made the utterances with intent to alarm Miss X.

She found Miss X credible and reliable in her evidence and her recollection of the contents of the phone call. She carefully considered the evidence of voice recognition. She considered whether the identification of the appellant by Miss X by her voice from previous meetings was correct.

The magistrate was satisfied that the quality of Miss X's voice recognition evidence was good and it was beyond doubt, credible as well as reliable. The magistrate accepted it in its entirety.

Having found it was the appellant who uttered those words to Miss X, she considers whether the words spoken as well as the threat of sending more nude photographs were sufficient to prove the offence beyond reasonable doubt. The magistrate found the threats clearly amounted to an intention to threaten injury to Miss X's reputation.

It was clear that nude photographs and intimate photographs of her and Mr Yip once sent out to such a large group of people would be detrimental to Miss X's reputation. Threatening to keep sending such photographs undoubtedly amounts to threats with injury to Miss X's reputation.

In relation to the last issue, the magistrate found it was obvious that such threats in the phone conversation were not "wild and whirling" words when one of the threats to ruin Miss X's reputation was to keep sending such photographs going forward or in the future.

Grounds of Appeal

With regard to this conviction, I have set out below the complaints from the appellant "Perfected Grounds of Appeal".

The magistrate erred in the exercise of her discretion to admit testimony of a purported identification of the appellant's voice by Miss X. The prejudice that arises by the admission of that evidence or testimony outweighed its probative value.

It is submitted that if Miss X's voice identification of the appellant was admissible and Ground 1 failed then, no weight should have been accorded to that testimony because it was weak, unreliable and unsafe.

It is submitted that if Ground 1 failed then, the magistrate erred in admitting inadmissible hearsay evidence. She wrongly took into account the declaration in that 1st WhatsApp message to the "Legacy" group that the author or sender was "the wife".

It is submitted that the magistrate displayed unintended confirmation bias when relying on the contents of the WhatsApp declarations as a basis for determining or supporting Miss X's purported voice recognition of the appellant.

There was no evidence that the appellant had access to her husband's mobile phone at the time of the alleged offence.

The magistrate failed to consider whether words fell outside what was required under section 24(a)(i) and whether the words were merely "wild and whirling" as an expression of rage and not intended to cause harm to Miss X or injure Miss X's reputation.

Legal Principles – Appeals

A magistracy appeal is conducted by way of a "rehearing" on the evidence heard before the magistrate. The legal principles concerning the approach to magistracy appeals include the principle that the appellate court will only depart from the lower court's finding of fact and assessment of the credibility of a witness where the finding of fact is plainly wrong.

Moreover, the test in deciding whether the magistrate has erred in a manner that the appeal should be allowed is whether it is just for the conviction to be quashed. Notwithstanding the absence of any error by the magistrate, the appellate court must still perform the statutory requirement of conducting a "rehearing". The court should examine closely whether on the evidence adduced the charge was proved beyond reasonable doubt, failing which the appeal should be allowed.

The trial magistrate enjoyed the advantage unlike the appellate court, of having seen and heard the witnesses giving evidence. Therefore, the reliability and credibility of witnesses is within the ambit of the trial magistrate's assessment.

The credibility of witnesses in this case is central to the issue. It is unrealistic to expect a magistrate to deal expressly with every detail referred to by the defence in its attack of the credibility of witnesses. A microscopic dissection of a transcript or a statement of findings or submissions will always uncover something unreasonable, a failure to answer a question directly or at all, a piece of evidence not included in the statement of a witness which usually make up the bulk of the grounds of appeal.

When this is the case, Stock J (as he then was) pointed out in *R v Kwong Wing On*, HCMA 574/1996 that “in the real world, and even with truthful witnesses, these discrepancies, improbabilities, and omissions will occur. Indeed if they do not, then the evidence is attacked as being artificial or collusive. The magistrate is not expected to deal expressly with every comforting crumb to which the defence may be able to point. A realistic attitude must be encouraged, and the approach to such attacks is to ask whether there have been material and significant discrepancies, improbabilities or omissions, such as would lead or should lead a tribunal to doubt credibility on central facts.”

Unless the magistrate is shown to have misquoted, or omitted, or failed to consider and analyse any significant aspect of the evidence, the conviction must stand. Unless findings are shown to be unreasonable, illogical, or inherently improbable the conviction must stand.

Consideration

Grounds 1 and 2

These first two grounds can be dealt with together. Defence counsels raised the issue of the prejudice occasioned by the admission of the identification evidence of the voice of the appellant by Miss X exceeding any probative value, which ought to have been accorded to such testimony.

Identifying a person by way of voice identification is admissible. The dangers of a miscarriage of justice because of misidentification of aural identification was stressed in submissions and during the appeal.

