

HONG KONG / JUDGMENT

HKSAR v. CHAN KAI MING

COURT

Court of First Instance

DECIDED

14 December 2007

CASE / FILE NUMBER

HCMA123/2007

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bjbj HCMA123/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 123 OF 2007 (ON APPEAL FROM ESCC 1111 OF 2006)

BETWEEN HKSAR Respondent and CHAN KAI MING(nvicted after trial in Kwun Tong Magistracy of three offences of accepting an advantage as an agent, contrary to section 9(1)(b) of the Prevention of Bribery Ordinance, Cap. 201 (the Ordinance). Each offence was charged in identical terms, save for the particularised date, as follows Particulars of offence CHAN kai-ming, being an agent, namely an Area Operations Supervisor of Park N Shop Limited, on or about the [date] in Hong Kong, without lawful authority or reasonable excuse, accepted an advantage, namely a gift, loan, fee, reward or commission or a favour consisting of a free trip to Macao including a round-trip ferry ticket and a hotel room, from LING Wai-yip, Jackie, as an inducement to or reward for or otherwise on account of the said CHAN Kai-ming showing or forbearing to show, or having shown or forborne to show, favour or disfavour to Uni-China Investment and Development Company Limited and Keen Way Trading (Fresh Meat Delivery) Company Limited, in relation to his principal s affairs or business. AUTONUMOUT The appellant now appeals those convictions. AUTONUMOUT The prosecution s case was that the appellant, at the material times in 2005, was an operations supervisor of Park N Shop Limited () whose responsibilities included the supervision of the supply of meat products packaging materials to various privately operated meat counters which did business on their own behalf within PNS stores in Hong Kong. AUTONUMOUT Ling Yip (Ling) was a proprietor of two companies which operated such counters, namely, Uni China Investment and Development Co. Ltd (Uni China) and Keen Way Trading (Fresh Meat Delivery) Co. Ltd (Keen Way). While Uni China and Keen Way were responsible for supplying their own meat products to the counters they operated, PNS was responsible for providing the counters with materials and appliances for the packaging and display of the meat. AUTONUMOUT Keen Way commenced doing business with PNS in March 2004 and Uni China in about April

2005. The appellant and Ling came to know each other in the course of Ling's companies doing their business at PNS. AUTONUMOUT In July, August and October 2005 Ling purchased entertainment packages for himself and the appellant to go to Macau. The packages included the return ferry trip and overnight accommodation expenses. The appellant subsequently admitted to interviewing ICAC officers that Ling had also provided him with chips to gamble with in a Macau casino. He told those officers also that he thought Ling in doing so might think he could help Ling's businesses. Ling had also provided him with the sexual services of a hostess at a night club and, on the occasion of the 3rd charged offence, a sharks fin and abalone meal. AUTONUMOUT The appellant gave evidence and his case was that to his understanding Ling had provided the trips, accommodation and other benefits to him simply because they were friends and that there had been no connection with his duties at PNS. AUTONUMOUT The magistrate, after considering all the evidence, concluded as follows
40. I am satisfied that the appellant, being an agent of PNS, on the material dates, without lawful authority or reasonable excuse, had accepted an advantage, namely, free trips to Macao including round-trip ferry tickets and hotel accommodation, from Ling, as an inducement to or reward for the appellant showing or having shown favour to Uni-china and Keen Way in relation to PNS affairs or business. AUTONUMOUT Alex Ng, for the appellant, advanced grounds of appeal which can be summarised as follows :
- (1) The magistrate was wrong to find, as required by section 9(1)(b), that the appellant accepted any advantage in relation to PNS's affairs or business .
 - (2) The magistrate erred in failing to find a causal relationship between the appellant's acceptance of the advantages and any act done or intended to be done by him.
 - (3) The magistrate descended into the arena and cross examined the appellant at length so as to display bias.
 - (4) The magistrate erred by allowing the admission into evidence of the appellant's video recorded interview. (1) In relation to PNS's affairs or business AUTONUMOUT The initial argument of Mr Ng in this regard was that the prosecution had to do something more than simply prove the advantages were provided to the appellant. They had to prove the appellant intended to do something in return. That is, as Mr Ng put it, that the appellant had a guilty mind in accepting the advantages in that he intended to show some favour to Ling or his companies in the future. If the appellant simply intended to perform his usual duties and not reciprocate in any such way, then the offence, according to Mr Ng, has not been made out. AUTONUMOUT With respect to that argument it goes too far. It is now trite law that the prosecution does not have to prove the acceptor of an advantage had any intention of actually showing any favour to the offeror. AUTONUMOUT Lee, for the respondent, relies upon section 11 of the Ordinance in that regard

