

HONG KONG / JUDGMENT

HKSAR v. CHEN ZHEN CHU

COURT

Court of Appeal

DECIDED

2 November 2007

CASE / FILE NUMBER

CACC433/2006

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Before: Hon Stuart-Moore VP, Yeung JA and Barnes J in Court

Date of Hearing: 25 October 2007

Date of Judgment: 2 November 2007

J U D G M E N T

Hon Yeung JA (giving the judgment of the Court):

Introduction

The applicant, Chen Zhen-chu, together with his three relatives, namely Lee Tak-shing (D2), Chen Yu-ru (D3) and Chan Yin-hei (D4), appeared before Deputy High Court Judge Wright (as he then was) and a jury on an indictment consisting of a single charge of

dealing with property known or believed to represent proceeds of an indictable offence.

Only the applicant and D4 were convicted, and they were sentenced to 9 years

and 4 years

imprisonment respectively.

The applicant and D4 both sought leave to appeal against conviction and sentence. D4 abandoned his application subsequently.

The applicant also abandoned his application for leave to appeal against conviction at the start of the hearing and we are therefore only concerned with his application for leave to appeal against sentence.

Mr Chan Siu Ming, instructed by the Director of Legal Aid, appears for the applicant.

Prosecution Case

Between January 2003 and February 2004, over 1,500 remittances of up to HK\$73 million in the names of 600 odd individuals from various branches of two banks in Sydney, Australia were deposited into 23 accounts controlled by the applicant through D4 and others.

In particular, there were 296 separate inward remittances in the names of 134 individuals of about \$14 million and 66 cash deposits of about \$5.5 million into the four accounts operated directly by the applicant.

There were also 130 separate remittances, each for less than AUD\$10,000, in the names of 78 individuals of over \$6.3 million and cash deposits of over \$8 million into the accounts of a firm of which the applicant was the sole proprietor. A total of over \$15 million was withdrawn by 81 cash withdrawals from those accounts during the relevant period of time.

According to the tax return declared by the applicant for his firm, the turnover and the net profit for the relevant period were respectively about \$2.5 million and \$73,000 only.

The Australian regulation requires banks to report to a central authority of any overseas transfer of over Australian \$10,000.

All, but one of the remittances in question, were for less than AUD \$10,000. Several branches of the same bank or adjacent branches of different banks were simultaneously used to effect the transfers in order to keep the amount of each remittance below AUD \$10,000.

It was obvious that an elaborate scheme was devised to avoid the obligation to report the remittances in accordance with the Australian regulation.

The money, having been remitted to an existing account or accounts opened specifically for the purpose of receiving the remittances, would be immediately withdrawn in cash.

The applicant, having withdrawn the money or received the money withdrawn by others, would carry the money in cash (many hundreds of thousands of dollars or over \$1 million each time) to the Mainland.

D4, according to the prosecution, was also a courier and had regularly carried money to the Mainland.

The suggestion was that the applicant

s brother, Peter Chen, was responsible for the organisation at the Australian end and that the applicant was the organiser at the Hong Kong end.

The prosecution suggested that the amount of the money involved and the manner in which the money was remitted to, and handled in, Hong Kong led to the only reasonable inference that the money was the proceeds of an indictable offence and that the applicant knew or had reasonable grounds to believe it was so.

The prosecution was unable to establish the underlying offence from which the money was generated although the jury must have rejected the defence

s suggestion that the money was the proceeds of legitimate garment and/or abalone businesses as alleged by the applicant.

Sentence

The judge, in sentencing the applicant, pointed out that the applicant

s brother (Peter Chen) was responsible for the organisation at the Australian end and the applicant was responsible at the Hong Kong end.

The judge, rightly, took the view that the nature of the underlying offence in a money laundering offence was insignificant unless the accused knew that the money was derived from very serious crime, in which event it would be an aggravating factor. At the end the judge did not take into consideration the nature of the underlying offence for the purpose of sentence.

The judge emphasized that huge sums of money were involved, on an average 100 transfers totalling \$5 million in a month, and that the applicant was involved in trans-national organised crime designed to subvert the legitimate attempts to restrict unchecked flow of funds from one jurisdiction to another.

