

HONG KONG / JUDGMENT

HKSAR v. CHAN HO

COURT

Court of Appeal

DECIDED

15 February 2007

CASE / FILE NUMBER

CACC383/2005

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Before: Hon Stuart-Moore VP and Lunn J Date of Hearing: 15 February 2007 Date of Judgment: 15 February 2007 J U D G M E N T Stuart-Moore, VP (giving the judgment of the Court): The applicant was convicted on 17 August 2005 by Deputy District Judge Wahab on a charge of making for sale or hire infringing copies of copyright works without the licence of the copyright owner, contrary to sections 118(1)(a) and 119(1) of the Copyright Ordinance, Cap.

528. The judge imposed a 3-year term of imprisonment on 25 August 2005 against which the applicant now seeks to renew an application for leave to appeal out of time. Earlier, the applicant had lodged an application for leave to appeal against conviction but this was dismissed by Woo VP for the reasons set out in his judgment on 1 August 2006 (see also CACC 383/2005). It was only after the dismissal of that application, which was not renewed before the full court, that the applicant made his first application in relation to sentence. In his affirmation dated 11 August 2006, the applicant clearly indicated that he had decided to seek leave to appeal against sentence but he gave no reason for his late decision. We observe that nothing in his grounds of appeal related to anything which had arisen in the year since his conviction. More recently, however, we received a new set of appeal grounds in which, amongst other things, the applicant wrote about having been given by Woo VP special leave to appeal against sentence out of time. He even went so far as to suggest that he then made his application as instructed by Woo VP. These assertions are not supported by a reading of Woo VP's judgment or by anything else in the case papers. Of course, if the applicant had enquired whether he could make such an application out of time, he would have been told that procedurally he could do so. However, this is a far cry from the applicant being given leave. In any event, on 30 November 2006, the late application for leave to appeal against sentence was refused by Yeung JA but the application was promptly renewed by a further notice dated 5 December 2006 in which the possible consequences of making a renewed application, as to which he had already been alerted by the judge, were plainly set out. We shall say very little about the facts of this case as these are sufficiently described in Woo VP's

judgment given on 1 August 2006. It is right to add, however, that a glance at the charge sheet would at first sight seem to indicate that this was a case of minor significance as the particulars were that, on 7 April 2003, the applicant made for sale or hire 6 video compact discs being infringing copies of copyright works, namely films . However, the six discs were merely samples, with two having been removed from each of the three production lines which were in operation at the time of a raid by customs officers. This was a feature of the case with which the judge dealt in his Reasons for Sentence when he said that the applicant's criminality was reflected in the fact that he had commissioned Sonice Industrial Limited (Sonice) to make 78,000 infringing copies. This represented 3,000 sets of discs, each set covering 26 episodes of the film. Originally, Sonice was itself the second defendant on the charge sheet but the prosecution offered no evidence at trial against both Sonice and a third defendant. The judge, in addition to dealing with the applicant on the basis of the overall criminality disclosed by his activities, sentenced him in the light of the decisions in HKSAR v Choi Sai-lok [1999] 4 HKC 334 and Secretary for Justice v Wong Dak-sun & Ors CAAR 10/1999 to a 3-year term having found nothing in the mitigating circumstances to reduce this. Having now had the benefit of seeing the applicant's grounds, we can readily see why his application was dismissed by the single judge and why his mitigation carried no weight before the trial judge. The applicant's further grounds do not provide any reason to reduce his sentence. Perhaps the most significant of these, at least potentially, was his complaint that there had been a substantial delay in his trial. As to this, we notice that the judge had made the observation, based upon the court papers, that the defence had indicated they would be challenging copyright in an endeavour to establish a statutory defence under section 118(3) of the Copyright Ordinance. However, the applicant's defence was disbelieved and he has only himself to blame for the delay. Other grounds raised by the applicant in court today (which also involved listening to parts of the audio-recording of the sentencing process) took the matter no further. We refuse leave out of time and the application is dismissed. This was an utterly unmeritorious application. The applicant, having been put on notice in the ordinary way about the possible consequences of renewing his application and having been given the opportunity to address us about loss of time , we have concluded that it is appropriate to make an order pursuant to section 83W of the Criminal Procedure Ordinance, Cap. 221, that 2 months of the time the applicant has spent in custody pending this application shall not be counted towards his sentence. (M. Stuart-Moore) Vice-President (Michael Lunn) Judge of the Court of First Instance Mr Eddie Sean, SADPP, of the Department of Justice, for the Respondent. The Applicant, in person. 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 1udk 1udk "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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