

HONG KONG / JUDGMENT

HKSAR v. ALISTAIR CHARLES CURRIE

COURT

Court of First Instance

DECIDED

12 October 2004

CASE / FILE NUMBER

HCMA795/2004

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bjbj% HCMA795/2004 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.795 OF 2004 (ON APPEAL FROM ESCC3581 OF 2003)

BETWEEN HKSAR Respondent and ALISTAIR CHARLES CURRIE Appellant

Before : Hon Lunn J in Court Date of Hearing : 24 September 2004 Date of Judgment : 12 October 2004

J U D G M E N T

Background

AUTONUMOUT On 23 April 2004, the appellant was convicted after trial by Mr Wyeth of a single charge of obtaining access to a computer with a view to dishonest gain for himself, contrary to section 161(1)(c) of the Crimes Ordinance, Cap.200. The appellant was sentenced to three months imprisonment, suspended for two years. AUTONUMOUT The appellant appeals against his conviction only. The prosecution case AUTONUMOUT The appellant is a Chief Inspector of Police who at the time of the alleged offence was attached to the Marine Regional Command and Control Centre (MRCCC). That centre has a computer system entitled Enhanced Computer Assisted Command and Control System ECACCS), which system contains personal particulars of persons, whether related to crimes or not. Police officers attached to the MRCCC are authorized to access the computer to obtain information. AUTONUMOUT On 15 October 2003, the appellant requested a police communication officer, PCO Shum, to access the computer. She did so entering into the computer her own U.I. number 87289 and then the appellant U.I. number 29072, a Hong Kong identity card number and the police reference number M91710 , all of which

information was supplied by the appellant. The appellant's request of her was to obtain the address of the person whose Hong Kong identity card number he had supplied. AUTONUMOUT In response to the request made of the computer by PCO Shum, information relating to Leung King Hang, including his residential address appeared on the screen. After an inquiry of PCO Shum by the appellant as to whether or not that was the address, which inquiry she answered in the affirmative, and her reply in the negative that she was unable to print out what appeared on the screen, the appellant wrote something on a piece of paper upon which had been written the identity card number and the police file reference number. AUTONUMOUT The police file reference number M19710 was a number assigned to an inquiry begun on 13 October 2003 in relation to a vessel Noor which inquiry had been assigned to the appellant. AUTONUMOUT Leung King Hang, with an identity card number identical to that number which had been supplied to Miss Shum by the appellant, was a person who had been the tenant of domestic premises let by the appellant as landlord on 21 May 2001. That tenancy had been terminated at the initiative of the tenant during 2001. AUTONUMOUT In addition to evidence led as to the events on 15 October 2003, the prosecution led evidence of approaches by the appellant to Station Sergeant Ng and PCO Tang on 12 October 2003. Station Sergeant Ng was asked by the appellant if the address of a person could be obtained by use of the ECACCS computer by reference to a person's identity card number or driver's licence number. The appellant was told that the address could be obtained from that information. PCO Tang was asked by the appellant a little later that same day, if the particulars of a person holding a driver's licence number written on a piece of paper he produced could be checked. However, in face of a requirement by PCO Tang that a police file reference number accompany the request, the appellant desisted with his inquiry. The defence case AUTONUMOUT The appellant did not give nor call evidence. In his closing speech Mr Chandler, counsel for the appellant at trial, indicated to the court that no issue was taken on the facts. Rather, the submission was made The offence is not about dishonestly accessing the computer. What the prosecution must prove before they are entitled to a conviction in any particular case is that the individual and again this is in our submission accessed the computer with a view to improperly using the information he derived as a result of the unauthorized access. AUTONUMOUT Consistent with that submission was the subsequent submission in respect of the evidence of PCO Shum, namely We acknowledged that your Worship is entitled to accept her evidence and that if you accept her evidence, you are entitled to find unauthorized access on the facts of this particular case. AUTONUMOUT It was submitted on behalf of the appellant that there simply was no evidence why the appellant had asked PCO Shum to input the identity card number and display the particulars of that person on the computer monitor. Of the improper use of the police file number assigned to the inquiry into the vessel Noor it was submitted that was relevant to the issue of improper access to the computer but not to the issue of whether the conduct of the appellant was with a view to dishonest gain for himself. Statement of findings AUTONUMOUT In his Statement of Findings dated 3 August 2004, Mr Wyeth stated that he adopted his oral Reasons for Verdict delivered on 23 April 2004 as his Statement of Findings. AUTONUMOUT In his oral Reasons for Verdict Mr Wyeth set out the relevant provisions of section 161(1) of the Crimes Ordinance, Cap.200 any person who obtains access to a computer with intent to commit an offence; with a dishonest intent to deceive; with a view to dishonest gain

