

HONG KONG / JUDGMENT

HKSAR v. CHAN KING WAN

COURT

Court of First Instance

DECIDED

5 January 2008

CASE / FILE NUMBER

HCMA226/2007

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bjbj HCMA226/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 226 OF 2007 (ON APPEAL FROM ESCC 4935 OF 2006)

BETWEEN HKSAR Respondent and CHAN KING WAN (appellant was convicted by Mr D.I. Thomas sitting in Eastern Magistrates Court of two charges : using a false instrument; and obtaining a pecuniary advantage by deception; and was sentenced to six months imprisonment. She now appeals against both conviction and sentence. AUTONUMOUT The particulars of the charge are that in relation to the 1st charge, it was alleged that the appellant used an instrument, namely a reference letter purportedly issued by a Lam Chung Shing () which was a false instrument with the intention of inducing a male known as Leung King Wai (Leung) to accept it as a genuine instrument and by reason of so accepting it to do or not to do some act to the prejudice of Mr Leung. AUTONUMOUT The particulars of the 2nd charge are that the appellant by a deception, namely producing a reference letter, purportedly issued by male Mr Lam, dishonestly obtained for herself a pecuniary advantage, namely a post in William K.W. Leung & Co. as a secretary. The prosecution s case AUTONUMOUT According to the respondent s written submission, the prosecution s case was that the appellant worked in a firm of solicitors, Messrs Kao, Lee & Yip (). Her employment was between 2 May 1994 and 12 September 2002. Between 1 September 2000 and 31 August 2002, a man called Adrian Lam () undertook his solicitor traineeship with KLY. PW1 left the firm shortly after being admitted as a solicitor in Hong Kong. AUTONUMOUT In September 2005, the appellant applied for the position of secretary to Mr Leung of Messrs William K.W. Leung & Co. Mr Leung interviewed the appellant on 3 October 2005. The appellant produced a reference letter on a letterhead of KLY (Exhibit) to Mr Leung in the interview. The letter stated that the appellant had been the secretary of Adrian Lam and she had been employed in the firm as a secretary for nine years. AUTONUMOUT Leung subsequently offered the position to the appellant. The appellant signed a contract on 7 October and began work on 10 October 2005. On 15 October 2005, Mr Leung considered the work performance of the appellant to be unsatisfactory. He therefore contacted KLY to verify the details contained in the reference letter P5. The administrator of KLY told Mr Leung that her firm had never written a

