

HONG KONG / JUDGMENT

HKSAR v. AU WING KUN

COURT

Court of Appeal

DECIDED

22 June 2007

CASE / FILE NUMBER

CACC391/2006

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bjbj @S8l9h) nomacro Applicant

Before: Hon Stuart-Moore VP and Beeson J Date of Hearing: 13 June 2007 Date of Judgment: 22 June 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court): On 30 August 2006, the applicant, aged 52 with no previous convictions, pleaded guilty before Deputy District Judge A Tse to four charges of fraud and a further charge of theft. Concurrent sentences of 30 months imprisonment were imposed by the judge on 14 September 2006 after a background report had been prepared. The applicant now seeks leave to appeal against sentence. We shall begin by looking at the reasons given by the judge for the sentence she imposed. These were as follows:

1. This is a very serious case. According to the Admitted Facts you were in fact acting as a financial adviser and investment agent of the victims [PW1-PW4]. Very large sums of money were involved totalling over \$1.26 million. There were four victims involved and the offences involved false accounting to the victims. The offences spanned a protracted period of time and, as a result, PW1 lost his life savings at a time when he was in urgent need of money.
2. According to the background report, you are self-centred and hedonistic. Apart from losing the money of the victims you spent the savings of your wife and your elder sister. You are evasive about how you lost so much money. This is a breach of trust case. Unless there are exceptional circumstances, the normal sentence for theft and breach of trust is immediate custodial sentence. No exceptional circumstances have been made out in this case. I have considered the relevant authorities, such as R v Barrick, R v Trevor Clark and HKSAR v Wong Kay Din.
3. For theft of between 100,000 to 200,000 the starting point after plea is 2 to 3 years imprisonment. I note that the amount involved is just under 100,000. However, there are a number of aggravating factors. As I said, these offences spanned a protracted period of time. There were a number of victims. You were involved in false accounting. The effect on PW1 is devastating. You have repaid \$300,000 but no further restitution can be offered. I propose to

take a global view and adopt 45 months as the starting point for each charge. I give you full discount for your guilty plea[s]. The sentence for each charge is reduced to 30 months. There are no other mitigating factors. You are sentenced to 30 months for each charge, to be served concurrently. (Appeal bundle pp. 15-16) We are a little surprised that the reasons given were so shortly stated although we observe from the District Court file that the judge rose for only ten minutes to consider sentence. This may have a bearing on the judge's decision to regard this case as one involving breach of trust of the kind intended to be covered by the authorities to which she referred. In *R v Trevor Clark* [1998] 2 Cr App R 137 at 140, (adopted in Hong Kong in *HKSAR v Wong Kay-din* CAAR 7/1998) Rose LJ, giving the judgment of the English Court of Appeal said: The starting point is necessarily *Barrick*. At p. 81 Lord Lane C.J., giving the judgment of the Court, said this: The type of case with which we are concerned is where a person in a position of trust, for example, an accountant, solicitor, bank employee or postman, has used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money. The applicant, in short, had been entrusted with \$1.265 million which had been given to him by PWs 1-4 for the agreed purpose of acquiring stocks and shares on their behalf. However, he simply used the money for his own purposes. When he was unable to repay the victims, a report was made to the police. In our opinion this was not strictly a breach of trust case. The applicant was not acting in any professional capacity as an investment agent for the victims as, for example, a banker or recognised broker would have been if performing the same task. The applicant had befriended his victims and was, in reality, no more than a conman practised in the art of deceit. Having said this, we do not regard this as a distinction of any real significance in the present circumstances. The next matter of any note is that the judge had referred to a theft between 100,000 to 200,000 calling for the starting point after plea of 2 to 3 years imprisonment. Again, the judge appears to have been making reference to *R v Trevor Clark* which was intended to deal with the effects of inflation since the decision in *R v Barrick* [1985] 81 Cr App R 78 where the guidelines for theft in breach of trust cases were first given. In the light of inflation since that time, the court in *R v Trevor Clark* (at page 142) made a number of suggestions, saying: We stress that they are by way of guidelines only and that many factors other than the amount involved may affect sentence. Where the amount is not small, but is less than 17,500, terms of imprisonment from the very short up to 21 months will be appropriate; cases involving sums between 17,500 and 100,000, will merit two to three years; cases involving sums between 100,000 and 250,000, will merit three to four years; cases involving between 250,000 and 1 million will merit between five and nine years; cases involving 1 million or more, will merit 10 years or more. These terms are appropriate for contested cases. Pleas of guilty will attract an appropriate discount. Where the sums involved are exceptionally large, and not stolen on a single occasion, or the dishonesty is directed at more than one victim or group of victims, consecutive sentences may be called for. It can be seen that the court was saying, by way of guideline only, that for amounts between 17,500 and 100,000, sentences of between 2 to 3 years imprisonment would be merited with an appropriate discount for pleas of guilty. The slip which the judge had apparently made by referring to the appropriate sentence after plea for a theft of

