

HONG KONG / JUDGMENT

ONG CHUN YING v. HKSAR

COURT

Court of Final Appeal

DECIDED

25 June 2007

CASE / FILE NUMBER

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bjbj FACC No. 8 of 2006 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION FINAL APPEAL NO. 8 OF 2006 (CRIMINAL) (ON APPEAL FROM HCMA NO. 897 OF 2005)

Between: ONG CHUN YING Appellant

- and - HONG KONG SPECIAL ADMINISTRATIVE REGION Respondent

Court: Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Sir Noel Power NPJ and Sir Anthony Mason NPJ Hearing and Decision: 21 June 2007 Handing Down of Reasons: 25 June 2007 J U D G M E N T Mr Justice Bokhary PJ : As is typical of a final appellate court, this Court's primary role in the administration of criminal justice is to resolve real controversy on points of law of great and general importance. Absent any such controversy, it is rare and exceptional for a criminal case to proceed beyond the intermediate appellate court. It can only happen pursuant to leave to appeal granted under the substantial and grave injustice limb of the provision governing access to this Court in criminal cases, namely s.32(2) of the Hong Kong Court of Final Appeal Ordinance, Cap.484. This limb provides a residual safeguard to cater for rare and exceptional cases in which there is a real danger of something so seriously wrong that justice demands an inquiry by way of a final criminal appeal despite the absence of any real controversy on any point of law of great and general importance. From *So Yiu Fung v. HKSAR* (1999) 2 HKCFAR 539 onwards, we have approached appeals brought under the substantial and grave injustice limb by considering whether the appellant has shown that there has been to his disadvantage a departure from accepted norms so serious as to constitute a substantial and grave injustice to him. What this appellant complains of, if his complaint is made out, would stand exposed as such a departure occasioned at trial, not remedied on intermediate appeal and now to be remedied on final appeal. This is because the material circumstances are as follows. The appellant was convicted after trial in the Magistrate's Court (Colin Mackintosh, Esq. as HH Judge Mackintosh then was) on a charge of having, in a flat in Yuen Long on 30 January 2005, assaulted a Ms Yu

occasioning her actual bodily harm. His conviction was affirmed by the High Court (Deputy Judge Arthur Leong, a former Chief Judge of the High Court). He now appeals to us under the substantial and grave injustice limb against his conviction. At his trial the appellant gave evidence of an alibi and called a witness in support of his alibi. The magistrate felt unable to reject this alibi but concluded that it was incomplete. In coming to this conclusion, the magistrate said that the alibi covered only part of the material period, it being not possible to be sure as to exactly when this assault is alleged to have taken place. The appellant contends that this view of the facts is unsupported by evidence. So his complaint, renewed before us after having been rejected by the High Court, is that he was convicted on a view of the facts which is unsupported by evidence and involves denying him the benefit of a reasonable doubt on a crucial matter. It is as simple and as fundamental as that. This appeal turns on whether the complaint is justified. The alibi which the magistrate felt unable to reject was that the appellant was in a restaurant in Kowloon from, as the magistrate expressed it, between around 10a.m. to 11a.m. on 30 January 2005. What the magistrate went on to say about traveling time indicates that he found this restaurant to be about half an hour away from the flat in Yuen Long where the alleged assault on Ms Yu was said to have taken place. Ms Yu said that she first arrived at that flat at about 8.30 that morning. As to what happened later that morning, her evidence was as follows. After playing video games for a while with the appellant and another person, she went out to feed a parking meter for the appellant at his request. Next she spent some time with her friends in a park. Then she returned to the flat. The appellant, who had been in the flat when she went out, was still in the flat when she returned. Some time thereafter, he assaulted her. So the appellant had an alibi which put him in a restaurant in Kowloon from about 10 o'clock to about 11 o'clock, this restaurant was about half an hour away from the flat in Yuen Long and Ms Yu said that the appellant was in that flat upon her return after which he assaulted her. It is therefore vital to consider the evidence which she gave as to when she returned to that flat and how long thereafter he assaulted her. She gave no such evidence as to timing during examination-in-chief. But it was brought out in cross examination that she had made a statement to the police on 1 February 2005 and that she had said in that statement that she returned to the flat at around 10.00. Then the cross-examiner inquired of her whether her evidence was that she returned to the flat at about 10.00 am, and Ms Yu responded by saying. When asked by the cross-examiner how long thereafter, according to her, she was assaulted by the appellant, Ms Yu's response was: Around 10-odd minutes. As to what the appellant did after assaulting her, Ms Yu's evidence under cross examination was to the effect that he remained in the flat: first having a meal and then playing mahjong with, among other persons, her. After her cross-examination, Ms Yu was re-examined by the prosecutor and also questioned by the magistrate. But she did not depart from the evidence which she gave during cross-examination as to when she returned to the flat, how long thereafter she was assaulted and what happened after the assault. It was argued by Mr Kevin Zervos SC for the respondent that Ms Yu was unclear as to time and that she had been boxed in by the cross examiner in that regard. But Ms Yu had, long before being cross examined, told the police that she had returned to the flat at around 10.00 am. And on the face of the transcript, her evidence is unequivocally to the effect that, having returned to the flat at that time, she was assaulted about 10 minutes thereafter. A Ms Chan, who is a friend of Ms Yu's, gave evidence for the prosecution to the effect that she was in