The judge also emphasized that the scheme in question was carefully planned and well-structured, and it involved the recruitment of many individuals and the deployment of a large number of bank accounts for the purpose of moving funds across the world.

The judge took the view that there were no sentencing guidelines for a money laundering offence because of the diversity of conduct involved and that references to sentences previously imposed was of little assistance, other than to provide a sense of the type of sentences which were being imposed.

The judge accepted that it was not the worst-case scenario, but nevertheless considered that a deterrent sentence was called for in order to send out a clear message that money laundering would attract substantial terms of imprisonment.

In the end the judge considered a sentence of 9 years

imprisonment appropriate for the applicant. The judge also sentenced D4 to 4 years

imprisonment on the basis that his roles were different from those of the applicant.

Grounds of Appeal Against Sentence

Mr Chan argued that as there was no evidence to show that the money came from serious crime, the 9 nine years

imprisonment is manifestly excessive.

Mr Chan suggests that as the judge had commented that the case could have been heard in the District Court, the judge should not have imposed a sentence exceeding the jurisdiction of the District Court.

Mr Chan also suggests that as D4 had assisted and had handled \$15 million, the applicant

s 9 years

imprisonment, when comparing with D4

s 4 years

imprisonment, could not be appropriate.

Discussion

Money laundering is a very serious offence as reflected by the maximum penalty of 14 years imprisonment and a fine of \$5 million.

As we have observed in HKSAR v Javid Kamran CACC 400/2004:

Money laundering is a very serious offence as it is an attempt to legitimize proceeds from criminal activities.

Serious criminal offences are very often motivated by financial gains and those who assist criminals in laundering money indirectly encourage them in their criminal activities. This is even more so when the laundered money is the proceeds from drug trafficking activities as it is often commented:

Those who launder money from drugs are nearly as bad as those who actually deal in them. It is merely one step along the line.

Successful deterrents against money laundering could be effective measures against crime.

The maximum sentence for a money laundering conviction on indictment is a fine of \$5 million and 14 years

imprisonment, which is perhaps a reflection of how such an offence is viewed.

On the other hand, it is not feasible to lay down guidelines for sentence of a money laundering offence, as there is a very wide range of culpability.

Other factors include the nature of the offence that generated the laundered money, the extent to which the offence assisted the crime or hindered its detection, the degree of sophistication of the offence and perhaps the defendant

s participation, including the length of time the offence lasted and the benefit he derived from the offence.

Even though the judge was unable to identify the nature of the underlying offence, the present case is a very bad case of its type. It involved many people and a huge sum of over \$73 million. The offence, committed in over one year, also involved three different jurisdictions.

The judge was right to emphasize that it was a trans-national organised crime designed to subvert the legitimate attempts to restrict unchecked flow of fund from one jurisdiction to another, and in so doing offended the regulations of both Australia and the Mainland.

The offence damaged the reputation of Hong Kong and the judge was also right in taking the view that a deterrent sentence was called for.

We wish to echo what Mayo VP said in HKSAR v Mak Shing, CACC 322 of 2001 at para 27 of the judgment:

there was an international element to the offences and

Hong Kong has to take a very serious view of such matters as its international reputation is not to be sullied.

However, 9 years

imprisonment is an usually harsh sentence for a money laundering offence when comparing with other similar cases.

The judge, in sentencing the applicant, had referred to HKSAR v Xu Xia Li & Others CACC 395/2003, HKSAR v Oei Hengky Wiryo CACC 109/2005, HKSAR v Shing Siu Ming & Ors [1999] 2 HKC 818, HKSAR v Wong Ping Shui Adam & Anor [2001] 1 HKC 600, HKSAR v Mak Shing CACC 322 of 2001 and HKSAR v Chan Kok Hung & Anor HCCC 307 of 2002.

Mr Chan has also drawn our attention to HKSAR v Cheng Sui Wa CACC 223/2001, HKSAR v Kam Susanto CACC 542/2003 and HKSAR v Lee Wai-yiu & Others CACC 100/2006.

From these decisions in other cases, it is apparent that the 9-year sentence imposed on the applicant was considerably out of line and far heavier than any term of imprisonment previously imposed in similar cases.