It was argued that the magistrate failed to consider the weaknesses in the identification evidence and failed to isolate and identify any matter of significance that may reasonably be regarded as undermining the reliability of that identification evidence. There was no voice recording to compare voices. There was no significant familiarity between Miss X and the appellant. This made the evidence weak and unreliable.

However, the magistrate considered in depth this type of evidence and the danger of admitting evidence of voice recognition to identify an accused. The magistrate was well aware of the dangers, gave herself the necessary Turnbull warning, and considered the special need for caution in convicting the appellant when relying on the correctness of this type of identification.

A voice recording for comparison purposes is not a prerequisite nor is as suggested, “an independent evaluation of the sound reproducing quality of the sending mobile phone or the receiving mobile phone including an evaluation of the ambient background applicable over to the sender or receiver”.

The magistrate carefully assessed the quality and reliability of the evidence from the victim relating to this voice identification including, the number of times that Miss X had face-to-face conversations with the appellant as well as phone conversations. She considered the duration of each meeting or call and the place or surroundings of each occasion. There were 8 occasions where Miss X either saw and heard or heard the appellant speaking. This was not a stranger’s

voice. In addition, she would have paid attention to the appellant because she was conducting an extra marital affair with the appellant's husband at the time.

Miss X was able to describe the appellant's voice and its characteristics. The description was not vague but specific. It demonstrated her recognition and therefore reliability of the voice identification evidence. The magistrate found this evidence credible and I see nothing wrong with her findings, reasons for her findings and her conclusion. Therefore, this was not a case where no weight should have been accorded to that testimony.

This was not a case where the prejudice occasioned by the consideration of the voice identification evidence exceeded any probative value. This was not the only admissible evidence. There were other pieces of circumstantial evidence which when taken together support Miss X's aural identification of the appellant. There is no merit in either Ground 1 or 2 and they fail.

Ground 3

It is submitted that the magistrate erred in admitting inadmissible hearsay evidence. The sender of the offending WhatsApp message wrote the sender was "the wife". It was submitted that the declaration that the caller was "the wife" is inadmissible if the purpose of producing that evidence of an out of court declaration is to prove that it was true; that the caller was "the wife". There was no evidence that the caller was who she declared to be, "the wife".

However, the magistrate did not take into account that the message "as a wife, I had given 4 chances. The fornicating couple are still shameless and were still lying yesterday night. It goes too far in bullying others." was the truth; she made it clear that she did not assume the truth of the contents and that wife meant Miss X's lover's wife, the appellant.

She carefully reminded herself that the reference to the contents of out of court statements does not infringe the hearsay rule as long as the contents of the statements are not assumed true in proving the fact or facts to be proved.

The magistrate very specifically pointed out the circumstantial evidence she took into account and considered whether they were relevant and admissible. Those were the text and images received by Miss X 24 minutes prior to the phone call in which Miss X identified the appellant. It included the text and images received by Miss X 12 minutes after that same phone call, and text messages received by Miss X approximately 3 ½ hours after that same phone call.

Reference was made by the magistrate to the Court of Final Appeal's affirmation in *Oei Hengky Wiryo v HKSAR* (No.2) (2007)10 HKCFAR 98 as well as *HKSAR v Yeung Ka Ho* (2013) 16 HKCFAR 609 that a trial court can take into account circumstantial evidence or surrounding circumstances consistent with statements made during a conversation for the purpose of voice identification. It was affirmed that the contents of out of court statements does not infringe the hearsay rule as long as the contents of the statement are not assumed to be true in proving the fact or facts to be proved.

The magistrate had in fact held as a preliminary issue that the circumstantial evidence surrounding the texts and images received prior to the material phone call and after it, are admissible in evidence as against the defendant as circumstantial evidence for the purposes of evaluating the identification testimony.

The magistrate carefully considered to what extent the circumstantial evidence in the case could be taken into consideration in evaluating the evidence of voice identification. She reminded herself that the content and nature of the messages in the WhatsApp can be considered, taken into account and compared to facts already established by other evidence but not as evidence of its truth.

The content and nature of the messages she found relevant included nude photographs of Miss X as well as intimate photographs of Miss X and the appellant's husband with accompanying written messages. The magistrate made a finding that from the contents of the messages they were referring to and directed at an extra marital affair between Miss X and Mr Yip. The photographs and texts show a woman scorned and angry over the affair. The audience was made up of 40 members of a WhatsApp group who were common business associates of Miss X and Mr Yip. It described the author or sender was trying to avoid these two people by moving away. That implies somebody who was living together with either Miss X or Mr Yip who had to move out or away.

Once Miss X learned of the messages and photographs on that WhatsApp group, she called Mr Yip's mobile. A female answered whom she identified as the appellant. The content of the conversation was considered and when Miss X begged the female to delete the photographs, the female refused and threatened to keep sending the photographs. She wanted Miss X to die and she knew where Miss X's office was located.