for himself or another; or with a dishonest intent to cause loss to another, whether on the same occasion as he obtains such access or on any future occasion commits an offence. He noted that the definition of gain and loss provides that they are to be construed as extending not only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent and that gain includes getting what one has not. AUTONUMOUT Of the evidence he said that he found the prosecution witnesses, including PCO Shum, PCO Tang and Station Sergeant Ng to be honest, reliable and accurate witnesses whose evidence he believed. He went on to find In my view the evidence is quite overwhelming that the defendant obtained access to a computer. The result of this access was that particulars, including the name and address of the holder of Hong Kong Identity Card No. XXXXXXX(X) were made available to the defendant who made a written note from the particulars displayed. The evidence is the holder of that Hong Kong Identity Card number is Mr Leung King hang, the defendant's former tenant. AUTONUMOUT Of the purpose of or motive for that conduct he went on to find What use, if any, the defendant made or intended to make of the information accessed, beyond having made a written note from it, is not shown from the evidence and would be a matter of conjecture only. Needless to say, I have not engaged in such conjecture. AUTONUMOUT In addressing the element of mens rea in the offence namely, with a view to dishonest gain for himself the learned magistrate stated that he construed the law thus :

- (1) the prosecution is not required to prove the defendant actually obtained any gain . It is for the prosecution to prove that when obtaining access to a computer it was with a view to dishonest gain .
- (2) it is well settled that gain in this context can include obtaining information which one did not have prior to access to a computer. Thereafter, Mr Wyeth adverted to the judgments in HKSAR v. Tsun Shui Lun [1999] 2 HKC at 547; HKSAR v. Yiu Ting, HCMA898/2002; Secretary for Justice v. Lee Wai, HCMA723/2002 and subsequently in the Court of Final Appeal in FACC6/2003. AUTONUMOUT Wyeth went on to find the evidence clearly establishes the defendant did obtain a gain. In context it is clear that is a reference to the provision by the computer of the address of Mr Leung. AUTONUMOUT Of the remaining issue of dishonesty Wyeth stated that he applied the test identified in R. v. Ghosh [1982] 1 QB 1053. AUTONUMOUT In the result he found : The defendant must have realised ordinary, reasonable and honest people would expect personal information such as Hong Kong Identity Card numbers, addresses and related information collected by or accessible by the police would not be accessed for other than genuine police business and that any illegitimate accessing of that information is not honest activity, it is dishonest. I consider by the ordinary standards of reasonable and honest people what was done was dishonest. The circumstances of the gaining of the access, the circumstances of his employment, his age and level of education, which includes tertiary legal education, was such that the defendant must have realised that what he was doing was dishonest by the ordinary standards by reasonable and honest people. Appellant's perfected grounds of appeal AUTONUMOUT It is submitted on behalf of the appellant that the learned magistrate erred in law and, in consequence, that the conviction of the appellant is unsafe and unsatisfactory, in that the

learned magistrate erred in holding that, on the basis that the conduct of the appellant amounted to gaining access to the ECACCS computer systems, the conduct of the appellant could be categorised as with the view to dishonest gain within the meaning of that phrase in section 161 of the Crimes Ordinance, Cap.200 when there was no evidence before the learned magistrate as to the purpose of such access. In this regard, the learned magistrate erred in holding that access to a computer without authority was, in effect, of itself, with a view to dishonest gain within the meaning of section 161. AUTONUMOUT In support of those grounds of appeal Mr Bruce, SC submitted on behalf of the appellant that in satisfying the ingredients of the offence created by section 161(1)(c) of the Crimes Ordinance, the prosecution must satisfy the court, not that access to the computer was obtained dishonestly but that the person who obtains access to a computer must do so with a view to dishonest gain for himself . Further, he submits that the prosecution must prove that the purpose of the person obtaining the information was with a view to a dishonest gain . Without evidence of the purpose for which the access to the computer was obtained an offence under this provision cannot be made out. AUTONUMOUT In the course of argument, Mr Bruce, SC accepted that the conduct of the appellant which the learned magistrate found proved relevant to the circumstances of the appellant obtaining access to the computer was also relevant to a consideration by the magistrate of the issue of dishonesty vis vis with a view to gain for himself. However, he submitted that whilst it could be taken into account in that analysis, proof was required of the purpose of the gain. Here, the magistrate stated in terms that there was no such proof. Accordingly, not all of the ingredients of the offence had been proved. AUTONUMOUT In support of his submissions, Mr Bruce referred to the judgment of the Court of Appeal delivered by Mortimer JA in R. v. Hung Hak Sing [1995] 3 HKC 327, in which case the applicant had been convicted in the District Court of an offence, contrary to section 161(1)(c) of the Crimes Ordinance. In that case the applicant, whose rank and status was not stated, had obtained access to the Immigration Department computer to obtain travel records to discover whether certain persons were on the watch list . The prosecution case was that the applicant performed those services in the expectation that he would be paid for them. Notwithstanding the fact that the Deputy Judge rejected that aspect of the prosecution case he went on to convict the applicant. Of the ingredients of the offence, Mortimer JA said (330A) The act is complete once access is obtained. It is then for the prosecution to prove that the person had the requisite intent in this case, a view to dishonest gain for himself or another. Once the judge had decided that the applicant obtained the access to the computer in this case as an act of friendship, that he was unaware of the underlying illegal purpose, and that he was not expecting any monetary payment or other reward, evidence relevant to proof that any gain was dishonest called for very careful consideration. Assuming contrary to Mr Beaumont s second submission that obtaining information may be sufficient gain within the meaning of the section, the judge decided that as the access to the computer was unauthorized, it was therefore dishonest without further examination of his other findings apparently inconsistent with dishonesty. This finding we cannot accept. Looking at the judge s reasons in the round, it was not open to him to find that the access to the computer was shown by the prosecution to be with a view to dishonest

