

HONG KONG / JUDGMENT

HKSAR v. CHAN HON MING

COURT

Court of Appeal

DECIDED

29 October 2008

CASE / FILE NUMBER

CACC314/2007

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bjbj n nomacro Applicant

Before: Hon Stuart-Moore VP, Yuen JA and Barnes J Date of Hearing: 29 October 2008 Date of Judgment: 29 October 2008 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court):

Background

On 29 August 2007, following a trial before Beeson J, the applicant was convicted on 31 counts involving offences of dishonesty for which he was sentenced to 6 years imprisonment on the following day. This is an application for leave to appeal against conviction which has focused upon a single issue, namely, whether the judge ought to have permitted the evidence of flight to the United States of America in support of the prosecution s case on all or any of the charges or, alternatively, if the evidence was correctly admitted, whether the judge properly directed the jury as to flight. The 1st count alleged the evasion of liability by deception, contrary to section 18B(1) (b) of the Theft Ordinance, Cap. 210 (the Ordinance). The 2nd, 3rd and 26th to 31st counts were allegations of false accounting, contrary to section 19(1)(a) of the Ordinance. Each of the remaining counts (4 to 25) was an allegation of procuring the making of an entry in a record of a bank by deception, contrary to section 18D(1) of the Ordinance. All of these offences were said to have been committed between 13 July and 26 August 1993. They arose from a course of conduct whereby the applicant deceived banks in order to evade payment of his debts or to obtain funds for himself. Within 7 days of the last offence in this series, the applicant and his family left Hong Kong owing substantial sums of money. For present purposes, we can use the helpful summary of facts which Mr Zervos SC, for the respondent, has provided to set out the general nature of the criminality alleged against the applicant. The applicant ran a garment business called Concord Trading Company. The business got into financial difficulties in 1993 when the applicant incurred substantial debts with his bankers and with a particular creditor, Mr Sae Jong, the proprietor of Yiu Yeung Enterprises Company. The applicant then allegedly resorted to this 6-week-long spree of offences. Count 1 related to the evasion of liability by deception of a credit card debt of

\$1,133,000 on 24 July 1993. Counts 2 and 3, which occurred on 13 and 29 July 1993, respectively, concerned the falsifying of invoices and cargo receipts relating to the purchase of goods by Concord Trading Company from Yiu Yeung Enterprises Company, which, in turn, were presented to the applicant's bank so that the bank would pay Mr Sae Jong. Counts 4 to 31 concerned fraudulent Letters of Credit which occurred on 21 July 1993 (counts 4 to 8), 6 August 1993 (counts 9, 10 and 17), 10 August 1993 (counts 18 and 26), 11 August 1993 (counts 19 to 22 and 27 to 30), 13 August 1993 (counts 23 and 24), 16 August 1993 (counts 11 to 13), 24 August 1993 (counts 14 to 15, 25 and 31) and 26 August 1993 (count 16). The overall losses are not easy to quantify but the loss on count 1 was \$1.133 million; counts 2 and 3 related to a sum of \$1.2 million; counts 4 to 16 were Letter of Credit frauds involving ABN-AMRO Bank and the dishonest utilization of a \$10 million credit facility; counts 17 to 25 were Letter of Credit frauds on the HSBC which involved an approximate loss to the bank of \$20 million; counts 26 to 31 were false accounting offences which mirrored the offences in counts 18 to 22 and count 25. The judge, when explaining the charges to the jury, said: Charge 1 indicates that he was able to run up a very large credit card bill with the approval of the bank, but later did not have the money to repay it. He had, allegedly, deceived the bank in making an agreement to repay the bank the outstanding money, in two instalments, when he knew he did not have the money to repay it and had no intention of repaying it. Charges 2 and 3 came about because he wished to pay his creditor, his long-term creditor, at least part of the large sum of money that was due and owing to him so, allegedly, he engaged in falsifying documents and deceived the bank into paying out the substantial sum of money that he owed to the proprietor of Yiu Yeung. The other false accounting charges, which were 26 to 31, involved different documents but, again, a dishonest falsification is alleged. He led the bank to believe that a documentary credit had been issued for goods purchased and the bank paid over the money on the basis of the letter of indemnity. In respect of the other counts, he sought to obtain large sums of money by manipulating the system of documentary credit, the letters of credit which are the basis of the trading finance facilities. The charges relating to those LCs are procuring an entry in the books of the bank by deception, the deception being the signing of the letter of indemnity, effectively agreeing to repay the bank if the deal did not go ahead. All the relevant events happened in and around 1993 and the period with which we are basically concerned runs roughly from the beginning of July to 24 August 1993. Thereafter, the accused, who had been running what Mr Sae Jong described as a substantial business, left Hong Kong and went to the USA. That was on 1 September 1993. He did not return to Hong Kong until 7 February 2007, some 14 years later, having been extradited from the USA, having been arrested there on 18 May 2006. Ground of appeal and argument Against this background, Mr Lawrence Lok SC, for the applicant, submitted that the judge had: erred in admitting evidence of the applicant flight to the USA as supporting the prosecution case or, alternatively, had erred by: giving directions on flight which were inadequate in that the standard flight directions catered for one criminal activity offences whereas the case against the Applicant involved many types of criminal activities. The learned Judge did not specify in what way would flight advance the prosecution case. (p.133P - p.135D) [Chan Kwok Keung & another v. The Queen (1989) 2 HKC; HKSAR v. Mo Shiu Shing (1999) 1 HKC]. It was submitted that the suggested error had rendered the convictions unsafe or unsatisfactory. The applicant's departure from Hong Kong was commented upon by Mr Callaghan in his final