In Xu Xia Li (supra), the defendants conspired with others to launder \$11 million and \$3 million respectively. A starting point of three years

imprisonment was considered proper although the Court of Appeal somehow decided, against the weight of authority, to reduce their sentences by three months on account of the defendants clear records. As to this last aspect, we emphasise that the decision in Xu Xia Li must be treated as a wholly individual decision, which should not be regarded as having any general application.

In Oei Hengky Wiryo (*supra*), the defendant was convicted on two counts of money laundering involving \$230 million and \$11 million, the starting points adopted were 4 years and 18 months respectively resulting in a total sentence of 5 years and 6 months. The large sums of money represented the turnover in an illegal bookmaking offence.

In Shing Siu Ming & Ors (*supra*), a case involving drug trafficking to Australia, 7 years

imprisonment was imposed on two defendants for laundering HK\$ 3 million and AUD\$ 1.5 million, being proceeds of drug trafficking. The Court of Appeal, in dismissing the application for leave to appeal against sentence, commented:

Our judgment in respect of the application for leave to appeal against conviction contained a detailed description of the nature of the conspiracy to traffic in dangerous drugs and the involvement of each of these ladies. Suffice it to say that the trafficking activities were undertaken on a very substantial scale over a lengthy period of time. Also it can be said that these ladies rendered considerable assistance to the first applicant. The second applicant received benefits from her involvement. The third applicant who was an accountant was closely involved in the first applicant

s financial affairs

.

What can be said is that both ladies were aware or were in a position to have been aware of the implications of their involvement. The judge was mindful of the necessity of bringing home to anyone who contemplates rendering assistance in this way the dire consequences which will ensue if they are brought to justice. It cannot be said that these sentences were either wrong in principle or manifestly excessive.

In Wong Ping Shui Adam & Anor (*supra*), the defendants laundered proceeds of smuggling activities in Russia. The moneys involved, being just moneys for the trial runs, were US\$50,000 and US\$20,000 respectively. A sentence of five years

imprisonment was considered not excessive.

In Mak Shing (*supra*), the defendant agreed with a Mr Tsang to use the accounts of his wife and a friend to launder what he was originally told were the proceeds of smuggling cigarettes. Subsequently, a sum of RMB14.56 million, being proceeds of a theft which had occurred in China, was received by Mr Tsang. A total of \$1.5 million was paid into the accounts referred to by the defendant.

On three counts of money laundering and bearing in mind the international element involved and perhaps the need to deter because of prevalence of the offence, the trial judge adopted a starting point of 5 years

imprisonment. He then reduced it to 4 years to reflect the fact that the accused had agreed all the basic facts. On appeal, the 5-year starting point was considered manifestly excessive and was substituted by one of 4 years and the overall sentence was reduced to 3 years

imprisonment.

In *Cheng Sui Wa* (supra), the defendant was convicted after trial of 11 counts of conspiracy to defraud and 3 counts of money laundering. It was a letter of credit fraud targeted at banks, using bogus transactions and the amount involved was over \$85 million. The 3 counts of money laundering involved \$16 million. The trial judge imposed sentences of 4 and 5 years

imprisonment on the conspiracy to defraud charges and 2 years

imprisonment on the money laundering charges partially to run consecutively, resulting in a total sentence of 9 years

imprisonment. On appeal the total sentence was reduced to 8 years

imprisonment.

In *Kam Susanto* (supra), another illegal bookmaking and money laundering case involving over \$470 million, a total sentence of 4

years imprisonment was imposed after a trial in the High Court.

In those cases involving large sums of money, such as *Oei Hengky Wiryo*, *Kam Susanto* and *Cheng Sui Wa*, the underlying offences were illegal bookmaking or letter of credit frauds, and the amounts involved were the turnovers in the bookmaking activities or the amounts of the letters of credit. Those amounts did not represent the profit to the defendants or the loss to the victims.

However, the gravamen of a money laundering offence is the amount of money handled, not the amount of profit to the defendants or the loss to the victims. In most money laundering cases, it is simply not possible to determine the question of profit to the defendants or the loss to the victims even if those victims could be identified.

