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CACC447/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
(Appellate Jurisdiction)
CRIMINAL APPEAL NO. 447 OF 2010
(ON APPEAL FROM DCCC NO. 488 OF 2010)

BETWEEN

HKSAR Respondent

and

CHAN HOI TAT (陳凱達) Applicant

Before : Hon Cheung and Hartmann JJA and Barnes J in Court
Dates of Hearing : 27 September 2011
Date of Judgment: 27 September 2011
Date of Handing Down Reasons for Judgment : 18 October 2011

R E A S O N S F O R J U D G M E N T

Hon Barnes J (giving the Judgment of the Court):

Introduction

1. The applicant appeared before HH Judge Geiser in the District Court and was convicted, after trial, of one count of aiding, abetting,

counselling and procuring the making of child pornography (1st charge); two counts of criminal intimidation (2nd and 4th charges); and two counts of indecent assault (3rd and 5th charges).

2. The applicant was sentenced to a total of 5 years' imprisonment for the five charges, as follows:

(a) 1st charge—1 year;

(b) 2nd charge—1 year, concurrent with 1st charge;

(c) 3rd charge—2 years, consecutive to 1st charge;

(d) 4th charge—1 year, concurrent with 1st and 2nd charges; and

(e) 5th charge—2 years, consecutive to 1st to 4th charges.

3. The appellant sought leave to appeal against both the convictions and the sentence. At the end of the hearing we dismissed both applications and indicated that we would give our reasons later, which we now do.

Prosecution case

4. The prosecution case was that the complainant ("Miss X") came to know the applicant via the internet in 2003 when she was aged 12 and the applicant was a 24-year-old man. The present charges arose from incidents that took place between 2003 and 2005.

5. On a date unknown in 2003, when Miss X was still a Primary 6 student, the applicant repeatedly asked Miss X for a naked photograph of herself and Miss X finally complied. Miss X first took one

photograph of herself naked—but without showing her face—and sent it over to the applicant using the webcam. The applicant then asked Miss X to send another naked photograph showing her face. Miss X did as asked (1st charge).

6. Sometime in March or April 2004, when Miss X was in her first year of her secondary education, the applicant contacted her and requested a meeting. Miss X refused but the applicant threatened her by saying that if she did not agree he would publish in the media and over the internet the two photographs she had previously sent to him. He also told her he would send the photographs to her father at his office (2nd charge).

7. As a result of such threat, Miss X agreed to meet up with the applicant one day after school. The applicant took her to a place which she believed was his home. There the applicant indecently assaulted Miss X by undressing her and forcing her to masturbate him and perform oral sex on him. The applicant then took some 10 photographs of Miss X after she was instructed to lie on the bed, still naked. After that the applicant kissed her body, including her "lower parts" (3rd charge).

8. In July 2005, again the applicant requested Miss X to meet up with him. When Miss X refused the applicant made the same threat again, i.e. that he would publish Miss X's naked photographs in the media and over the internet; and would send them to her father at his office, if she did not agree (4th charge).

9. As a result of the threat, Miss X agreed to meet with the applicant on 5 August 2005 at around noon. Miss X remembered the date

as it was her sister's birthday. The applicant took her to an hourly hotel called Emerald House in Causeway Bay. There the applicant indecently assaulted Miss X. On this occasion, apart from forcing Miss X to masturbate him and perform oral sex on him, the applicant also rubbed his penis against Miss X's thighs from behind in a form of simulated sex. Again, some 10 photographs of a naked Miss X were taken by the applicant on this occasion. After taking the photographs, the applicant again forced Miss X to perform oral sex on him. The applicant also kissed Miss X's body, including her "lower parts" on this occasion (5th charge).

Defence case

10. The applicant elected not to give evidence but called two witnesses. The line of cross-examination was along the line that he had done nothing improper to Miss X; that Miss X was angered by his revelation that he had married and she either fabricated all these incidents, or that such incidents happened to someone else. Miss X flatly disagreed with these suggestions.