reference letter on behalf of the appellant. The appellant resigned from Mr Leung's firm the same day. AUTONUMOUT In March 2006, KLY wrote to PW1 for an explanation of the preparation of the reference letter without permission from the firm. PW1 denied having written the letter P5. The appellant had never been his secretary. He could not have said in P5 that the appellant had worked at KLY for nine years as the appellant had left KLY only after he had left the firm. He would not have known her total length of service. The defence case AUTONUMOUT The appellant gave evidence and her case was that she had helped PW1 by carrying out some typing and photocopying for him. She had not asked PW1 to give her the reference letter P5. About two weeks before PW1 left KLY, PW1 approached the appellant and gave her an envelope containing the letter P5 in the presence of another colleague. The appellant alleged that the letter P5 was signed by PW1. Grounds of appeal AUTONUMOUT Ng, appearing for the appellant, advanced four grounds of appeal, two of which he abandoned on the day of the appeal. The first ground he relied upon was that the learned magistrate got the evidence of the appellant wrong and/or failed to properly evaluate the defence evidence. AUTONUMOUT The mistake made by the magistrate (which he immediately acknowledged when he wrote out the Statement of Findings) was that when he summarised the appellant's evidence in his oral reasons for verdict, he had said in effect that when PW1 handed the appellant an envelope which contained P5, this was in the presence of Mr Manix Ng when according to the appellant's evidence it was Manix Ho. The magistrate had mistaken Manix Ho for Manix Ng. Manix was not the first name of one M.Y. Ng who had also given the appellant a reference letter. This reference letter was produced at the trial as Defence Exhibit D1. The appellant in her evidence said that at the interview with Mr Leung she had given him both D1 and P5. AUTONUMOUT In the appellant's evidence she said that when the brown envelope containing P5 was presented over to her by PW1, Manix Ho asked to see the letter. However when the letter was handed over, PW1 said to the appellant What I gave you, do have a look at it at home. PW1 also added that his consent was needed should the appellant show the letter to others. AUTONUMOUT The respondent by its representative Mr Joseph Wong submitted that the mistake or the misunderstanding by the magistrate of the appellant's evidence did not affect the magistrate's assessment of the credibility of the appellant. The magistrate did consider the appellant's evidence that the handing over of the reference letter was witnessed by a third party. AUTONUMOUT The magistrate in his oral reasons did state quite clearly that he did not accept the appellant's evidence that PW1 had handed over P5 to her. What the magistrate said in relation to his not accepting the appellant's evidence on this was Not only did I consider this evidence also to belong to the realm of fantasy, the presence of the colleague and the request of the colleague to read the reference letter in question were matters that were not even put to PW1 in cross examination. AUTONUMOUT The only matter of any moment is in the course of giving his oral reasons, the magistrate said this Ng is head of the legal executives in the litigation department of Kao, Lee & Yip, and seems to have done nothing. Here he witnesses a trainee solicitor try to hand over, and indeed succeed in handing over, a document on the firm's notepaper which he tried to shield from Mr Ng. Mr Ng did not, it appears, take any action and certainly did not bring the matter to the attention of his principals. He certainly does not seem to have cautioned the defendant to be careful about what she was doing with the document. Again, to say any more would be speculation. It is quite clear that Mr Ng did not do anything. That may

have been because he had given his own private reference by then, but it is noteworthy that although, as I have pointed out, Mr Ng gave the address of the firm, gave his occupation and status in the firm, and indicated where the defendant fitted into the firm, he did not do it on headed notepaper. But there apparently was something on headed notepaper which was being kept from him. One might have thought that he would have said something about it. Again I emphasise that to go any further along this track is to indulge in speculation, and I do not do it. AUTONUMOUT Further on the magistrate said In any event, I find it difficult to conceive of someone in PW1 s position doing what he did; The magistrate carried on But he goes along to the defendant and hands over something and he says that she should not read there but read at home. Clearly he would have had no idea what the reaction of the defendant would have been. For all he knew, she might have said m sorry, I m not taking this without knowing what it is. She might have thrown it back at him. For all he knew, she might have gone off to the senior partner or a partner to complain. He simply had no idea what the reaction of the defendant would have been. And again, that is just so improbable that again it seems to me to be the stuff of fantasy. AUTONUMOUT From the above quote it is quite clear to me that the reason why the magistrate rejected this part of the appellant s evidence was not so much that Mr Ng (who was the person that the magistrate thought was present witnessing the handing over of the reference letter) did not do anything in relation to the incident which he witnessed but rather that it was, it seemed to the magistrate, impossible that someone in PW1 s position would have done what he was alleged to have done for the reasons which the magistrate gave, namely he did not know what the reaction of the appellant might be and he did not know what the appellant might have done for example running off to a partner to report the incident. AUTONUMOUT For that reason I am of the view that the mistake made by the magistrate with regard to the identity of the witness of the incident was not so basic and fundamental that it in any way would have prejudiced the magistrate s assessment of the appellant s evidence. AUTONUMOUT The remaining ground relied on by Mr Ng was that the learned magistrate failed to properly evaluate the evidence of PW1 and erred in the evaluation of PW1 s credibility. AUTONUMOUT In relation to this ground, the reply by the respondent is that the magistrate accepted the evidence of PW1 because he was impressed by the quality of his evidence. The magistrate considered the evidence given by PW1 to be cogent and logical. PW1 was frank in telling the court that he had three usual signatures and PW1 gave samples of those signatures in court. AUTONUMOUT The respondent submits that the learned magistrate had cautioned himself that his task was not to choose between two opposite stories. Even if he had doubts about the evidence of the appellant, it was still for the prosecution to prove its case so that he was satisfied so that he was sure, beyond a reasonable doubt, of the appellant s guilt. He had also made it clear that, in coming to his decision, the fact that PW1 was now a solicitor did not entitle him to special consideration. PW1 was to be treated in the same way as any other witness. AUTONUMOUT The respondent submits that the learned magistrate had considered the defence submission that PW1 reported the matter to the police because he was deliberately covering up the fact that he had used letter head paper of the solicitors firm for personal purposes. The respondent submitted that the learned magistrate was entitled to accept the evidence of PW1 after he had considered all the evidence and the defence submission. AUTONUMOUT I agree with the submission by Mr Joseph Wong on behalf of the

