

HONG KONG / JUDGMENT

HKSAR v. CHENG CHUN WAI

COURT

Court of First Instance

DECIDED

11 July 2007

CASE / FILE NUMBER

HCMA724/2006

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bjbj HCMA 724/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 724 OF 2006 (ON APPEAL FROM KCCC 8121/2004)

BETWEEN HKSAR Respondent and CHENG CHUN WAI Appellant

Before: Deputy High Court Judge E Toh in Court Dates of Hearing: 15 December 2006 & 8 May 2007 Date of Judgment: 11 July 2007

J U D G M E N T

The appellant was convicted after a retrial of two charges of misconduct in public office contrary to common law and punishable under section 101I(1) of the Criminal Procedure Ordinance, Cap. 221, Laws of Hong Kong. He was sentenced to 15 months imprisonment for each charge to run concurrently. He appeals against his conviction and sentence. Evidence for the prosecution At the material time, the Fire Services Department held examinations for the registration of Class 3 Fire Service Installation Contractor on a regular basis. Those passing the examination would be registered as Class 3 Fire Service Installation Contractors and would then be qualified to submit tenders for contracts from the Fire Services Department for work relating to the maintenance of fire extinguishers in buildings in Hong Kong. Each examination consisted of a written part and an oral part. Questions for both parts were chosen by the Chief Fire Officer from a pool of about 30 standard questions and answers, and these questions and answers were kept in a file (P4) under the custody of the secretary to the Chief Fire Officer. The file was marked confidential and generally only accessible to officers involved in the examination. Once the questions have been chosen, an executive officer would arrange for the printing of the examination paper. For the oral test, candidates, amongst other tasks, would be shown different types of fire extinguishers and

asked to identify them. They would also be asked questions and they would be asked to demonstrate their knowledge about the maintenance of such fire extinguishers. These fire extinguishers would be placed in a room before the candidates were brought in. The appellant joined the Fire Services Department in 1972 and by 2003, he was the Divisional Officer of the Marine Division cum Commander of the Fire Services Department, and was due to retire in June 2007. During the relevant period, the appellant had been one of the markers of the examination and on more than one occasion, he had sat as a member of the interview board for the oral examination. Examination markers were normally given a set of instructions containing, inter alia, examination questions, the standard answers to the questions and a marking scheme. These instructions were marked confidential and the markers to the examination were specifically reminded that their appointments and all information relating to the examination must not be disclosed to unauthorised persons (see P62). All examination questions had been held confidential until 2004, from which point such questions may be downloaded from the Fire Services Department website. Standard answers, however, to these questions remained inaccessible to members of the public. At the material time, the oral test was normally held in a conference room on the 5th floor of the headquarters of the Fire Services Department. It was in evidence that the appellant's office was also on the same floor. The trial in the court below commenced with a voir dire, determining the admissibility of oral admissions allegedly made by the appellant to the ICAC undercover agents. Parts of those admissions were recorded by recording devices and parts were based on the recollections of the individual ICAC officers. It was the defence's contention that the admissions were obtained by inducement and/or obtained in circumstances that were so unfair that the court ought to exercise its residual discretion to exclude them. The veracity of the witnesses' testimonies were also challenged. PW1 was an ICAC officer, who had pretended to be a garment accessories salesman when he met the appellant. He was introduced to the appellant by Mr Li Yuk-kun (). After establishing a social friendship with the appellant, PW1 told the appellant that he had a friend called Ah Chi (PW2) who was eager to be registered as a Class 3 Contractor. Conversations about this matter took place on several occasions, some of these conversations were recorded without the knowledge of the appellant. And the prosecution had sought to reply on the admissions made by the appellant on three of these occasions. However, after the meeting with the appellant on the 20th of December, 2002, PW1 said he discovered that the recording device had failed to function properly, and therefore he had to make a post record of what had been said and the prosecution sought to rely on the appellant's oral admissions made during this meeting. PW2, another ICAC officer, as part of the investigation, had enrolled for the examinations in 2002. He subsequently had detailed discussion with Li but failed to pass the examination held on 13 December 2002. In some of the discussions with Li, the appellant was present. On 28 February 2003, PW2 applied to sit for the examination again. On 23 March 2003, he met up with Li, PW1 and the appellant in a restaurant in China. In the course of this meeting, PW1 had broached the subject of PW2 taking the examination which was to take place in June. PW2 asked for the appellant's assistance, the appellant had replied that in the past he had taken the examination papers from the bank and given them to Li. PW2 then asked the appellant if he could have those papers and the appellant said he would have to discuss this with Li. When the parties were on the way back to Hong Kong