Just as in the present case, it is impossible to say, of the \$73 million in question, how much of it was the profit to the applicant and Peter Chen when it was not even possible to determine the nature of the underlying offence.

Mr Chapman, on behalf of the respondent, submits that comparison of amounts involved does not necessarily represent an accurate guide to the seriousness of money laundering offences and therefore the culpability falling to be assessed.

The other aggravating factors identified by the judge were the international element involved, being a trans-national organised crime and its sophistication.

By its very nature, money laundering must involve the use of banks accounts and the transfer of money via those accounts, and there has to be some degree of careful planning and execution, perhaps involving a number of individuals.

**In both Shing Siu Ming and Wong Ping Shui, there was an international element.
The 7 years**

imprisonment imposed in Shing Siu Ming was considered justified clearly because the money laundered represented the proceeds of drug trafficking and the underlying offence in Wong Ping Shui was identified as smuggling in Russia.

In the context of money laundering, if the defendant knew that the money was derived from very serious crime, it would be an aggravating factor (see Xu Xia Li) and, if we may add, sometimes a very important aggravating factor.

If the judge had sentenced the applicant on the basis that the underlying offence was drug trafficking and that the applicant was fully aware of the nature of it, the sentence of 9 years might well be justified. However, the judge expressly stated he was unable to determine the nature of the underlying offence and he was unable to take that into consideration.

Mr Chapman, on behalf of the respondent, argues that having heard the case for 38 days, the judge must have a

feel

about it and we should therefore respect the sentence that the judge had imposed on the applicant.

We do not completely disagree with Mr Chapman
s suggestion.

**However, we have been unable to identify, either from the facts of the case or the
judge**

s reasoning, a sufficient logical foundation for the significant disparity in the sentence imposed on the applicant and those imposed in other similar cases referred to us.

The sentence for a money laundering offence when the underlying offence is not established should not be more serious than the sentence for a similar offence where the underlying offence is identified.

We are also concerned that if the present case was to call for 9 years

imprisonment, this might leave little room for distinguishing this from other cases where there are gravely aggravating circumstances to be taken into account over and above those in the present case.

We fully agree with the aggravating factors identified by the judge, such as the large amount (over \$73 million), the international element (money from Australia and taken to the Mainland), the carefully planned and well-structured scheme (with the recruitment of large number of individual both in Australia and in Hong Kong and the opening of large number of bank accounts), and the fact that the applicant was working together with his brother.

We also wish to add that the applicant was clearly the leader who had enlisted the help of others to perpetrate the crime, and therefore he could have no legitimate complaint at his sentence being considerably longer than D4

s when D4 had clearly played a much lesser role. We should also add that the view expressed by the judge that the proper venue of the trial should have been the District Court was subsequently withdrawn when he remarked that this was made before he had heard the evidence.

Nevertheless, the starting point of 9 years adopted by the judge is, in our view, when compared with the sentences in other similar cases, manifestly excessive.

We wish to add, however, that the seriousness and prevalence of money laundering offences are such that it may be necessary for the courts to take a more robust view about them. In appropriate cases where the aggravating factors are such as those identified above and the sums involved are large, more robust sentences may well be called for than in some of the cases cited to us where relatively modest terms of imprisonment appear to have been imposed.

In money laundering cases where the underlying offences are drug trafficking, human smuggling and other serious trans-national crime, sentences of 10 years

imprisonment or above may well be justified if a defendant knowingly engages in them.

However, we are not satisfied that this is one of those cases. Despite the various aggravating factors properly identified by the judge, we are of the view that a starting point of 7

years

imprisonment is adequate.

Conclusion

We grant leave to the applicant to appeal against sentence and treating it as the appeal proper, we allow the appeal and reduce his sentence from 9 years to 7

years

imprisonment.

(M. Stuart-Moore)

Vice-President

(W Yeung)

Justice of Appeal

(Judianna Barnes)

Judge of the Court of

First Instance

Mr P S Chapman, SADPP and Ms Laura Ng, SGC of the Department of Justice for the Respondent.

Mr Chan Siu Ming instructed by Messrs Simon Si & Co. for the Applicant.

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