

HONG KONG / JUDGMENT

HKSAR v. CHAN WAI HO

[2021] HKCFI 3439**COURT**

Court of First Instance

DECIDED

19 November 2021

CASE / FILE NUMBER

HCMA127/2021

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bjbj Appellant

Before: Hon Campbell-Moffat J in Court Date of Hearing: 15 November 2021 Date of Judgment: 15 November 2021 Date of Reasons for Judgment: 19 November 2021 REASONS FOR JUDGMENT

Introduction

The appellant was convicted after trial before Deputy Magistrate Chan Pui man on 11 February 2021, of one count of attempting to obtain property by deception contrary to s17(1) of the Theft Ordinance, Cap 210, and s159G of the Crimes Ordinance, Cap 200. On the same date, the appellant was sentenced to a fine in the sum of \$15,000. By his Notice of Appeal dated 25 February 2021, the appellant submits that the conviction was against the weight of the evidence and that evidence was improperly admitted or rejected, alternatively there was no or no sufficient evidence to found the conviction. By his Perfected Grounds of Appeal dated 3 June 2021, Mr Lawrence Hui, on behalf the appellant submits: Ground 1: The learned magistrate erred in finding that the appellant was subjectively dishonest: The evidence of Miss Chan (DW1) and of the immediate reaction of the appellant at the shop were not properly evaluated. The learned Magistrate failed to identify which parts of the record of interview were inculpatory and which exculpatory or to make a fair assessment of the record of interview. The learned Magistrate unfairly took Clause 3 of the Terms and Conditions of the Credit Card into account in convicting the appellant. Ground 2: The conviction was unsafe and unsatisfactory: Oral utterances made by the appellant at the shop were not proven to be false and were immaterial to the charge. There is a reasonable doubt as to whether PW1 was deceived by the appellant. Judicial notice should not have been taken of the entitlement and authorisation to use the credit card. No judicial notice should have been taken without hearing the views of the parties beforehand. The learned magistrate gave different versions of her reasons by discarding judicial notice in the Statement of Findings. The Prosecution Case On 30 December 2017, the appellant sought to purchase two iPhone 8s from Eleven Mobile , a store in Mong Kok at a price of \$13,000. He indicated that he

wished to pay for the purchase by credit card. The appellant presented a card to PW1 and he was asked whether the card was his to which he said yes. He was then asked if the name on the card was his name and he again said yes. PW1 proceeded to process the purchase and gave the appellant a sales slip to sign. The signature caused PW1 some concern. He therefore asked to verify the appellant's identity through the production of a HKID. At this point the appellant maintained that he had left it at home on the Mainland. As a result, PW1 made a report to the police and the appellant was arrested. Upon arrest and caution, the appellant said that the card belonged to his sister. She had authorised him to use the card to make a purchase so that she could obtain airline airmiles. He had used the card at Eleven Mobile because he had previously attempted to use it at two separate Fortress stores but had been asked to produce his HKID each time. He did not think the staff of Eleven Mobile would do this. The Defence Case The appellant did not testify. He called one witness which was his sister to whom the card was registered. She confirmed that she had authorised the appellant to use her card to purchase iPhones for a family member and that she had not imposed any limit upon how much he could spend.

Analysis

This was a charge of attempt to obtain property by deception. Section 159G of the Crimes Ordinance Cap 200 states:

- (1) A person who, intending to commit an offence to which this section applies, does an act that is more than merely preparatory to the commission of the offence is guilty of attempting to commit the offence. (Emphasis added) Section 17 of the Theft Ordinance, Cap 210 states:
- (1) Any person who by any deception (whether or not such deception was the sole or main inducement) dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall be guilty of an offence (Emphasis added) Whilst s17 of the Theft Ordinance requires an operative deception i.e. any deception whether deliberate or reckless by words or conduct as to fact or as to law including a deception relating to the past, present or future intentions of the person using the deception or any other person and it must operate upon the mind of the person sought to be deceived, this was a charge of attempt. In the case of an attempt under s159G of the Crimes Ordinance, it is not necessary on the facts of this case to prove an operative deception. The mens rea and actus reus of attempt require an intention to commit a crime and an act which is more than merely preparatory towards fulfilling that intention. There is no necessity to prove in the circumstances of these facts that PW1 was in fact deceived. The physical act of deception may or may not be necessary however to prove an act which is more than merely preparatory. It will very much depend upon the facts of the case. In this case the appellant accepts he sought to purchase two iPhones. He accepts that he went as far as seeking to pay for two iPhones by presenting a credit card registered in his sister's name. Those two acts alone would amount to acts evidencing intention and which were more than merely preparatory, without more. But there was more because he told PW1 the card was his and he confirmed the card was in his name, both of which he knew to be untrue. He then signed for

