

HONG KONG / JUDGMENT

HKSAR v. CHAE MAN TOCK AND ANOTHER

COURT

Court of Appeal

DECIDED

9 October 2012

CASE / FILE NUMBER

CACC255/2012

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bjbj CACC 255/2012 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CRIMINAL APPEAL CASE NO 255 OF 2012 (on appeal from DCCC 973
of 2011)

IN THE MATTER of section 83R and 83Y of the Criminal Procedure Ordinance (Cap. 221) and IN
THE MATTER of an application by CHAE MAN TOCK and CHOW SHUK MEI for bail pending
appeal

BETWEEN HKSAR Respondent and CHAE MAN TOCK nd wife have applied for bail pending
appeal. On 6 June 2012 the 1st Applicant was found guilty by HH Judge Browne of:

- 2 counts of accepting an advantage as an agent (contrary to s.9(1)(a) and s.12(1) of the Prevention of Bribery Ordinance Cap. 201), for which he was sentenced to 12 months imprisonment; and
- 25 counts of fraud (contrary to s.16A of the Theft Ordinance Cap.210), for which he was sentenced to 3 years and 6 months imprisonment. Twenty one of the fraud charges were preferred as alternative charges to the original Charge 16, which alleged conspiracy to defraud with one Daniel Yeung Hoi Fan (PW4), for which the judge found no case to answer. All sentences were ordered to be served concurrently. He has applied for leave to appeal against conviction only. The 2nd Applicant was found guilty by Judge Browne of:
- 3 counts of accepting an advantage as an agent (contrary to s.9(1)(a) and s.12(1) of the Prevention of Bribery Ordinance Cap. 201), for which she was sentenced to 12 months imprisonment;

- 25 counts of fraud (contrary to s.16A of the Theft Ordinance Cap.210), for which she was sentenced to 3 years and 6 months imprisonment (similarly to the 1st Applicant, 21 of the fraud charges were preferred as alternative charges to the original conspiracy to defraud charge, i.e. Charge 16); and
- 2 counts of aiding and abetting an agent to accept an advantage, for which she was sentenced to 12 months imprisonment. All sentences were ordered to be served concurrently. She has also applied for leave to appeal against conviction only. Principles governing bail pending appeal The court has an unfettered discretion in deciding whether to grant bail pending appeal. It is usually only granted where it appears prima facie that the appeal is likely to be successful. Another factor (which does not apply to the present case) is a risk that the sentence will have been served by the time the appeal is heard (see R v Lee Hoi-Kwong [1993] HKLY 216). Case The prosecution case was that the 1st Applicant was the manager of the Hong Kong office of a UK company as from May 2007. It is not disputed that previously (from April 2006) he was employed by the UK company in its Shenzhen office. The 2nd Applicant, his wife, was also employed by the UK company at the HK office as from August 2007. The UK company acquired goods from suppliers on the mainland. The goods were sourced first by the Shenzhen office, and then when it closed in May 2007, by the HK office. Invoices were made out to the UK company and payment was made by the UK company directly to the suppliers. Essentially the prosecution case was that the 1st Applicant caused the suppliers to inflate their prices, and then requested the suppliers to pay him (mostly through his wife, the 2nd Applicant) the difference between the inflated prices and the original prices. The prosecution case was that this was a surreptitious arrangement not known to the Applicants employer. The transactions pursuant to this arrangement formed the basis of the fraud charges against both Applicants. The price differential was mainly received by the 2nd Applicant and this formed the basis of Charges 3-5 against her. A supplier Yuan Shenyong (PW7) testified that even when the 1st Applicant was working in the Shenzhen office, the 1st Applicant had made a similar arrangement with him for inflating prices, in order that the 1st Applicant could pocket the price differential. This formed the basis for Charges 1 and 2 against the 1st Applicant, and Charges 17 and 18 against the 2nd Applicant. The defence case was that the 1st Applicant had entered into a partnership agreement with Peter Townsend (PW1) who controlled the UK company. As part of this partnership, the 1st Applicant would receive whatever price differential he could get from the suppliers, and the UK company would not be made aware of the original prices. There was no documentary evidence of this partnership agreement alleged by the 1st Applicant. However, there was (exhibited as P9" at trial) a photocopy of a written employment agreement under which the UK company employed the 1st Applicant in its Shenzhen office. There was also exhibited as P10" a letter which PW1 said was written when the 1st Applicant started at the HK office. P10" referred to P9" but with changes to the currency of payment and relieving the UK company of the obligation to pay MPF for the 1st Applicant in Hong Kong. The 1st Applicant denied that exhibit P9" was signed by him and that he had received exhibit P10". He alleged that he had never seen these documents. The