11. The first defence witness called was his brother-in-law ("DW1") who gave alibi evidence in relation to the 5th charge. According to DW1, on 5 August 2005, his maternal grandfather was dying and he went to the Buddhist Hospital in Wong Tai Sin. He arrived at the hospital at 12:30 p.m. and saw the applicant there with his sister (who was then the applicant's girlfriend). DW1 testified that the applicant and his sister left the hospital at about 2 p.m.

12. The second defence witness was the applicant's mother ("DW2"). Her evidence mainly concerned the whereabouts and settings of the applicant's home in 2004, which differs in many ways from the description of the applicant's "home" given by Miss X.

Grounds of appeal against convictions

13. Mr James McGowan, who represented the applicant both before us and in the District Court, advanced 8 grounds of appeal.

14. The first four grounds centred on the evidence of Miss X. The applicant complained that the learned judge (1) erred in accepting Miss X's evidence without question; (2) failed to direct himself on the danger of acting on the unsupported evidence of Miss X; (3) failed to consider the "prejudice to" the applicant caused by the lack of particularity as to the dates in the charges and/or delay in reporting the allegation; and (4) failed to consider the relevance of the absence of any photographs of Miss X or any pornography in the applicant's possession or control.

15. The next three grounds centred on the evidence of the defence witnesses. The applicant complained that the learned judge (5) erred in placing "little or no weight" on the evidence of DW1; (6) failed to consider or direct himself that the burden of disproving alibi evidence is on the prosecution; and (7) erred in finding that DW2's evidence had no relevance.

16. The last ground was the usual catch-all ground that the convictions were unsafe or unsatisfactory.

17. In support of the first four grounds, Mr McGowan, in his written submission, referred extensively to the evidence of Miss X. He also supplemented his written submission with oral submission before us. We do not find it necessary to reiterate what Mr McGowan submitted. It is sufficient to say that Mr McGowan attempted to demonstrate how unbelievable and unreliable Miss X's evidence was—particularly when her evidence was not supported by any independent evidence.

18. In respect of the next four grounds, Mr McGowan criticized the judge's treatment of the alibi evidence, submitting that the alibi evidence threw doubt on Miss X's evidence regarding the alleged indecent assault at the Emerald House (5th charge), which in turn, Mr McGowan submitted, threw doubt on all her evidence in relation to all other charges. Mr McGowan also submitted, with reference to DW2's evidence, that since the applicant was not living at a place as described by Miss X, that also threw doubt on her evidence in relation to the alleged first indecent assault (3rd charge).

19. We have considered the very detailed and forceful arguments advanced by Mr McGowan, in particular Miss X's evidence that there were no threats initially made to her to obtain the naked photographs, and that no photographs of Miss X were found in the applicant's possession or custody.

20. The short answer is that these were all matters within the fact-finding province of the trial judge. The judge was fully aware that the credibility of Miss X was crucial in this case. He was also fully aware that Miss X's evidence was not supported by any other independent

evidence, and that she was relating to incidents that had taken place years ago—when she gave evidence before the judge in September 2010.

21. The judge had the benefit of observing Miss X giving evidence before him for a number of days and he found her "to be a most impressive witness who gave compelling evidence of these distressing events which form the subject matter of [the] five charges"; and, despite the lapse of time, he found Miss X "was able to give a detailed description as to what by any account must have been extremely unpleasant and embarrassing for her". The trial judge found Miss X "to be entirely truthful and reject out of hand the suggestion that she has fabricated the events she testified to and deliberately lied to [the] court" (AB 20—para. 16 of the Reasons for Verdict).

22. We have had the benefit of reading the full transcript of the trial. Miss X's evidence of what had happened to her is not inherently improbable. One must bear in mind Miss X was a 12-year-old when she came across the applicant on the internet. Her evidence was that she "just want to get someone to chat with on the internet and [she] never intended to meet [that person]"; she told the applicant "roughly where [she] lived, but [she] never thought he would come to look for [her]. At that time [she] thought that when making friends, there was no need to lie to that person." (AB 91, Line O to T).