the flat in Yuen Long throughout and witnessed an assault by the appellant on Ms Yu in that flat. But Ms Chan did not give any meaningful evidence as to time. In weighing Ms Yu and Ms Chan's testimony, the magistrate would no doubt have had regard to their demeanour. But the value of demeanour, while it can be considerable, is not limitless. Nor is demeanour a substitute for evidence in support of a view of the facts, especially when that view is against an accused. When a court says in a criminal case that it is not sure of something, that is normally said in the context of acquitting an accused person on the basis of a reasonable doubt. But the magistrate's statement in the present case that it was not possible to be sure as to exactly when this assault is alleged to have taken place was not made in the context of acquitting an accused person. Rather does it form a vital part of the thought process by which the magistrate concluded that the appellant's alibi was incomplete and convicted him on that basis. And yet that statement represents a view of the facts which is unsupported by evidence and, indeed, contrary to the evidence of the prosecution's main witness, Ms Yu. Similar observations can be made in regard to the last sentence of the passage in the magistrate's statement of findings where, having referred to the fact that the prosecution were unaware of any alibi prior to closing its case, the magistrate continued thus : I suppose that the prosecution could have applied to recall the girls and ask whether [the appellant] had left during the course of their stay at the flat. But this is a summary court, not the District Court or the High Court, and a rather more prosaic approach has to be taken without, of course, compromising the fairness of the proceedings. It would not have been desirable to recall these girls. So we do not know one way or the other what they might have said about [the appellant's] apparent departure. However, I am sure that the alibi does not undermine the allegation of violence by [the appellant] towards [Ms Yu]. As to the rest of that passage, precisely what the magistrate meant by a rather more prosaic approach is not clear. One precise difference between, on the one hand, High Court and District Court prosecutions and, on the other hand, Magistrate's Court prosecutions is that there are notice of alibi provisions applicable to the former but no such provisions applicable to the latter. Hence this exchange between defence counsel and the magistrate : COURT: No. We've reached the lunch adjournment. What do you anticipate is the next stage ... Ms WONG: No, I think the defendant will give evidence and there will be two witnesses on the alibi issue. COURT: Right. Have particulars of the alibi been given to the prosecution? Ms WONG: No. COURT: You are not obliged to do so ... Ms WONG: No. COURT: ... of course, but if the prosecution need time to investigate it, they may ask for an adjournment. No adjournment for the purpose of investigating the alibi was asked for by the prosecution. The purpose of a notice of alibi is, as the magistrate's last observation quoted above rightly recognises, to afford the prosecution a pre trial opportunity to investigate a proposed alibi. It is not to afford prosecution witnesses an opportunity to trim their evidence in order to meet an alibi. So the fact that the prosecution did not receive a pre-trial notice of alibi is no reason for ignoring any deficiency in the prosecution's evidence. The magistrate did not say why he was of the view that [i]t would not have been desirable to recall these girls . Perhaps he thought and he would have been right in thinking that recalling them would not have taken the prosecution's case further if they added nothing to their earlier evidence and that anything they added would have been suspect. This was a case of a somewhat murky background. The lower courts no doubt gave the matter their conscientious consideration. But, although the

intermediate appellate court failed to appreciate it, the appellant's pivotal complaint is justified : he was convicted on a view of the facts which is unsupported by evidence and involves denying him the benefit of a reasonable doubt on a crucial matter. And that is why, at the conclusion of the hearing, we allowed this appeal to quash his conviction. The appellant, who was legally aided before us but privately represented in courts below, asked for his costs in the courts below. This was opposed by the respondent essentially on the ground that the appellant had brought suspicion upon himself by the relationship which he had maintained with Ms Yu and Ms Chan. Taking the view that this cannot amount to his having brought suspicion upon himself of having assaulted Ms Yu, we felt unable to deny the appellant his costs in the courts below, and awarded him the same. (Kemal Bokhary) Permanent Judge (Patrick Chan) Permanent Judge (R.A.V. Ribeiro) Permanent Judge (Sir Noel Power) Non-Permanent Judge (Sir Anthony Mason) Non-Permanent Judge Mr Peter Duncan SC (instructed by Messrs Hampton, Winter & Glynn and assigned by the Legal Aid Department) for the appellant Mr Kevin Zervos SC (of the Department of Justice) for the respondent

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