judge found that, even without exhibits P9" and P10", the 1st Applicant was not a partner of the UK company, but was its employee. The Applicants receipt of the price differential was not permitted by his employer, and hence the judge found both the 1st and 2nd Applicants guilty of the charges set out earlier in this judgment. Grounds of Appeal I have considered the Applicants perfected grounds of appeal as well as submissions made by counsel on their behalf. It was submitted that the judge was wrong to have added 21 substantive charges of fraud as alternatives to the original Charge 16 which alleged conspiracy to defraud by the Applicants together with PW4. PW4 was a colleague of the Applicants in the HK office who had testified under immunity. However his testimony was unclear as to his own involvement in the conspiracy, and hence the prosecution evidence did not support the conspiracy charge which included reference to his participation. That left only the Applicants in the charge of conspiracy, but as they were husband and wife, that would not have been possible as a matter of law. It was under those circumstances that 21 joint charges of fraud were added against the Applicants as alternatives to the original conspiracy charge, for which the judge found no case to answer. The prosecution submits that the judge was entitled to do this under s.23(1) of the Criminal Procedure Ordinance Cap. 221 which entitles the court to make orders for the amendment of an indictment to meet the circumstances of the case so long as they can be made without injustice. At this stage it seems to me that the amendment of the indictment by replacing the conspiracy to defraud charge with the substantive fraud charges was technically valid, so long as no injustice was caused to the Applicants. At trial, after the application to amend the indictment, defence counsel was offered an adjournment and given the opportunity to have witnesses recalled for cross-examination. The grounds of appeal and the submissions of counsel for the Applicants do not indicate what injustice has been caused by the amendment in the present case and counsel for the Applicants expressly did not rely on *R v Piggott and another* [1999] All ER (D) 292. Another argument raised by the Applicants was that at trial, the document expert Dr Valery Aginsky had testified that the signature page of exhibit P9" was suspect by reason of a different reproduction history, and the Applicants also threw suspicion on exhibit P10" which was a letter sent to the 1st Applicant at his home address. However in the judge's Reasons for Verdict, he expressly put no weight on exhibits P9" and P10" and he treated the evidence of PW1 and PW24 on this aspect with the greatest caution. It is of course well-established law that a judge may accept one part of a witness's testimony and reject another part in which he is perhaps seeking to embellish other parts of his evidence. The judge held that there was other compelling evidence that the relationship between the UK company and the 1st Applicant was that of employer-employee, rather than one of partners. It was also submitted that the judge failed to take into account a sentence in the statement made by PW1 to the ICAC (which according to PW1, was drafted by an employee) which said that the 1st Applicant was initially employed by [the UK company], after several years of employment requested that his status become self-employed. The judge was clearly aware of this, but noted that on the following page of the same document, it said that the impression the HK staff wished to give of operating as an agent and being entitled to commission payments was NOT, and never has been the case. It was also submitted that the judge misunderstood one piece of evidence

relating to the demand by a supplier called Aesthetics Prototype Ltd against the 1st Applicant himself for a sum of \$214,866. The 1st Applicant had an account in his name which was used for paying petty cash for the HK office. He drew a cheque but later stopped payment. The evidence was that he accompanied the supplier to a solicitor's office in Hong Kong, and gave instructions to the solicitors to issue a letter before action. This led to a letter from the UK company's solicitors which referred to the 1st Applicant as agent. However PW1 explained that he had not noticed it at the time and the letter was prepared in haste as the 1st Applicant told him that he had been assaulted and he (PW1) wished to protect his staff. Further the judge was sceptical of the entire episode as the letter before action was arranged by the 1st Applicant himself in an attempt to recoup his profit on that deal. More importantly, in finding that the 1st Applicant had remained an employee after the HK office started,

- the judge took into account evidence including documentary evidence in which the 1st Applicant referred to PW1 as his employer or his boss, referred to his own wages, asked for bonuses, and the fact that the staff was employed by the UK company, and not by the 1st Applicant as he alleged;
 - the judge also took into account the fact that if (as the 1st Applicant alleged) he had a legitimate business of his own, he would have kept proper records, such as accounts, but he did not;
 - it was also relevant that he had to answer to the UK company for payments to suppliers. As for the grounds individual to the 2nd Applicant, it was submitted that there was no evidence to show that she knew the 1st Applicant was an employee only and not a partner. However the judge referred to a number of pieces of evidence from which he inferred that the 2nd Applicant was aware of her husband's role. This included evidence that she had received money from suppliers for orders placed when the 1st Applicant was employed in the Shenzhen office, and the fact that after she was employed by the UK company in HK, she received cash from a supplier Joe Chan Wai Chung (PW5) in the downstairs area of the HK office. The Applicants have also submitted that the judge played the role of detective in respect of a notebook recovered from the 2nd Applicant's desk (exhibit P1045"). This notebook contained writing (identified by a witness to be the 2nd Applicant
- s) indicating the price differential for a batch of goods. It seems to me at this stage that what is more important is the fact that the judge drew attention of counsel to the notebook and asked both counsel to address him on the exhibit before making findings on it. As such it does not seem to me (at this stage) that the judge had stepped beyond the acceptable boundaries of a judge's role at trial. As for credibility issues taken in the grounds of appeal, it is well-established that this is essentially a matter for the trial judge who had the opportunity of seeing and hearing the witnesses give evidence, and that an appellate court would not usually interfere with matters of credibility. I have considered these and other matters. The prosecution case was not an open and shut one, but given the nature of this application, it suffices for me to say that I am not satisfied that the Applicant has a prima

facie prospect of success. There is no submission based on the length of imprisonment that will have been served before the hearing of the application for leave to appeal. Order In the circumstances, I would dismiss the application. (MARIA YUEN) Justice of Appeal Mr Kevin Egan instructed by Robertsons for the Applicants Ms June Cheung SPP of Department of Justice for the Respondent PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H n`RER8n ZOZD teVH cXNC hzvl gdzvl hzvl hzvl gd6cI gdg[ zrnrrnrnrn^Y h3BZ h3BZ h?Xs h6!Y h6!Y h6cI hhHt h3BZ hhHt gdhHt gdhHt hhHt gdhHt @ I J K L M N O P Q R S T U V [Content\_Types].xml Iw}, \$yi} \_rels/.rels theme/theme/themeManager.xml K Y, sQj)# theme/theme/theme1.xml w toc'v )I`n 3Vq%`#q x}r :TZaG I u3 L+M2 e\O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)` `R>QD =(K&=al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6:\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> U.4 "n zFH k"y# t DB rlE\$ 6`P& XUok XUok k"y# U.4 J GQ CACV 362/2007 Judiciary hccw (for Susan Kwan only).dot Judiciary Microsoft Office Word Judiciary Hong Kong CACV 362/2007 Title Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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