

HONG KONG / JUDGMENT

HKSAR v. CHAN KAM CHING

[2022] HKCFA 13

COURT

Court of Final Appeal

DECIDED

22 June 2022

CASE / FILE NUMBER

FACC10/2021

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bjbj ustice Ribeiro PJ: This is the judgment of the Court. On 14 April 2022, we handed down judgment allowing this appeal, quashing the appellant's convictions and declining to substitute alternative convictions. This judgment deals with consequential costs in the light of the parties' written submissions. The appeal was centrally concerned with what constitutes falsity for the purposes of forgery-related offences involving use of a false instrument under the Crimes Ordinance. The Court examined two competing lines of authority which had developed in England and Hong Kong. It held that on its true construction, the reference to a false instrument in the Ordinance is to an instrument which tells a lie about itself, ie, as to the circumstances of its making or alteration (referred to as the automendacity principle and not, as the other line of authority adopting a wide construction would have it, telling a lie about extraneous facts treated as circumstances relevant to the falsity of the instrument. At the trial and in the Court of Appeal, the parties and the Courts below had proceeded on the basis that the wide construction represented the law, arguing about its application to the facts. It was only on the present appeal that the automendacity approach was canvassed and held to be applicable, resulting in the quashing of the appellant's conviction. The appellant now seeks orders for the costs of the proceedings at trial, in the Court of Appeal and in the Court of Final Appeal, certified fit for two counsel where more than one was engaged, and for three counsel in the substantive appeal before the Court of Final Appeal. The respondent concedes that it should pay the costs of the substantive appeal in the Court of Final Appeal but objects to orders for costs in favour of the appellant at the trial, in the Court of Appeal and on the leave application. It also objects to the certificates for counsel sought. The principles relating to costs in criminal cases involving an acquittal at first instance or a quashing of the conviction on appeal are well-established and may be summarised as follows. The courts are given a broad discretion regarding such costs. Thus, section 15(c) of the Costs in Criminal Cases Ordinance provides that in any criminal proceedings an order as to costs shall be such as a court or a judge considers just and reasonable. Section 43(1) of the Court's statute provides: Costs, including costs in the courts below or before a magistrate, shall be paid by such party or person as the Court shall order, ... , while section 17, dealing with its decisions on appeal, states: The Court may confirm, reverse or

vary the decision of the court from which the appeal lies or may remit the matter with its opinion thereon to that court, or may make such other order in the matter, including any order as to costs, as it thinks fit. Upon an acquittal, the court normally makes a costs order in favour of the accused unless there is a positive reason for departing from that rule. Most frequently, such a reason is found to exist where the accused has brought suspicion on himself or herself, leading to the prosecution. This may be due to that person's conduct in the course of the investigation or during the trial, but the discretion is not bounded by any inflexible rule. Conduct of the accused prior to the investigation and trial stages, including conduct providing the setting for such charges, may have invited suspicion and so be taken into account in the exercise of the discretion. The courts will especially take into account conduct by the accused which is reprehensible and deserving of condemnation or such as to render an award of costs an affront to the administration of justice. These principles apply equally where a conviction at first instance is subsequently overturned on appeal, for instance on a point of law: the accused may be deprived of the costs of the trial because of his or her conduct as aforesaid. If the conviction is quashed in the Court of Final Appeal, treatment of the costs of the intermediate appeal will depend on the circumstances and the basis on which the conviction was overturned. For instance, where arguments which ultimately succeeded in this Court were advanced in, but erroneously rejected by, the Court of Appeal, the costs of the intermediate appeal would normally be awarded to the appellant. It is open to the Court to deprive the accused or appellant of some portion of the costs in relation to any stage of the proceedings, for instance because much time was spent advancing unmeritorious or unarguable points. However, in exercising the discretion as aforesaid, the Court must not act on a basis which contradicts the verdict of acquittal or undermines the presumption of innocence. It can never refuse costs on the basis that the accused ought instead to have been convicted. In jury cases, the basis for the verdict is often opaque and, while the accused may properly be deprived of costs based on admissions or uncontested facts, care must be taken to ensure that the exercise of discretion is consistent with the verdict of acquittal. The principles applied