gain. AUTONUMOUT It is to be noted however that the impugned reasoning of the judge was his determination that as the access to the computer was unauthorized, it was therefore dishonest without further examination of his other findings apparently inconsistent with dishonesty. AUTONUMOUT In HKSAR v. Tsun Shui Lun [1999] 2 HKC 547, Chan CJHC (as he then was) was seized of an appeal from a conviction under the same sub section of section 161 of the Crimes Ordinance. In that appeal, the appellant had obtained access to a computer by the use of a password provided to him in the course of his work and, as a result, had obtained a report of a CT scan performed upon the Secretary for Justice, a patient at the hospital at which he worked. On the same day, he had faxed the copy of that report to two newspapers. AUTONUMOUT Bruce has prayed in aid in support of his submissions the observations made by Chan CJHC of the fact that the appellant in that case had on the day previously accessed the computer and printed out a copy of the report which he had shown to his wife before destroying it, which conduct was not the subject of a charge. Of that Chan CJHC had said He had in fact committed the actus reus of the offence by obtaining access to the computer on the previous day. But it could be argued that on the previous occasion, he was doing it out of curiosity and without a view to dishonest gain to himself. AUTONUMOUT In my judgment the effect of the observation by Chan CJHC is, in reality, to do no more than to highlight the importance of the issue of dishonesty as an ingredient of the offence. AUTONUMOUT Finally, Mr Bruce referred to the judgment of the Court of Final Appeal in Li Man Wai v. Secretary for Justice [2003] 6 HKCFAR

466. That appeal came before the Court of Final Appeal following upon a successful appeal by way of Case Stated to a judge of the Court of First Instance from an acquittal in the magistracy of the appellant of an offence contrary to section 161(1)(c) of the Crimes Ordinance. Subsequently, at the direction of the judge of the Court of First Instance, the magistrate proceeded to convict the appellant. It is clear that the ratio decidendi of the case is simply that given the finding of the magistrate had not been perverse, although a reasonable tribunal of fact could have made a conclusion that the appellant was dishonest, it was not open to the judge to intervene. However, Mr Bruce invites the court to have regard to the facts of the case and to some observations made in the course of the judgment. AUTONUMOUT The appellant in that case was an assistant assessor of the Inland Revenue Department who was charged with an offence contrary to Section 161(1)(c) of the Crimes Ordinance. Having gained access to the IRD computer system, the appellant made use of such information in applying for membership of the World Wide Fund for Nature Hong Kong on behalf of another person. In the application form, he included his own name and credit card to enable payment for membership to be made. The other person had not requested the appellant to make the application for her. AUTONUMOUT In those circumstances, the magistrate had determined that there was no evidence of dishonest intent or dishonest gain. AUTONUMOUT In reviewing the evidence adduced before the magistrate and the conclusions to be drawn from it, noting that the appellant had not sought to conceal his own identity or involvement in the application, Chan CJHC in the judgment of the court said