respondent. I will only add that it is well nigh impossible for the appellant to say that the learned magistrate failed to properly evaluate the evidence of PW1 and that he erred in the evaluation of PW1's credibility because the magistrate when he gave his oral reasons went into great details of the evidence and analysed each piece of evidence very carefully, so much so that the oral reasons took up 20 pages of foolscap paper in the appeal bundle. With respect, I do not think anyone could have been more meticulous and analytical with his assessment of the evidence adduced at the trial. AUTONUMOUT For these reasons, the appeal against conviction by the appellant is dismissed. Appeal against sentence AUTONUMOUT The appellant was sentenced to six months imprisonment on each charge, the sentences to be served concurrently. The magistrate mentioned in his reasons for sentence, before he actually passed the sentence, that it was the duty of the court to make it abundantly clear that those defendants who gamble by dishonesty, not only in the offence but in the way in which they have chosen to conduct the defence, and the risk thereby to a man of professional standing and status, cannot be ignored. AUTONUMOUT Wong submits that this is a case of a breach of trust because the appellant took a headed letter paper from the firm and then forged or caused the forgery of the letter on the letter paper. He relied on the case of HKSAR v. Poon Lap Fung, HCMA413/1998 for the proposition that persons who forge documents with a view to obtaining employment, or better employment, will always stand the risk of being sentenced to immediate imprisonment or receiving suspended sentences. He submits that the learned magistrate had considered the clear record of the appellant and that the appellant had no other mitigating factor. AUTONUMOUT I have considered the report by the probation officer on the appellant's suitability to perform community service. I note that the appellant in the past participated in voluntary work and donated money to deprived groups. The appellant's parents are aged and suffering from ill health. The appellant expressed her remorse to the probation officer saying that she had learned a bitter lesson through this court experience. The probation officer found that the appellant would be suitable to perform community service and he recommended that she should be ordered to perform community service from 200 to 240 hours. AUTONUMOUT I take into account the fact that after the appellant was sentenced she remained in custody for 14 days until she was granted bail pending appeal. The appellant said in her affirmation that after her release from prison on bail pending appeal she suffered constant anxiety, depression and numerous nightmares and that she menstruated two to three times a month. AUTONUMOUT Since 27 September 2007, the appellant has been working as a clerk in an apparel company earning \$9,000 per month. Since April 2007, she has been performing charitable work on the 2nd Friday of each month by going to the Cheshire Home in Chung Hom Kok and helping out there. AUTONUMOUT As I pointed out in HCMA831/2006 HKSAR v. Au Yong Shong Samuel, a community service order is not a soft option. As McMahon DJ (as he then was) said in HCMA174/1999, HKSAR v. Ogawa Shuichi I might emphasise that a community service order is a real and effective alternative to prison. Its purpose is both punishment and deterrence. AUTONUMOUT I therefore allow the appeal against sentence. I quash the term of imprisonment, and I order that the appellant should perform community service for 200 hours. (Peter Nguyen) Judge of the Court of First Instance, High Court Mr Joseph Wong, SGC of Department of Justice, for HKSAR Mr Ken Ng, instructed by Messrs Au Yeung, Cheng, Ho & Tin, for the Appellant PAGE 1udk 1udk &`#\$ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document

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