by ferry, PW2 recorded his discussion with the appellant and during this conversation, PW2 asked the appellant for help in the examination, but the appellant was non-committal and said that he would have to discuss with Li first. PW2 asked the appellant if he should offer any advantage to Li and the appellant said no and specified that it was he who handed them to Li and that the questions also came with the answers (see P128). The learned Magistrate ruled the recorded interviews and the oral admissions were admissible, and declined to exercise his discretion to exclude such admissions. The evidence of PW1 and PW2 were adopted for the general issue. PW4 was an Assistant Divisional Officer in June 1997 and was assigned to be a marker for the examination together with the appellant. It was PW4's evidence that after he had received the examination papers, he divided the work between the two of them. Each paper was divided into two parts, and each would mark the part assigned before handing it over to the other person who would mark it again for the second time. Thus, each set of examination paper would be scrutinised twice and each marker would give his own assessment of the candidate's score. If the marks given to any candidate should differ, the final score would be the mean of the two. PW4 pointed out that while working through the papers, there could have been moments when one of them had left the room, but he could not remember whether that had actually happened in June 1997. PW4 agreed that it would have been extremely difficult for anyone to swap the papers. PW13, secretary to the Chief Fire Officer at the material time confirmed that a number of persons could have access to the file of questions and answers, and she had kept a log of who had access to the file. PW8 was a business partner of Li at the material time. Both he and Li had enrolled for the examination in June 1997. In March 1997, he said Li gave him some examination questions and answers in English, and he made photocopies of them. The two sets of documents handed to him by Li were amongst the four exhibits, P137, P139, P141 and P143, which were handed to him by Li, but he could not identify which of the four were the two sets handed to him by Li. He eventually took the examination and failed. After the arrest of the appellant, he had been interviewed under caution by ICAC officers on three separate occasions. Two of these recorded interviews were admitted as part of the prosecution's case by agreement. P157 is a record of interview on 8 April 2003. In this interview, the appellant agreed he was acquainted with Li and knew that he was sitting for the examination in June 1997. He admitted he had helped Li with advice generally on the whole syllabus and denied giving away or selling examination questions for money. The appellant said he could not remember if he had told PW1 that he had helped Li pass the examination by letting him redo the paper, and he could not remember ever marking Li's paper. The appellant also denied that he had anything to do with copies of past examination papers found in the drawer of the desk he used and explained that his office was open to a lot of people and his desk was used by others while he was on leave. The appellant maintained his innocence and said he might have said things when inebriated, but denied accepting any advantage. In the interview recorded in P160, the recorded conversation between him and PW1 (P126) was played to the appellant. The appellant denied the veracity of his utterances and said that they were said in jest, that he was merely bluffing and that he knew all along that PW1 was an undercover officer and he had said those words in order to play a practical joke on PW1. The appellant stated that he did not know for whom PW1 was working at the time, but found that PW1's identity was a bit suspicious. In view of the fact that Li was not called to give evidence, the