23. Miss X's naivety and guilelessness could also be gleaned from her evidence in relation the applicant's query about her father. She said that she had told the applicant that her father was a doctor. She then said, "he even asked me whether my father was in medicine or surgery, but

at that time I couldn't even tell the difference between the two, so I told him I didn't know" (AB 94, Line S to U). Miss X also testified that the applicant asked her what kind of car her father drove and the registration number of the car. She said she did tell the applicant "because at that time [she] thought that there were cars everywhere on the street, [the applicant] wouldn't be able to recognize. Even if he did, he wouldn't really go up to talk to [her] father" (AB 95 Line C to E).

24. In our judgment, it is not inherently improbable for Miss X to have acted as she did, particularly when the applicant introduced the topic of sexual matters to her and repeatedly asked her to give him a naked photograph of herself. It is not beyond the realm of reality that youngsters would do things with strangers via the internet that they would not have done if they were face-to-face with such strangers.

25. It is also not inherently improbable for a young girl aged 13 or 14 to be scared and feel intimidated when the very person to whom she had sent naked photographs threatened not only to publish those photographs, but also to send copies to her father, if she refused to meet with him, resulting in her meeting with and being sexually assaulted by that person.

26. Although the learned judge did not set out the differences and/or inconsistencies drawn to the attention of Miss X during cross-examination in full in his Reasons for Verdict, the fact of the matter is that Miss X has given her explanation as to why there were such differences or inconsistencies and the learned judge accepted her explanation. One must not lose sight of the fact that Miss X was relating

events that happened to her years ago, when she was only aged 12 to 14. It is perfectly understandable that she was not able to name the date or even the month when these events took place—save the one which took place on a date with a significance to her, i.e. her sister's birthday on 5 August 2005. She was certainly able to give details as to how she came to send the naked photographs and what acts of indecency were done to her by the applicant on those two separate occasions.

27. We are not persuaded that the judge simply accepted Miss X's evidence without question. We do not accept that any prejudice was caused to the applicant when 4 out of the 5 charges did not specify the exact date of the offence in the particulars.

28. The judge is a very experienced judge. He does not have to spell out the danger in accepting Miss X's unsupported evidence in this case, when the need to corroborate was abrogated long time ago.

29. We found the first 4 grounds of appeal without merit.

30. Before dealing with grounds 5 and 6, it is helpful to mention briefly what had taken place.

31. Miss X started giving evidence on 13 September 2010. She finished her evidence-in-chief on the first day and Mr McGowan started his cross-examination late in the afternoon. The cross-examination continued the next day. Before the morning break that day Miss X gave evidence that she met up with the applicant on 5 August 2005 between noon and 3 p.m. After the lunch adjournment, Mr McGowan raised with

the judge—for the first time—the issue of alibi. He told the judge that he only became aware that same morning that the applicant had an alibi. Application was then made to lead alibi evidence. The prosecution did not resist the application. No explanation was tendered as to the reason for the lateness of such a notification. The case was adjourned after Miss X and the policeman who arrested the applicant finished their evidence.

32. DW2 is the brother-in-law of the applicant. He gave evidence when the case resumed that on 5 August 2005, he went to the Buddhist Hospital in Wong Tai Sin to visit his maternal grandfather. When he arrived there at 12:30 p.m., his sister—who was then the applicant's girlfriend—and the applicant were already present at the hospital. The applicant did not leave the hospital until 2 p.m. His grandfather died later that same date.

33. If DW2's evidence was true or could have been true, such alibi evidence would have thrown doubt on the evidence of Miss X in relation to the indecent assault at the Emerald House.