the purchase and allowed it to be processed with the credit card company. This offence requires a dishonest intent. *R v Ghosh* [1982] 75 Cr App R 154 applies. The court must first be satisfied whether, according to the ordinary standards of reasonable and honest people, what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter. If it was considered to be dishonest by those standards, the Court has to go on to consider whether the appellant himself must have realised what he was doing was by those standards dishonest. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest even if he asserts or genuinely believes that he is morally justified in acting as he did e.g. because his sister had given him permission to use her card. As to the complaint that the learned magistrate had wrongly found the appellant to be subjectively dishonest, the appellant accepts that he deliberately lied when asked if the card was his and when he was asked whether the card was in his own name. It appears he had signed the back of the card himself earlier that evening in another shop because his sister had forgotten to do so. He clearly should not have done so as he was not the registered user of the card. He admitted to the police that he had previously attempted to make the same purchase at two Fortress stores and had been refused because he could not corroborate the card by using his HKID. Those were deliberate representations that he was authorised to use the card, not by his sister, but by the issuer. If the appellant had believed that he was lawfully entitled to make a purchase using a credit card registered to his sister, why did he need to lie about it and why did he need to do so three times? The lies to PW1, without more were sufficient for the finding of dishonesty. It cannot be negated or nullified by the agreement reached between his sister, the registered owner, and the appellant. His behaviour shows his guilty mind. The fact that he may have been authorised in the circumstances of this case does not make honest something which you know to be dishonest. It is an explanation of why he was making the purchases on his sister's card but it does not exonerate him as he knew that the shop staff would not have allowed him to make the purchase if they had known he was not the registered user of the card. Nor does it require an examination of the terms and conditions of the contract between the credit card issuing bank and the registered owner, or judicial notice of such. If, the magistrate erred by also taking into account other matters, that in no way undermines her discreet finding that this was a dishonest act on the basis of his representations in answer to PW1. As for Ground 2 and the issue of the reasonable doubt that PW1 was not deceived, I have already explained that this was not a necessary finding upon the charge and the facts of this case. There is no merit in this point. In respect of the judicial notice, if indeed the learned magistrate relied upon judicial notice, then it did not form the basis of her reasoning and was in any event otiose and irrelevant to her consideration, which was founded upon the representations made by the appellant. Even if I were wrong as to that, this is a rehearing and this Court confines itself to what is necessary to prove an attempt to obtain property by deception.

Conclusion

The issue before the learned Magistrate, as it is before this court upon a rehearing, is whether the appellant did an act more than merely preparatory to the offence of obtaining property by deception intending to carry out that offence. The prosecution need only rely upon the acts immediately preceding the deception sought to be carried out within Eleven Mobile and to the answers given to PW1 to establish a dishonest intention to deceive PW1 into accepting a credit card, which the appellant knew was not his and which he would not have been able to present if he had answered PW1 honestly. This he admitted. The fact that the learned magistrate, no doubt as a result of encouragement by counsel, took other matters into account which she did not need to do, does not in any way undermine her decision or her reasoning, which was clear as to the essential findings. The remainder goes to blameworthiness and to sentencing and was reflected within the fine that was ordered to be paid. This appeal is dismissed. The sentence of the Magistrate stands. There will be no order as to costs. (A P Campbell Moffat) Judge of the Court of First Instance High Court Ms Samantha Chiu, SPP, of the Department of Justice, for the respondent Mr Lawrence Hui, instructed by M.M. Wong & Co., for the appellant R v Laverty (1970) 54 Cr App R 495 AB p29 43 - PAGE * MERGEFORMAT - 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 F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V h;F+ h{` ) gdVu gdVu gd\`d gd{` ) ~wog h\`d hV*0 hV*0 gdV*0 zvzkzc h"*9 h"*9 h"*9 h"*9 hV*0 hV*0 hV*0 hV*0 hh2e gdn9 gd@h h"*9 h5)# vovo hSyw hSyw hSyw gdn9 :p#ij & ## & ## & ## [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O} Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q- jyV` | PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /,EE\} theme/theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> [Content_Types].xml dlyLho ;d]6 yJ.; _rels/.rels fLV:*]m@= T;GI b9`5 drs/e2oDoc.xml 4m1` s\ 9z8 `f&8 pyA) IIQ> jp#jWZCy7 #hWIP w-8:~ 2%wb~ drs/downrev.xmlL 6)i6E @\*\YS \DQ, [Content\_Types].xmlPK \_rels/.relsPK drs/e2oDoc.xmlPK drs/downrev.xmlPK [Content\_Types].xml dlyLho ;d]6 yJ.; \_rels/.rels fLV:\* ]m@= T;GI b9`5 drs/e2oDoc.xml gJs)rL. Vv5S TA E 2ZCt [ml84; uA~Z LX7Ge \\$K/* #HXI drs/downrev.xmlL 6)i6E @*\YS \DQ, [Content_Types].xmlPK _rels/.relsPK drs/e2oDoc.xmlPK drs/downrev.xmlPK [Content_Types].xml dlyLho ;d]6 yJ.; _rels/.rels fLV:*]m@= T;GI b9`5 drs/e2oDoc.xml #&\*Ys |\_W- kEG@ JVLk8- TA E A7rB P\*8| I"/ uA~Z LX7Ge drs/downrev.xmlL 6)i6E @\*\YS \DQ, [Content\_Types].xmlPK \_rels/.relsPK drs/e2oDoc.xmlPK drs/downrev.xmlPK [Content\_Types].xml dlyLho ;d]6 yJ.; \_rels/.rels fLV:\* ]m@= T;GI b9`5 drs/e2oDoc.xml gJs)rL. Vv5S TA E I"/ I[Zv \^P"a drs/downrev.xmlL 6)i6E @*\YS \DQ, [Content_Types].xmlPK _rels/.relsPK drs/e2oDoc.xmlPK drs/downrev.xmlPK &tBL ;R,U VZ" E*p# ;R,U _V5i High Court Normal.dotm Windows User Microsoft Office Word Judiciary Hong Kong Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://

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