speech to the jury in the context of the 1st count when he referred to the applicant's disappearance and failure to repay the \$1.133 million he owed to the bank in these terms: He didn't pay it back; he couldn't pay it back. He could not be located. He disappeared without a word. There was no further contact with the bank and he left Hong Kong never to return. Nothing was said. In 14 years, never heard anything. And he was brought back to Hong Kong by the Hong Kong Police. The only inference, from all the circumstances, that you can draw, in our submission to you, members of the jury, is that he never intended to pay that money to the bank, and when he told them that he was going to pay it back, in two instalments, that that was a lie, that he never intended to keep that promise. And what happened afterwards demonstrates that. A little earlier, Mr Callaghan had remarked that the applicant had been planning to leave Hong Kong permanently when he made this arrangement with the bank and that instead of keeping his promise with the bank he ran away. In summing up, the judge dealt with the applicant's departure from Hong Kong as follows: There is one matter I have to put before you. It is admitted that the accused disappeared deliberately from Hong Kong and went to the USA on 1 September 1993. That was almost immediately after these events in July and August. You are entitled to consider whether that supports the case brought against him by the prosecution - that flight, as it were, supports the case brought against him by the prosecution. You will need to consider, first of all, whether it has been established that the accused did run away after these offences were allegedly committed. It is certainly admitted that he left the jurisdiction on 1 September, but you will recall from the Admitted Facts put before you by the defence that he had had resident's rights since March of 1993 in the USA. If you are sure, when you have considered the matters that have been put before you, that he did run away, then you would have to go on and consider why did he run away. The mere fact that he chose to leave is not in itself any direct evidence of guilt. There are many innocent reasons why a person might leave abruptly. It has been suggested on behalf of the accused that he might have been one of the people who were nervous about what might happen in 1997 and that that might have caused him to leave. It is possible that a person might leave because of a family or business crisis. You will recall Mr Sae Jong's evidence that he went at one stage to the business premises of the accused and found the staff packing up, but no one knew where he was. The banks were unable to contact him. He did not return to Hong Kong until he was arrested and extradited in 2007. If you think there may be what you might call an innocent explanation for his leaving Hong Kong, you should take no notice of the fact that he chose to leave. It is only if you are sure that he did not run away for some innocent reason that his actions in leaving Hong Kong could be regarded as evidence which might support the prosecution case. You will note by that stage that he was, according to Mr Sae Jong anyway, he was in some difficulty financially. The banks indicate that he was overdrawn at the time he incurred the credit card debt which is the subject of Charge 1. Mr Sae Jong also says that he was kept waiting for payment almost the whole period of their two-year relationship when they were working together and that he considered that he had a cash-flow problem. But nevertheless, if you think that there might be an innocent explanation for his leaving Hong Kong, you should just ignore the fact that he chose to leave because, as I say, it is only if you are sure that he left for some non-innocent reason that his actions can be regarded as evidence which might support the prosecution case. Mr Lok submitted that there had not been a sufficient nexus between the