34. The judge dealt with this in para. 17 of his Reasons for Verdict (AB 21):

> "… As to the evidence of DW1, Mr Ma Kai-yin, the brother-in-law of the defendant, I attach little or no weight to it. The application to produce alibi evidence of this nature was made after Miss X had given evidence under cross-examination that the assault which is the subject matter of charge 5 took place on 5 August 2005 between 12 noon and 3 pm. No proper explanation has been put forward as to the reasons for the lateness of this application. *In any event, I have already accepted the evidence of Miss X that in relation to charge 5 she was the subject of a gross indecent assault at the hands of the*

> *defendant between 12 noon and 3 pm and to the extent that DW1 testified that between 12:30 pm and 2 pm the defendant was at the Buddhist Hospital in Wong Tai Sin, I reject it.* As to precisely what time the defendant may have been at the hospital that day, if he ever was, I cannot speculate." (*Emphasis applied*)

35. The 5th charge is the only charge which specified the date of the offence in the particulars. No explanation at all was given to the judge why the application to adduce alibi evidence was made after Miss X had already been cross-examined on this area. The fact that the prosecution did not resist the application and did not put to DW2 that he was either lying or his testimony was unreliable does not mean that the judge was bound to accept the alibi evidence. As a fact-finder, it is up to the judge to decide whether the alibi evidence was credible.

36. In the absence of a proper explanation, clearly the judge did not find the alibi evidence credible. The judge did not rule out the possibility that the applicant might have gone to the hospital on the day in question, he just did not accept that it was between 12:30 p.m. and 2 p.m. as testified by DW2.

37. It is trite law that the burden of disproving an alibi is on the prosecution (see *R v Tsang Kam Hing* [1991] 1 HKC 72). Although the judge did not specifically refer to this burden on the prosecution, as an experienced professional judge who is also the fact-finder, there is no requirement for him to spell such out—unlike the case of a jury being the fact-finder.

38. The sentence used by the judge which we have put emphasis on was "*In any event, I have already accepted the evidence of Miss X that*

in relation to charge 5 she was the subject of a gross indecent assault at the hands of the defendant between 12 noon and 3 pm and to the extent that DW1 testified that between 12:30 pm and 2 pm the defendant was at the Buddist Hospital in Wong Tai Sin, I reject it." At first glance, it gives one an impression that the judge had already accepted the evidence of Miss X before even considering the alibi evidence. However, reading this sentence in context, we are satisfied that the judge has used an unfortunate turn of phrase. We are satisfied that what he meant to convey was that he found Miss X's evidence credible and the alibi evidence did not throw doubt on Miss X's evidence; nor did such evidence cause him any concern.

39. Grounds 5 and 6 failed.

40. In relation to ground 7, the short answer is that Miss X only told the court what she believed to be the applicant's home—from what the applicant told her. She did not testify that the place where she was first indecently assaulted was indeed the applicant's home. The fact that the applicant was living in a building markedly different from the one described by Miss X is neither here nor there. It is certainly not inherently improbable for a man to borrow someone else's place for the purpose of taking a girl there. This ground also failed.

41. The convictions were neither unsafe nor unsatisfactory. We therefore dismissed the application for leave to appeal against convictions.

Grounds for appeal against sentence

42. The only ground of appeal was that the total sentence of 5 years was manifestly excessive. In support of this ground Mr McGowan relied on the applicant's "excellent background", his previous clear record and his "positive good character", submitting that the judge had not taken these matters sufficiently into account.

43. The applicant is now aged 33. He held a Bachelor's degree in Finance from a local university and he worked as a sales manager in a big motor company, earning $500,000 to $600,000 per annum. His prospects at work were said to be promising. He is married with an infant son. According to his family, the applicant was a filial son, a caring husband and the major breadwinner of the family. The applicant also worked as a volunteer to help mentally-retarded children.

44. As the judge said when he sentenced the applicant, as far as the applicant was concerned, this was a "spectacular fall from grace".