The magistrate made a connection between the phone conversation with the woman she identified as the appellant and the messages that followed from Mr Yip's phone number to the newly named WhatsApp group with the same participants. The magistrate found that the female on the phone during the phone call knew who Miss X was and was expecting her to call that number.

The texts in the next messages after the phone call referred to the threat made during the phone call and that was to keep posting those photographs. Another reference to conversation in the phone call was that the sender would not delete those photographs. The magistrate drew the inference that the same person knew about the nude photographs before the phone call and could make a decision whether to delete them or keep posting them.

Those same photographs were posted again in the newly named WhatsApp group as promised in the telephone conversation. The magistrate also took into account the proximity in time between the photos sent before the phone call and being sent again after the phone call.

The magistrate was entitled to consider the circumstances, which suggested that the messages before the phone call and the content of the phone call conversation as well as the messages after the phone call were a continuous course of conduct. She was entitled to infer that it was the same person who sent the messages before the phone call, made threats during the phone call and sent a repeat of the photographs after the phone call.

Given that continuous course of conduct, the magistrate found that the person who sent the messages with photographs and uttered the threat on the phone call was someone who had access to Mr Yip's mobile phone. This same person made repeated references to the extramarital affair between Miss X and Mr Yip and named Miss X as being the one at fault, naming her by name.

I find the magistrate was entitled to take into account the direct evidence of the admissible and credible aural identification together with the circumstantial evidence of the photographs sent twice in the WhatsApp messages and the contents of the phone conversation to draw the irresistible inference that the person who spoke to Miss X during that phone conversation was indeed the appellant.

The magistrate dealt with the suggestions put forward by the defence of other possibilities; that is someone other than the appellant who was aggrieved by the extramarital affair. There could be other girlfriends of Mr Yip who could have made the calls and posted the photographs with messages or even a very drunk Mr Yip. She made short shrift of those submissions as fanciful and imaginative.

The magistrate's assessment of the circumstantial evidence, the hearsay rule and whether an irresistible inference could be drawn under the circumstances was faultless. I see no merit in Ground 3 and that fails.

Ground 4

The appellant suggests the magistrate displayed unintended confirmation bias when considering the WhatsApp contents as a basis to determine the correctness of the purported voice recognition. The magistrate was accused of proceeding on the basis that the appellant was upset about the extramarital affair because normally a wife would be upset under the circumstances.

The magistrate did find the person who sent the messages and photographs to be angry and upset from the contents of the messages. She did not find or conclude the appellant was upset or angry. As the respondent says, there was no unintended confirmation bias when relying on the WhatsApp messages to find the purported voice recognition evidence credible. In short, the magistrate made findings based on the evidence and not on the assumption that the appellant as the wife was upset about the extramarital affair.

I see no merit in Ground 4 and that fails.

Ground 5

Ground 5 was that there was no evidence the appellant had access to Mr Yip's mobile phone at the time of the alleged offence. As submitted by the respondent, the magistrate's finding was that the appellant answered Mr Yip's mobile phone when Miss X called his number. It was the magistrate's finding that it was the appellant who threatened Miss X during that telephone conversation. There was no need to produce further evidence as to the location of the mobile at that material time. Neither was this issue raised by the defence during the course of the trial.

I agree with this submission. I find no fault with the magistrate's findings that the aural identification evidence was credible. This means that the appellant had access to Mr Yip's mobile telephone number at that material time. There is no merit in this ground and it fails.

Ground 6

It is submitted the magistrate failed to consider whether the words amounted to criminal intimidation and whether the words were only "wild and whirling words", words uttered in exasperation and "signifying nothing more".

The magistrate certainly considered whether the words uttered by the appellant during the phone conversation amounted to threats with injury to the reputation of Miss X. She also carefully consider whether the appellant uttered those words with intent to alarm Miss X.

The magistrate thoroughly evaluated the contents of the phone conversations, the words uttered and threats made. Her analysis is more than sound and has proper evidential basis. She gave cogent reasons for the findings of facts she made including the finding the appellant uttered the threats with the intention to alarm Miss X and to injure her reputation.

After all, she sent compromising photographs of Miss X with her husband to a large group of people connected to Miss X professionally. The magistrate was right to rule out the possibility that threats made were merely "wild and whirling words". This last ground is without merit and fails.

Conclusion

I have reminded myself of the principles on "rehearing" magistracy appeals. I find no wrong or fault or flaw in the magistrates findings. She gave cogent analytical reasons for the findings of fact she made and I see no reason to disturb this safe and satisfactory conviction.

Accordingly, I dismiss the appeal against conviction.

(Amanda Jane Woodcock)

Deputy High Court Judge

Ms Grace Chan, Senior Public Prosecutor of Department of Justice, for the Respondent

Mr Andrew Bruce SC leading Mr David Khosa, instructed by Carina Chen & Co., for the Appellant

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Prepared on 29 October 2026 · Esheria