- (1) If, in any proceedings for an offence under any section in this Part, it is proved that the accused accepted any advantage, believing or suspecting or having grounds to believe or suspect that the advantage was given as an inducement to or reward for or otherwise on account of his doing or forbearing to do, or having done or forborne to do, any act referred to in that section, it shall be no defence that
- (a) he did not actually have the power, right or opportunity so to do or forbear;
 - (b) he accepted the advantage without intending so to do or forbear; or
 - (c) he did not in fact so do or forbear. AUTONUMOUT Ng argues further, however, that section 11 does not apply if the advantages were given by Ling and received by the appellant purely as a matter of friendship, then they could not have been given as an inducement to or reward for or otherwise on account of [the appellant] showing favour to any person in relation to PNS's affairs or business as required by section 9(1)(b). If authority be needed for that straightforward proposition then Mr Ng relies upon *Commissioner of the Independent Commission Against Corruption v. Ching Poh* [1997] HKLRD 652 per Lord Lloyd of Berwick at 657B D. AUTONUMOUT agree that section 11 only operates in circumstances where the prosecution have proven an individual accepted an advantage believing or suspecting or having grounds to believe or suspect that the advantage was given for the relevant purpose specified in section 9 of the Ordinance. Mr Ng must therefore be right in asserting that if the appellant accepted the advantages simply on the basis of friendship that the section 9(1)(b) offences have not been made out. But the magistrate's findings were emphatic in this regard 37. The cost of the ferry tickets and hotel accommodation are expensive (the appellant said in the VIR, they were \$1,000 odd, \$2,000), and also, on each trip, they had gone to a night club, and sexual services of a hostess was provided, and on the third trip, Ling had ordered an abalone and shark's fin meal, costing several hundred of dollars per person, none of which had been for by the appellant. It would be unbelievable that Ling, even as a friend, would pay for all this, for no reason at all. The appellant must have known, believed or suspected, at the material time when the trips were given, why Ling was treating him so generously. AUTONUMOUT In my view the magistrate was quite right, on the evidence before her, to arrive at that conclusion. AUTONUMOUT There is no merit in this ground.
- (2) The lack of a causal relationship AUTONUMOUT The appellant puts his argument in respect of this ground in the following way : the prosecution opened and conducted their case on the basis that the appellant accepted the advantages knowing they were offered specifically to encourage him to organise the provision of packaging and display materials to Uni China and Keen Way's counters at PNS. The lack of provision of these items had been somewhat of a problem. AUTONUMOUT For that reason Mr Ng argues that the magistrate was wrong to arrive at her findings on a more general basis without requiring the prosecution to prove the appellant knew or suspected the advantages were given him for a specific favour. The relationship between the provision of advantages and the specific favour sought was what Mr Ng described as the causal relationship . The magistrate's findings, relied upon by Mr Ng as being in general terms and not finding any such causal relationship, were as follows