45. This is a serious case. From the evidence accepted by the judge, clearly the applicant was grooming a 12-year-old via the internet. He talked with her about daily matters before progressing to introducing matters of a sexual nature to this young girl. It is far too easy for an older man to prey on the innocence and/or naivety of a youngster and a deterrent sentence must be imposed to protect the young.

46. Although this case does not involve a person having unlawful sexual intercourse with an underaged girl, we found the sentiments expressed by the English Court of Appeal in *Attorney General's Reference*

No. 127 of 2004 (David Michael Briggs) [2005] 2 Cr. App. Rep. (S.) 74 at page 469 (which was cited with approval by this Court (differently constituted) in *Secretary for Justice v Chung Yui Hung* [2007] 2 HKLRD 771) equally applicable here:

> "… One of the perils of the misuse of the internet by an older man was that he could groom an immature girl into believing that she was more mature than she was, and to give her the false confidence that she could behave and should be treated as if she were an adult. The internet was now widely available for all sorts of innocent, valuable and educational purposes. Its misuse by older men to seek and find and then groom girls who were vulnerable and immature, should be deterred. The Court agreed with the observation in *Attorney General's Refrerence No. 39 of 2003 (Michael Anthony Wheeler)* [2004] 1 Cr. App.Rep.(S.) 79 (p.468), that it was an area in which the Court needed to deliver a clear message of disapproval."

47. The applicant not only obtained naked photographs of this 12-year-old, he later threatened her with the publication of those photographs and succeeded in getting her to meet up with him, whereby he satisfied his own sexual gratification by indecently assaulting Miss X in a gross fashion. He then repeated the same conduct one year later.

48. For the offence of indecent assault, the act could range from a relatively minor touch to an act short of an attempted rape. It is necessary to look at all the circumstances to decide what is the appropriate sentence, bearing in mind the need to protect the young and the vulnerable from such transgressions, the need to deter others and the need to redress the grievances suffered by the victim and his/her family.

49. The acts involved in both indecent assault charges are very serious, particularly when there was an additional act of similated sex involved in the 5th charge. A starting point of 2 years was, in our view,

too low in all the circumstances. However, we have to consider whether an overall sentence of 5 years was manifestly excessive in this case. Having considered the seriousness of these offences and the aggravating features, we do not agree that an overall sentence of 5 years was manifestly excessive. We dismissed the application for leave to appeal against sentence.

Comments and observation

50. Throughout the trial the identity of the complainant was kept secret. She was named Miss X on the indictment and was also addressed as Miss X when she gave evidence. However, while going through the transcript, we were perturbed to note that references were made during her testimony which could well have disclosed her real identity.

51. Firstly, she was asked her MSN address which she gave. The address clearly showed her name and her year of birth. Why there was a need to know her MSN address was not made clear. As there was no dispute that she came to know the applicant via the internet, information as to her actual MSN address did not appear to be of relevance.

52. Furthermore, Miss X was asked to disclose the name of her school in Hong Kong. While we appreciate the need for the defence to ask her questions about the general area in which the school was located, a reference to a school in that particular area should suffice, without naming the actual school.

53. What caused us considerable concern was the fact that Miss X was asked to disclose the name of the school she attended when she was studying overseas. We do not see any need in this case to disclose which country she went to further her studies, and definitely not the name of the very school.

54. If anyone in court was minded to put all this information together: her MSN address and the names of her schools, it would not have been difficult to ascertain her real identity.

55. We wish to point out that care must be exercised by judges and counsel if a witness is asked questions of this nature—questions with the potential of revealing the complainant's identity. If the question is relevant, the complainant should be asked to write down the answer on a piece of paper first to ensure that his or her identity is not inadvertently disclosed.

(Peter Cheung) Justice of Appeal	(M.J. Hartmann) Justice of Appeal	(Judianna Barnes) Judge of the Court of First Instance

Ms Agnes Chan, ADPP of Department of Justice, for the Respondent

Mr James McGowan, instructed by Messrs Jimmie K.S. Wong & Partners, for the Applicant