25. Considering the evidence as a whole, I would accept that a reasonable tribunal of fact, bearing in mind the proper considerations and the proper directions, could have concluded that the prosecution have proved that the appellant was dishonest. On the other hand, such a tribunal could easily have come to the opposite conclusion as the magistrate did in this case. AUTONUMOUT Bruce invites this court to have regard to observations made later in that judgment, in a review of the type of offences punishable under section 161(1) of the Crimes Ordinance, namely But the law as it now stands does not punish all kinds of unauthorized access to computers, it only prohibits the unauthorized and dishonest extraction and use of information. And it is essentially a question of fact for the jury to decide whether there is dishonesty in each case. AUTONUMOUT When this court raised the issues Mr Bruce accepted that it is not an ingredient of an offence contrary to section 161(1) of the Crimes Ordinance, that access to the computer be unauthorized nor that the information be used. The respondent s submissions AUTONUMOUT Miss Shine SGC, for the respondent, submits that proof is not required of the purpose of the access by the appellant of the computer. It is not an ingredient of the offence created by section 161(1)(c) of the Crimes Ordinance. She invites this court to have regard to the judgment of Chan CJHC in Tsun Shui Lun, at 555E 556B, but in particular perhaps (555G) the subject matter of a gain as defined in s161 would include information which the person obtaining access to the computer did not have before the access. [Emphasis added] AUTONUMOUT This court is invited to note that this construction of the term gain has been followed by both Beeson J in the Secretary for Justice v. Li Man Wai, HCMA723/2002, notwithstanding the fact that for other reasons the consequences of that judgment were reversed by the judgment of the Court of Final Appeal (see paras. 11 and 12 of the judgment of Beeson J) and also by Deputy Judge Barnes in her judgment in HKSAR v. Yu Mei King, HCMA898/2002. AUTONUMOUT Of the resolution of the issue of whether the evidence established that the appellant had acted with a view to dishonest gain (the information) for himself, Miss Shine submits that the learned magistrate was entitled to view all of the evidence in the round. She submits that the evidence to which the magistrate adverted of the circumstances in which the appellant had obtained access to the computer, following which he obtained access to the information was both relevant and probative of the issue to be determined.

Conclusion

AUTONUMOUT No issue is taken in this appeal of the learned magistrate s finding that the evidence established that the appellant obtained access to a computer, albeit through PCO Shum. Nor is it disputed that in consequence of that access, the address of Mr Leung was made available to the appellant who then made a written note. AUTONUMOUT In his analysis in Tsun Shui Lun of the ingredients of the offences created by section 161(1), Chan CJHC said The actus reus is obtaining access to a computer. Each of the four situations constitutes the mens rea of the respective crime. What s.161 is intended to do is to punish access into a computer with a particular intent or for a particular purpose. The intent with which or the purpose for which the access is made must be either criminal or dishonest. It would also follow that it is the intent or

purpose of the offender at the time of the access which must be looked at, not his intent or purpose at some later stage. AUTONUMOUT Of the meaning of gain , Chan CJHC went on to state Looking at the definition of gain in the context of a computer crime, it is clear, in my view, that the subject matter of a gain as defined in s.161 would include information which the person obtaining access to the computer did not have before the access. It is clear that the section, is intended to cover the acquisition of information which is in itself (i) neither a monetary nor proprietary benefit; but is (ii) something that is capable of retaining at least temporarily if not permanently and (iii) something that is capable of keeping when one has already got it and capable of getting when one has not. What is anticipated by gain in s.161(1)(c) is a benefit or an advantage. However, I do not agree that it must be something which can be utilised or used. That is not expressed nor can it be implied in the section. For these reasons, I take the view that s.161(1)(c), when it is construed in the context of a computer crime and the rest of the section, permits the construction of the word gain to include obtaining information which one did not have prior to his access to a computer. The information may be transient if it is read on the screen or permanent if it is printed out or copied onto another diskette. AUTONUMOUT With respect I adopt the construction put on that term by Chan CJHC in the passages cited earlier. In my judgment, the learned magistrate was correct to find that the obtaining of the address of Mr Leung, being information which the appellant did not have prior to the access to the computer, was a gain within the context of the use of that term in section 161(1)(c) of the Crimes Ordinance. AUTONUMOUT With respect to Mr Bruce I reject his submission that it is an ingredient of the offence that the prosecution prove the purpose for which the appellant obtained that information. The simple language of the subsection does not permit of that interpretation. In my judgment, what he there describes as the purpose is in reality the motive for the appellant to obtain the gain of that information. It is not necessary for the prosecution to prove that motive. AUTONUMOUT Of the issue of dishonesty, I reject Mr Bruce s submission that the evidence to which the magistrate had regard, namely evidence relating to the circumstances in which the appellant had come to obtain access to the computer and then to gain the information, the address of Mr Leung, was insufficient to determine that the appellant had conducted himself with a view to dishonest gain for himself . It was both relevant and cogent evidence in respect of that issue. On that evidence the magistrate was entitled to make the finding he did. AUTONUMOUT In the result, the appellant s appeal against conviction is dismissed. (Michael Lunn) Judge of the Court of First Instance High Court Miss Lynda Shine, SGC, of the Department of Justice, for the Respondent Mr Andrew Bruce, 1udk 1udk O P Q R S T U V (#p# &`#\$ V) /6 JOQN V) / JOQN & 6" CACV Jeannie MY MokSo ABC.dot setup Microsoft Word 9.0 Judiciary CACV Title Microsoft Word Document MSWordDoc Word.Document.8

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