between 100,000 and 200,000 is difficult to relate to the instant case as the sum was, as the judge clearly recognized, under 100,000. The third point we have noted from the Reasons for Sentence is that when the judge referred to a number of aggravating factors, she took into account the number of victims, the applicant's involvement in false accounting and the devastating effect on PW1 of the theft from him. This last point appears to have been an inference drawn because the judge had thought that PW1 had lost his life savings. Little needs to be said about the first two factors said to have aggravated the offences for the purposes of sentence, albeit the false accounting was no more than a set of handwritten notes made by the applicant in his notebook which he had shown to PW1. More importantly, we have gone to considerable lengths in an attempt to discover the origin of the third factor as this might well have amounted to a seriously aggravating factor had it been borne out. We have, however, been unable to find any support for saying that PW1 had lost his life savings and that the effect upon him was devastating as no doubt it would have been had this been the case. We have carefully examined all the facts and the District Court file. Ms Wong, for the respondent, was unable to assist us and the police who were in attendance during the hearing were equally unable to do so. Significantly, nothing was said about this in either the Summary of Facts or the transcript of proceedings. We are at a complete loss to understand from where this potentially important ingredient in aggravation of the offence, which was plainly in the judge's mind, had come. The applicant, we have noted, was unrepresented throughout the District Court proceedings so that the error into which the judge had, with respect, unfortunately fallen could not be pointed out by counsel on his behalf. Having said this, there was every reason for the prosecutor to have done so assuming that this had been noticed by him. Apparently, however, this important comment went by unnoticed as nothing was said to correct it. The last observation we make about the Reasons for Sentence is that, aside from the guilty pleas, the judge took particular note of the fact that the applicant had repaid \$300,000 although no further restitution can be offered. This was not an entirely apt description of what had occurred as the so-called repayment was, as Mr Robert Y H Pang for the applicant candidly accepted, not restitution at all. The applicant had repaid this sum to PW1 as a means of buying further time in order to avoid being found out at a stage when PW1 was seeking the return of all the money which he believed the applicant had invested for him. We have little doubt that what the judge was trying to say was that in the applicant's favour, although the offences covered by the charge sheet amounted to \$1.265 million, \$300,000 of that sum had been returned to PW1. In fact, a similar point could also have been made in respect of PW3 to whom a net sum of \$70,000 was returned. The actual loss was, therefore, approximately \$895,000 albeit this is a somewhat artificial figure when the overall figure, covered by the frauds as a whole, was \$1.265 million. Mr Pang, in a most persuasive address, emphasised all the points to which we have referred when advancing his main ground of appeal. He submitted that the sentence was manifestly excessive as the judge had departed from the established guidelines [in *R v Trevor Clark* affirmed in *HKSAR v Wong Kay-din*] in adopting a starting point of 45 months when the circumstances of the case did not merit such departure. After careful consideration, we have taken the view that the starting point of 45 months in respect of the overall criminality reflected by these offences

was very possibly influenced by a number of factors adverse to the applicant which ought not to have been taken against him. Accordingly, we shall, as a matter of principle, begin the sentencing exercise afresh. The sums, totalling \$1,265,500 involved in the charges were as follows:

- (1) \$830,000
 - (2) \$80,500
 - (3) \$110,000
 - (4) \$145,000
 - (5) \$100,000
- We consider, in the light of the arguments so well presented by Mr Pang, that the starting point on charge 1 should be 30 months imprisonment and that the starting points for the remaining charges should be, in each case, 18 months imprisonment. The applicant is, of course, entitled to a one-third discount in each case to reflect his guilty pleas. Accordingly, we shall grant leave and, treating the hearing as the appeal, we shall allow the appeal to the extent that the concurrent sentences of 30 months imprisonment imposed in the court below are quashed and in their place we substitute a sentence of 20 months on the 1st charge and 12 months imprisonment on each of the remaining charges. We shall, however, order that whilst the 12-month terms on charges 2 to 5 are to be served concurrently to each other, 4 months of this term will be served consecutively to the sentence on the 1st charge. This results in an overall sentence of 2 years imprisonment which represents a reduction by 6 months in the overall sentence originally imposed. (M. Stuart-Moore) macrobutton nomacro Vice-President (C-M Beeson) Judge of the Court of First Instance Ms Wong Kam Hing, SGC, of the Department of Justice, for the Respondent. Mr Pang Yiu Hung, Robert, instructed by Director of Legal Aid, for the macrobutton nomacro Applicant PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S 1udk 1udk 1udk L M N O P Q R S T U V "0 "0 "0 i\$&`G Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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