33. I was satisfied that Ling, having met the appellant in the course of his business dealings with PNS, had offered these free trips to Macao to the appellant, as an inducement or reward for the appellant showing or having shown favour to Uni-China and Keen Way in relation to PNS's affairs or business. There is no other reasonable inference for Ling to have done this. and finally
40. I am satisfied that the appellant, being an agent of PNS, on the material dates, without lawful authority or reasonable excuse, had accepted an advantage, namely, free trips to Macao including round-trip ferry tickets and hotel accommodation, from Ling, as an inducement to or reward for the appellant showing or having shown favour to Uni-china and Keen Way in relation to PNS affairs or business. AUTONUMOUT After the prosecution's opening, which consisted of a reading of the summary of facts, the following exchange occurred between defence counsel, Mr Wong, and the prosecutor, Mr MR WONG: Madam, before the prosecution calls the witnesses for the voir dire proceedings, may I at this stage invite the prosecution to give certain further and better particulars in relation to the three charges. Despite the fact that the prosecution have promptly read out the Summary of Facts as the opening speech for the prosecution, yet for ease of understanding or better understanding of the prosecution case, it's not only for myself but perhaps ease of your Worship to understand the prosecution case, may I ask the prosecution to identify what favour or disfavour they seek to allege against the defendant when the alleged bribe was offered to him. That's my submission. MR LAM: Madam, as the charges show, the favour consists of a free trip to Macau, including a round trip ferry ticket and a hotel room. MR WONG: No, I'm talking about favour to the offeror. COURT: To the what? MR WONG: To the offeror of the bribe, namely Uni China Investment and/or Keen Way Tradinig. What sort of favour they received in return for the advantage so alleged. MR LAM: Well, the favour refers to the arrangement of packing materials by the defendant COURT: Sorry, favour as to MR LAM: The arrangement of ordering packing materials by the defendant for Ling's companies. I wonder is it sufficiently MR WONG: Yes, very well. MR LAM: clear now for my learned friend. MR WONG; I'm satisfied. Thank you, madam. COURT: Yes. AUTONUMOUT Ng argues that the prosecution had nailed its colours to the mast and therefore the magistrate should have approached the case on the basis that the prosecution was required to prove that which it said it would. In other words, argues Mr Ng, the prosecution had plainly decided not to proceed on the basis that the advantages offered to the appellant were in the nature of general sweeteners where no specific favour was the target of the payment as in R. v. Chung Fat Ming [1978] HKLR 480, and see the comments of McMullin J in R. v. Chan WingYuen [1977] HKLR 186 where he said The substance of the offence created by section 4(2) is in the soliciting or accepting of an advantage by one acting in the capacity of a government servant under circumstances which make it clear that the advantage is solicited or offered in reference to his having such capacity. It is a feature of the particular evil at which those provisions are aimed that the purpose may be generally apparent without being entirely explicit. In a given case it may be that the evidence available to the prosecution is not sufficiently specific to indicate whether the advantage has been solicited or offered as an

inducement to do a particular act or as a reward for having done it. In such a case the charge should no doubt properly speaking be one of offering or accepting the advantage on account of some prospect of favour not particularized but discernible among a variety of possible acts within the public capacity of the accused. Yet the addition of the other two terms in the charge, in such a case, can scarcely prejudice the accused whereas if the Crown pins itself to naming either inducement or reward for a particular purpose and the evidence turns out not to be so specific as to warrant such a charge and yet shows a clear mutual understanding that the purpose was to keep the official sweet there will arise the necessity of amending, a course which, though permissible, could be avoided without injustice to the accused by naming of all the alternatives in the first instance. By narrowing the charge in the present instance to one of inducement alone the argument was left available that the evidence had shown nothing so specific as an inducement. I say nothing as to the validity of that argument and I mention it only to indicate the difficulties that may arise if an amendment beyond the needs of the case is effected especially at a late stage in the proceedings. Although that case dealt with an offence under section 4 of the Ordinance, the same procedural logic must apply to a prosecution under section 9. AUTONUMOUT In the present case the charge was widely expressed and was not limited to any specific act as a *quid pro quo*. It encompassed the advantages being provided as a general sweetener, and so far as can be seen from the papers there was no need for the prosecuting counsel to restrict his case in the way he did. AUTONUMOUT That being said, however, this was not a situation where the prosecution had changed its course to any significant extent during the course of trial. The principle expressed in *R. v. Falconer-Atlee*, 58 Cr. App. 348 was not breached. Nor had the magistrate convicted on a basis different from that of the case put forward by the prosecution as occurred in *R. v. Ramzan* [1998] 2 Cr. App. 328 and *R. v. Taylor* [1998] Cr. LR 582 and *R. v. Gregory*, 77 Cr. App. 41. AUTONUMOUT There had been some cross examination of prosecution witnesses during the course of the trial as to the duties of the appellant. Indeed, oddly the appellant's own counsel elicited in cross examination of PW1 who was the commercial manager of PNS and a supervisor of the appellant, that the appellant was responsible for providing or supervising the provision of packaging materials to meat counter operators. This exchange took place Q. Did it occur to you some time last year that there were complaints by the meat counters that the supplies of the packaging materials was in short? A. Yes. Q. So what did you know about that? A. What I knew basically is that the Keen Way Company transliteration when they packaged the meat, they needed a lot of packing materials. The complained that sometimes the materials were in short, so they were unable to sell the meal. Q. Briefly tell us what these packaging materials were. A. Including foam trays, cling film, and some price labels. Q. So what did you do after having received this so called complaint? A. I then instructed my subordinate to provide sufficient supplies to the relevant stores. Q. Which or who was the subordinate manager you instructed him to deal with this matter? A. In fact, I don't recall very well but I suppose I either instructed Kwan Hok-man (?) transliteration because he was the buyer of pork or Wong Pok-lui to handle this case. Q. Did it occur to you that either Raymond Kwan or Wong Pok-lui had instructed the defendant, Mr Chan, to deal with this matter? A. I knew that. Q. Yes. Indeed,