- (a) Costs of the trial In the present case, the appellant's conduct plainly brought suspicion and the prosecution on himself so that he should not be awarded any of the costs of the trial. The Courts below unequivocally found that he was responsible for drawing up and proffering to the finance company and the Land Registry originals and copies of a sale and purchase agreement and an assignment which purported to record the existence and terms of transactions which he knew to be false. They found that he intended to induce the staff of the finance company and the Land Registry to accept and to act on the documents as genuine, releasing the mortgage funds and entering the documents in the Land Register. Such behaviour was essentially fraudulent even though the lies told did not come within the automendacity principle. He admitted his actions when giving evidence in earlier proceedings involving a money laundering prosecution against his clients. His conduct was all the more reprehensible since the appellant was acting as a solicitor and, in those earlier proceedings, stated that he considered such conduct to be standard practice. In its judgment, the Court commented as follows: The complications and difficulties in the present case flow

from the prosecutorial decision to charge the forgery-related offences under CO sections 73 and 74 rather than bringing more straightforward charges which might well have led to a different outcome. It must not be thought that in holding that the offences charged were not proved, this judgment in any way condones schemes of the type that was hatched and carried out in the present case. Applying for all the costs, the appellant's central submission (relying on *HKSAR v Li Kwok Cheung George (No 2)*) is that: ... The Appellant was put to the expense of defending himself on a charge that, on a proper construction of section 69(a)(vii), could not be established on the facts of this case. Accordingly, he should not now have to bear the burden of meeting the expenses necessarily incurred by him in defending the prosecution allegation in the trial proceedings ... Adding: ... the essential point is that the Appellant was not and could not be guilty of the offence with which he was charged. *HKSAR v Li Kwok Cheung George* was an exceptional case where the accused was prosecuted for money laundering in respect of funds which were known from the outset to be clean, there having been no suggestion that [such funds] derived from the commission of an indictable offence the prosecution taking the view that it was enough if the funds were used in connection with the commission of such an offence. As the Court stated in its judgment on costs, that prosecution was accordingly misconceived as a matter of law and for that reason, it could not be said that the appellants had brought suspicion upon themselves in relation to that offence. The position is very different in the present case. As noted above, the prosecution was founded on the fact that the appellant had undoubtedly engaged in reprehensible conduct involving the aforesaid false representations. Reliance on such conduct cannot be said to have been misconceived since the prosecutor's view (and indeed that of both parties in the Courts below) that his acts constituted the offences charged was supported by a line of authority favouring a wide construction of sections 73 and 74 of the Crimes Ordinance. As it turns out, the Final Court held that the competing automendacity construction was to be preferred so that the conviction had to be quashed. The appellant's conduct had nonetheless clearly brought suspicion and the prosecution on himself. Indeed, the Court's decision to examine the possibility of substituting a conviction for fraud or conspiracy to defraud indicates the dim view taken of the appellant's conduct.

- (b) Costs in the Court of Appeal As noted above, the parties' arguments and the judgment in the Court of Appeal continued to proceed on the basis that the wider construction was correct. It is not a case where the appellant mounted arguments erroneously rejected in that forum which later succeeded in the Final Court. The intermediate appellate proceedings were essentially an extension of the prosecution which he had brought on himself. In the exercise of its discretion, the Court declines to award the appellant any costs of the intermediate appeal.
- (c) Costs of the application for leave to appeal The appellant sought leave to appeal only on the substantial and grave injustice ground, seeking to argue (as he had done in the Court of Appeal) that though the wide construction was correct, it had been misapplied on the facts. The point of law on which the appeal ultimately succeeded was formulated by the Appeal Committee. In the circumstances, there is nothing to recommend an award of costs to the

appellant in respect of that application and we refuse him such costs. Costs in the Court of Final Appeal Since the costs of the substantive final appeal are conceded by the prosecution and since the argument there properly focussed on the competing lines of authority, we grant the appellant those costs to be taxed if not agreed. Certificates for counsel The appellant's application for a certificate for two counsel is unnecessary so far as the Court of Final Appeal is concerned, as has been made clear on many occasions. As Chan PJ explained: Rule 43 of the Hong Kong Court of Final Appeal Rules allows for two counsel to be heard for each party without the leave of the Court. It is thus not necessary to ask for such a certificate for the purpose of taxation of costs, but if any party seeks to recover the costs of more than two counsel, the Court should be invited to certify to this effect. Thus, subject to the reasonableness of the fees paid, the Registrar will normally allow the costs incurred by a party who has employed two counsel in the Court of Final Appeal. Where an order for the costs incurred by the employment of more than two counsel is sought, an application for a certificate should be made. A certificate will not be granted unless the case is of such an exceptional nature as to warrant engagement of the number of counsel concerned. Employment of more than two counsel by the other side or the employment of overseas counsel will not necessarily affect the decision. The appellant seeks a certificate for three counsel in the substantive appeal before the Final Court. In our view, the appeal is not of such an exceptional character as to warrant such a costs order and we refuse such certificate. Costs of written submission on costs Since the appellant has essentially failed to obtain any of the costs orders sought other than an order conceded by the prosecution, we refuse costs in respect of the written submissions under consideration.