prosecution relied on the admissions of the appellant made to the undercover officers and to the admissions in the recorded interviews. The appellant had chosen not to give evidence nor called any witnesses. Magistrate s findings The learned Magistrate accepted the truth of the appellant s admissions in P126 that he had helped Li by giving him the examination questions and that when the appellant was marking Li s paper and noticed that Li s marks were too low, he had taken out that paper and told Li to do it again and the appellant then inserted that re-done paper back into the file, so that Li was able to get a pass. The learned Magistrate also accepted that there were many occasions when Li and the appellant had left Hong Kong in June and July by the same border control points at almost the same time and the crucial dates were the 12th and 29th of June 1997 and 12th July 1997, which was a day after the marking report of the written examinations had been submitted to the Chief Fire Officer. The learned Magistrate had also compared Li s answer to the 10 examination questions (P101) to the Chinese model answers (P62) which were almost identical in the sentence structures, choice of words and sequence of various answers. The learned Magistrate also noted that the original answer to Question 9(b)(i) was identical to its model answer, and it had been crossed out and replaced by an answer bearing the same meaning but with a different sentence structure and a different choice of words. The learned Magistrate then said these: These indicia, when stood alone, would not have amounted to anything. However, when read together, I could detect a certain pattern which, in geometrical progression, led me to the irresistible inference and conclusion that the defendant had assisted his friend Li by providing the latter with model answers and afforded an opportunity for Li to amend his earlier papers. Furthermore, these evidence also lent substance to the defendant s words to PW1 and PW2: they were statements of fact rather than simply idle brags. The learned Magistrate also relied on the admissions made by the appellant in P126 that he had taken Li to the room to identify the fire extinguishers prior to the oral test. The learned Magistrate noted that Li s practical test or oral test took place on the 12th of September 1997, the fire extinguishers on that date had been placed in the conference room which were on the same floor as the appellant s office. Further, the learned Magistrate noted that immigration records showed that the appellant and Li left Hong Kong for China via Lo Wu Terminal on the same day and both returned to Hong Kong at 1602 hours via the China Ferry Terminal the next day. Li passed the oral test with the second highest score of 93.6 points. The learned Magistrate, having referred to the facts above, said this: The facts cited above by themselves might not be sufficient for me to come to the inescapable conclusion that the defendant did help LI by giving him a pre-view of the fire-extinguishers placed inside the conference room. However, they did help to point to the inference that the defendant and Li were good friends and they also furnished solid proof that the defendant was in a position to physically assist Li in the Practical Test/Interview part of the examination. This also proved that the defendant s admissions to PW1 were not idle words but an account of what had actually happened. The learned Magistrate then convicted the appellant of Charge 1. As for Charge 2, the learned Magistrate relied on the admissions of the appellant made in a conversation on 15 December 2002 when he was speaking to the undercover officers. The learned Magistrate noted that in that conversation, the appellant had admitted that he had disclosed to Li the standard questions and their model answers including the oral examination on which the examination was based. The appellant had also admitted in his conversation with PW1

on 13 March 2003, that he had given the examination questions to Li and he knew that Li had used those questions to help several persons get a pass (see P124 and P126). The learned Magistrate also relied on the accounts given by PW1 and PW2 about their unrecorded conversations with the appellant, where the appellant was alleged to have alluded to the fact that he had taken past examination questions and answers from the bank and given them to Li. This had happened many years ago and the appellant said he was not sure the questions had been changed. But he had warned Li not to pass on the papers. The learned Magistrate also took into account the fact that the appellant as an appointed marker of the examination would have access to the confidential file of model questions and answers kept by the secretary to the Chief Fire Officer. On 7th of April 2003, a photocopy of 30 questions and answers for the oral test for June 1994 were seized from inside a drawer of a desk in the appellant's office. And the appellant's right thumbprint was found on that document (P129). Also on the 7th of April 2003, ICAC officers seized data identical to that found on P129 from a portable computer found in a vehicle owned by Li (see P132 to P136). On that same day, ICAC officers seized two sets of papers from a flat belonging to a person called Hung Siu-ping. These two sets of papers, P145 and P147, contained data which were identical to the data collected from the car of Li. The learned Magistrate observed that the appellant had in his conversations with PW1 referred to a person by the name of Siu Ping. And the learned Magistrate concluded that he had no doubt that the appellant knew that the questions had been passed to a Siu Ping (see P124 and P126). The learned Magistrate had no doubt that Siu Ping was Hung Siu-ping who had passed his examination on his second attempt on 7 February 2002. The learned Magistrate was therefore satisfied beyond a reasonable doubt that the prosecution had proved that the appellant was guilty of Charges 1 and 2. Appeal against conviction The grounds of appeal are summarized here-below:

- (1) The learned Magistrate should have exercised his discretion to rule that the taped conversations between the appellant and PW1 and PW2 to be inadmissible in order to ensure a fair trial.
- (2) Further or in the alternative, the learned Magistrate should have exercised his discretion to rule the verbals inadmissible as no verbatim record was kept by PW1 and PW2 and the evidence of PW1 and PW2 of such verbals were based on their memory and therefore extremely likely to be inaccurate.
- (3) It was factually impossible or improbable for the appellant to commit the offences alleged.
- (4) The learned Magistrate had failed to properly evaluate the contents of the 2nd and 3rd interviews under caution.
- (5) The learned Magistrate had failed to consider the 1st cautioned interview properly.
- (6) The learned Magistrate had failed to consider that evidence found in Li's possession or alleged to have emanated from Li was not admissible because the charge does not allege that the appellant had committed these offences in joint enterprise with Li.

- (7) The learned Magistrate had failed to properly take into account the failure of the prosecution to call Li as a witness which affected the evidence of PW1, PW2 and PW8.
- (8) There was material irregularity because PW8 had given evidence under an immunity P168 which provided immunity to PW8 for other offences unrelated to this present one.
- (9) The learned Magistrate had failed to properly consider that on the whole of the evidence, the appellant's guilt was not the only irresistible inference from the facts proved.
- (10) The learned Magistrate had failed to properly consider that the prosecution had failed to prove the essential elements of the offence of misconduct in a public office .
- (11) That in all the circumstances of the case, the conviction was unsafe and unsatisfactory.
Grounds 1, 2, 3, 4, 5 It was the evidence of PW1, an undercover agent that he had secretly recorded conversations between the appellant and himself during social activities in Hong Kong but not in mainland China. PW1 also said, however, that subsequently it was discovered that only about half of the alleged conversations were successfully taped. PW2 had also recorded conversations between the appellant and himself in Hong Kong. Again it was clear from his evidence that part of the conversations that he had with the appellant had not been successfully recorded. At the trial, the defence had objected to the admissibility of the oral admissions allegedly made by the appellant to the ICAC undercover officers, parts of which had been recorded and parts of which were based on the recollections of the individual ICAC officers. The complaint by Mr Cheng, S.C. for the appellant is that the learned Magistrate should have exercised his discretion to exclude these conversations both taped and untaped in order to secure a fair trial for the accused. As Mr McWalters pointed out the fact that some of these conversations were not recorded is irrelevant to the admissibility of the recording that exists. Furthermore, the conversations that PW1 and PW2 had with the appellant though untaped are admissible and relevant in the trial. It is a matter for the learned Magistrate whether he found PW1 and PW2's recollections were reliable and whether these witnesses were credible, and how much weight to give to their evidence as to what the appellant had said during these conversations. It was clear from the evidence of PW1 and PW2 that they had not employed any unfair tactics or improper inducements on the appellant at the relevant time. As these witnesses were acting undercover, they had to socialise with the appellant to gain his confidence, and these social activities necessarily included Li. I agree with Mr McWalters that there is no evidence whatsoever to support the implication that Li may be seen as an agent of the ICAC. He was a bridge which the ICAC used to connect to the appellant. Of course in a perfect world, it would have been desirable for Li to have been called as a witness, but his absence is not necessarily fatal to the conviction. The evidence referring to Li was merely given as a background to the whole affair, and at the end of the day, the admissions by the appellant played a large part in his conviction. It is clear from the learned Magistrate's Statement of Findings that the learned Magistrate relied mainly on the evidence of the appellant's admission to convict him on Charge