applicant's departure from Hong Kong and the offences alleged against him. The applicant had acquired his Green Card and U.S. citizenship in March 1993 and some of the offences on the indictment were committed several weeks prior to his departure so that it could not be said that there was the necessary immediacy to suggest that this was flight arising from feelings of guilt as opposed to a simple desire to take up residency in the USA where the applicant was fully entitled to go. Mr Lok's alternative submission was that as these charges reflected various different factual scenarios, it was not appropriate for the judge to have given the jury a standard specimen flight direction, appropriate for a single offence, when this needed to be tailored to the circumstances which had arisen in the present case where multiple offences were alleged against the applicant. In this regard, Mr Lok placed reliance on *US v Myers* 550 Federal Reporter 2d Series 1036, a number of Canadian cases following the decision in *R v Arcangioli* [1994] 1 SCR 129 and *R v Gantar* 167 A Crim R 504, all of which we found unhelpful having regard to the situation which had arisen in the instant case where the applicant's departure from Hong Kong and his 31 fraudulent dealings with the banks all occurred within the space of 7 weeks between 13 July and 1 September 2003. The judge had been careful to direct the jury that it was a matter for them to consider whether the applicant had run away in a passage taken from the summing up which we have already cited (see paragraph REF _Ref212969547 \r \p \h * MERGEFORMAT 12 above). Earlier, the judge had directed the jury in the following terms, leaving them in no doubt as to the approach they should take in regard to each offence: The accused faces 31 charges. You have to consider the case against and for the accused on each count separately, and reach a verdict in respect of each charge after you have focussed on that charge and formed a separate decision about it. You may find it helpful to consider the evidence relevant to each charge, dealing with each charge in turn and making a decision before going on to the next charge. The charges divide into roughly two separate areas and it may help you first to consider the charges within those areas, and then consider each individual charge. The evidence that you have to consider, if you adopt that procedure, may overlap in some respects and you may find that you have to examine some parts of the evidence more than once, if you follow that method. However, because it is important that each charge is dealt with separately, I suggest you follow the method I suggest, or a similar method, to ensure that each charge has your individual attention. The fact that you consider each charge separately does not mean that you ignore all the evidence of background circumstances relevant to other charges or other areas that might be evidence which will assist you in reaching a verdict. You are free to follow your own methods rather than my suggestions as long as you adopt a procedure that ensures you deal with each charge as a separate charge. You can reach different verdicts on different charges. The fact that you find the accused guilty of one charge in a particular area does not mean that you must find him guilty of all the remaining charges. He can be acquitted of one, some, or all of the charges, or be convicted on one, some, or all of the charges. You must reach separate verdicts for each count after having directed your attention to the facts of each count separately and after having made a separate decision about it. When you return your verdict, you will be asked to deliver a separate verdict on each of the charges. Whilst there may undoubtedly be cases where flight may be a relevant consideration to some offences on an indictment but not to others, in the circumstances of the present case it is our view that it would have been wholly unrealistic to invite the jury to consider in any greater

detail than the judge had outlined to them whether flight might have had relevance to some of the counts on the indictment but not others. Here, a large number of similar offences, all closely connected in time and part of an unbroken single series of criminal acts, were committed within days of the applicant leaving Hong Kong with his family. A clearer example of where a flight direction of the kind given by the judge was appropriate it would be hard to imagine.

Conclusion

The application is dismissed. (M. Stuart-Moore) macrobutton nomacro Vice-President (Maria Yuen) Justice of Appeal (Judianna Barnes) Judge of the Court of First Instance Mr Kevin P Zervos, SC, DDPP and Mr Marco Li, SPP, of the Department of Justice, for the Respondent. Mr Lawrence Lok, SC and Mr Caesar Lo, instructed by Messrs Tang, Wong & Cheung, for the macrobutton nomacro Applicant PAGE - PAGE - A B C D E F G H I J K 1udk 1udk 1udk D E F G H I J K L M N O P Q R S T U V "0 "0 "0 i\$&`G Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 27 October 2026 · Esheria