Conclusion

We accordingly grant the appellant costs limited to the costs of the substantive appeal in the Court of Final Appeal. (Andrew Cheung) Chief Justice (R A V Ribeiro) Permanent Judge (Joseph Fok) Permanent Judge (M H Lam) Permanent Judge (Lord Phillips of Worth Matravers) Non-Permanent Judge Written submissions by Mr David Perry QC, Ms Maggie Wong SC and Ms Karry Lau, instructed by Chui & Lau, for the Appellant Written submissions by Ms Maggie Yang, DPP, Mr Derek Lau, SADPP (Ag) and Ms Sabra Lo, SPP, of the Department of Justice, for the Respondent

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41-50. Before HH Judge K Lo [2019] HKDC 611, Reasons for Verdict () (29 March 2019). Yeung VP, Pang JA and Anthea Pang J [2021] HKCA 7 (7 January 2021). Although in the Court of Appeal, there was reference to a document which tells a lie about itself, this was treated as involving the question whether the background facts are contradictory to the nature of the document, relying on Attorney General's Reference (No 1 of 2000) [2001] Cr App R 218 (CA 28). Cap 492. Hong Kong Court of Final Appeal Ordinance (Cap 484). Tong Cun Lin v HKSAR (1999) 2 HKCFAR 531 at 535; HKSAR v Chan Yau Hei (FACC 3/2013, 20 May 2014) at 6; HKSAR v Pang Hung Fai (No 2) (2015) 18 HKCFAR 1 at 3-4. Tong Cun Lin v HKSAR (1999) 2 HKCFAR 531 at 535. Ting James Henry v HKSAR (No 2) (2007) 10 HKCFAR 730 at 16. Ibid. Ibid at 17: dishonest conduct; HKSAR v Chow Nok Hang (FACC 12/2012, 18 March 2014) at 8: conduct interfering with the exercise of free speech by others roundly condemned by each member of the Court; HKSAR v Wong Tak Keung (No 2) (2015) 18 HKCFAR 158 at 12-13: savage beatings administered to a 15 year old drug courier in Australia (and thus not indictable in Hong Kong). HKSAR v Chan Yau Hei (FACC 3/2013, 20 May 2014); HKSAR v Wong Tak Keung (No 2) (2015) 18 HKCFAR 158. HKSAR v Wong Tak Keung (No 2) (2015) 18 HKCFAR 158 at 15. HKSAR v Li Kwok Cheung George (No 2) (2014) 17 HKCFAR 575 at 10-11, 20. HKSAR v Wong Tak Keung (No 2) (2015) 18 HKCFAR 158 at 6; Tsang Wai Ping v HKSAR (2005) 8 HKCFAR 80 at 16; Ting James Henry v HKSAR (No 2) (2007) 10 HKCFAR 730 at 16-17; Qamar Sheraz v HKSAR (2007) 10 HKCFAR 696 at 18. Tsang Wai Ping v HKSAR (2005) 8 HKCFAR 80 at 28. RFV 178. RFV 185-187; CA 33-34. DCCC 175/2013 see RFV 152-159. RFV 159.

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(2014) 17 HKCFAR 575 at 23-24. Appellant's Submissions on Costs 1.4. Appellant's Reply Submissions on Costs 2.9.

(2014) 17 HKCFAR 319. Ibid at 11.

(2014) 17 HKCFAR 575 at 22. Which did not come to pass because of the procedural rules limiting such substitutions. As explained in Attorney General's Reference (No 1 of 2000) [2001] Cr App R 218. Ribeiro and Lam PJJ and Stock NPJ [2021] HKCFA 43 (13 December 2021) at Hebei Enterprises Ltd v Livasiri & Co (FACV 23/2007, 5 December 2008) at

4. See also HKSAR v Egan (No 2) (2010) 13 HKCFAR 689 at 10. HKSAR v Pang Hung Fai (No 2) (2015) 18 HKCFAR 1 at 12; Moral Luck Finance Ltd hC^6 b|p| ~xoxo`oZo`oQ h<%X u~ul h0mb hk/F h0mb h<%X h<%X gd]O gXgO hC^6 hC^6 h_#@ siZsis hC^6 hC^6 hC^6 {rcrZrQ hC^6 hC^6 hC^6 gdM1 hrST hC^6 hrST hrST hrST hC^6 hC^6 h<%X hC^6 hC^6 miaO> hC^6 hC^6 hC^6 hC^6 hC^6 ynd` hrST hrST hC^6 hC^6 xnjbVKbC hrST hrST hrST hC^6 hC^6 hrST hrST hrST hrST hrST v Law Kin Leung (FACV 5 & 6 of 2015, 11 September 2015) at HKSAR v Li Kwok Cheung George (No 2) (2014) 17 HKCFAR 575 at 32; HKSAR v Pang Hung Fai (No 2) (2015) 18 HKCFAR 1 at 12, 15; Moral Luck Finance Ltd v Law Kin Leung (FACV 5 & 6 of 2015, 11 September 2015) at Fu Kor Kuen Patrick v HKSAR (FACC 4/2011, 27 August 2012) at 5;

HKSAR v Pang Hung Fai (No 2) (2015) 18 HKCFAR 1 at 14. - PAGE * MERGEFORMAT -
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