from time to time well, put it this way. Let me pose this question first. Eventually Mr Chan proposed to deal with these matters by way of a request form which to be handed to the supplying department each week. COURT: Eventually Mr Chan you mean Q. Mr Chan proposed to you that he would deal with these requests or order by preparing a form and send the same to the supplying department each week. A. Let me think about whether it was his proposal. COURT: Well, when you say Mr Chan, by the way, who are you talking about? MR WONG: The defendant, madam. Sorry. COURT: The defendant, yes. A. I don't recall very well whether it was his proposal, but it was true that he would handle it every week. AUTONUMOUT Additionally during the course of her Statement of Findings the magistrate said, in her analysis of the evidence in reference to the admissions made by the appellant in his video recorded interview

34. Did the appellant believe or suspect that the trips were given as a reward or inducement or otherwise on account of his duties at PNS? In the VIR, the appellant admitted that he had kept helping Ling in his business at PNS, and Ling wanted to treat him to a meal, and for fun (para 642 of the VIR transcript).
35. Further, in the VIR, the appellant referred to the passage in Cheng's notebook which read: Mak: Why did Jacky [Ling] have to give you chips? Chan: He asked me to gamble for him. He might think that I could help him - on his business. The appellant explained that this meant, To apply for some some appliances, and to help him to check carefully, check whether some appliances failed to arrive, that sort (of thing). Appliances in the context of the case referred to packaging and display materials. AUTONUMOUT The magistrate went on to conclude
36. These admissions are detailed, clear and unequivocal: he thought Ling had supplied the free trips because he could assist in Ling's business with PNS. and later set out her general findings relied upon by Mr Ng. AUTONUMOUT It is quite plain in my view that the basis of the magistrate's conviction was her acceptance of the prosecution case that the advantages offered to the appellant were intended to be, and understood by him to be, for the purpose of gaining his cooperation in, particularly, the provision of the packaging materials each meat counter required so as to be able to successfully operate. AUTONUMOUT The more general conclusions of the magistrate excerpted above and relied upon by Mr Ng obviously encompassed and followed on from the magistrate concluding the prosecution had proven the appellant received the advantages well aware they were to encourage him to assist Ling's company by, inter alia, providing their meat counters with sufficient packaging materials. AUTONUMOUT This ground must fail. AUTONUMOUT might add that prosecutors should perhaps be careful in deciding whether their case is based on a general sweetener allegation or an allegation of a more specific quid pro quo given the peculiar difficulties involved in investigating and prosecuting corruption offences whether under section 4 or section 9 of the Ordinance. If the latter, then a prosecutor should be quick to bring to the attention of the court and the defence any change in his stance from that of a specific quid pro quo allegation to that of a more general allegation, in the event such a change is made necessary during the course of the trial. It may be that to accommodate any such change in the

prosecution's allegations the charge will need to be amended and further evidence called.

- (3) The magistrate's interventions AUTONUMOUT Ng primarily complains about certain comments made and questions asked by the magistrate at the end of the appellant's evidence. These comments and questions came after counsel had concluded their own questions of the appellant. They focused on whether the appellant thought Hong Kong laws were the same as Macau laws. The relevance of that series of questions, I must say, is not clear but in any event after the appellant told the magistrate that he thought Macau and Hong Kong laws were much the same, the magistrate sarcastically asked the appellant whether he thought Donald Tsang was the Governor of Macau. AUTONUMOUT After this series of questions, which were nine in number, the magistrate went on to ask a few more relevant and brief questions. Whilst the complained of questions by the magistrate seemed unrelated to any real issue in the trial and while one question was unnecessarily sarcastic and wholly out of place, I do not think taking the conduct of the trial as a whole that the appellant's defence was undermined or diminished. The questions were asked not during the appellant's evidence-in-chief or cross-examination but at the very end of his evidence and, as such, were not interventions of the sort which would have prevented him putting forward his defence, nor would an informed observer in the context of the trial as a whole have regarded them as evidence of bias on the part of the magistrate. AUTONUMOUT Nevertheless, the particular question I have referred to was wholly inappropriate. A judicial officer should treat witnesses and defendants with due respect. Sarcastic or flippant remarks made to a witness do not further the cause of justice. AUTONUMOUT However, for the reasons I have given, this ground fails.
- (4) The admission of the appellant's video interview AUTONUMOUT Ng complains of certain comments made by the magistrate in giving reasons for admitting the appellant's video interview into evidence. AUTONUMOUT In commenting on the appellant's evidence in the *voire dire* proceedings, the magistrate found his evidence to be incredible and exaggerated. The appellant had complained that an ICAC officer had threatened to turn his house upside down in a search if the appellant did not cooperate and to handcuff him in front of his parents. In that regard, the magistrate said of the appellant's assertion
13. If his house were turned upside down, the consequences would be minor and trivial. If the appellant were taken from the house in handcuffs, any alarm felt by his parents would only be temporary and minor. I cannot believe he would sign the notebook because of such alleged threats. AUTONUMOUT Another complaint of the appellant was that he had been asked to face the wall when he had arrived at the ICAC car park after his arrest and told not to look at passing vehicles. In that regard, the magistrate said in rejecting this as oppression
14. The appellant complained that on arrival at the ICAC carpark, Cheng pressed his head down, and told him fiercely to face the wall and not to look back when a vehicle passed behind. I cannot believe that the officers did this to oppress him, but in any event, there were good reasons for the appellant to face the wall, to protect his identity from any members of the public in the vehicle, or prevent the appellant seeing who had been involved with the ICAC.

Even if this occurred, I cannot believe this would affect his voluntariness relating to the VIR. There is no substance in this complaint. AUTONUMOUT The magistrate, in dealing with the appellant's further allegation that he had been forced unnecessarily to take his trousers off when searched, said

15. The appellant complained that when searched, he had to take his trousers off. There is no reason for the ICAC guard or Mak to do this to him, and I cannot believe it happened. Even if it did, the humiliation or embarrassment, if any, would have been temporary. And then finally concluded
16. The appellant exaggerated and was unreliable in his evidence, and I did not believe him. His demeanour in court was consistent with this. AUTONUMOUT Whilst aspects of her findings are phrased so as to be unfortunately perhaps somewhat suggestive that the magistrate was contemplating the possibility of error in her findings, in the circumstances of this case her comments made sense. Fundamentally the magistrate was saying that she rejected the appellant as a witness of truth, and that even if his allegations had been true they were not such as to possibly cause him to make the admissions he made. AUTONUMOUT In my view, her assessment of the effect of any such allegations upon the appellant in determining whether his will may have been overborne, as he said, so as to cause him to cooperate with the ICAC was a matter which, as a matter of common sense, properly went to his credibility. AUTONUMOUT s complaint that the magistrate's reasons were flawed in this regard cannot be sustained. AUTONUMOUT The appeal is dismissed. (M.A. McMahon) Judge of the Court of First Instance High Court Mr Edmond Lee, SGC of the Department of Justice, for HKSAR Mr Alex Ng, instructed by Messrs Au, Thong & Tsang, for the Appellant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V t"(& `#\$ "@AB & 6" ABC.dot setup Microsoft Word 9.0 o[h= Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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