1. He also considered the circumstantial evidence which provided the opportunity for the appellant to have done what he said he did. These circumstantial evidence, inter alia, the appellant having the opportunity to mark Li's answers to the examination questions in P101 and when these are compared to the Chinese model answers in P62 they were almost identical. The learned Magistrate correctly stated that these circumstantial evidence alone would not have amounted to anything, but reading them together with the admissions led the learned Magistrate to find conclusively that the appellant had assisted his friend Li, as alleged in Charge 1, and the appellant's contention that these were boastful brags were not accepted by the learned Magistrate. The learned Magistrate was well aware that the witnesses were relying on their recollections and that part of the conversations they said they had with the appellant were unrecorded. Nevertheless, the learned Magistrate accepted the evidence of PW1 and PW2 as credible and reliable, which he was entitled to do in the circumstances and therefore, I do not find that there is any merit in grounds 1 and 2 of the grounds of appeal. Once the learned Magistrate accepted the evidence of the prosecution witnesses that the circumstances were such that the appellant had opportunity to assist Li in passing his examination, then the learned Magistrate could use that evidence to lend support to the appellant's admissions to the prosecution witnesses that he did help Li. Further, the learned Magistrate was entitled to rely on the inculpatory parts of the cautioned interviews of the appellant as part of the evidence upon which he found to support the conviction. The learned Magistrate was also entitled to disbelieve the exculpatory parts of the cautioned interviews including the 3rd cautioned interview. Particularly, as in this case, the appellant had chosen not to give evidence and therefore, the exculpatory parts of his cautioned interview had not been tested in cross-examination. I therefore find no merit in grounds 1, 2, 3, 4 and 5. Grounds 6, 7, 8, 9, 10 In the admitted facts (MPI3), it was admitted that on 7 April 2003, the ICAC found a portable computer hard disk from a car owned by Li, and such disk was produced as exhibit P131. The data on the portable disk included five sets of 30 model questions and answers, four in Chinese and one in English. They were produced in hard copy as exhibit P132 to P136 inclusive (P133 being the original English version). On the same day, the ICAC seized from the home of a Mr Hung Siu-ping two sets of 30 model questions and answers in Chinese which were produced as exhibits P145 with certified translation (P146) and P147 with certified translation (P148). It was also admitted that Hung has failed the written portion of the relevant examination on the 25th of June 1998, but passed the same examination when he re-sat on the 22nd of June 2001. He subsequently registered as a Class 3 Fire Service Installation Contractor in February 2002 and reported to the Fire Services Department that his address was at the company owned by Li. It had also been admitted in the admitted facts that P129 which was found in the desk used by the appellant with the fingerprint of the appellant on the document had been used to make photocopies of some pages among exhibits P137, P139, P141 or P143 produced by Leung Yat-ming. (He was PW8 who was a witness under an immunity who alleged that the examination papers in his possession were given by Li to him, but he had not known the source of the examination papers.) Counsel for the appellant argued that the prosecution had not alleged that Li or Hung were co-conspirators of the appellant or were acting in a joint enterprise

with the appellant. Therefore, he argued that the learned Magistrate should not have relied or given any weight to these admitted facts as part of the evidence to support the conviction of the appellant. Mr McWalters argued that the learned Magistrate was entitled to infer from these admitted facts that Hung Siu-ping was the man Siu Ping referred to by the appellant in his cautioned interview that Li had assisted by giving model answers to. As it is not denied that Hung Siu-ping had indeed taken the examination at the relevant time and passed and had reported the same address as Li's company, it is therefore reasonable for the learned Magistrate to infer that Hung Siu-ping and Siu Ping were the very same person that the appellant had referred to as Li having helped. As to the argument that the portable computer hard disk, though being found in Li's car may not have belonged to Li, I only need to say that the learned Magistrate was fully entitled to draw the only irresistible inference that Li was in possession of that computer hard disk found in his car. Further the prosecution was entitled to call PW8 Leung Yat-ming to give evidence and produce the relevant exhibits to prove a link to Li with the exhibits he produced. It was a question of fact for the learned Magistrate. As to the evidence of the departure and arrival of Mr Li and the appellant to and from China, the prosecution was entitled to prove that evidence and use it as part of the circumstantial evidence linking Li to the appellant. As the learned Magistrate noted that this evidence by itself cannot prove the charges against the appellant, but this together with the other circumstantial evidence in this case lend support to the admissions of the appellant that he had helped Li pass the examinations and also supplied him with questions which he knew had been passed on to others. I therefore find Ground 6 of the Grounds of appeal also fails. As to Ground 7, it is not incumbent on the magistrate to speculate as to why Li was not called as a witness. There exists many valid reasons why Li was not called, and the learned Magistrate was fully aware that it would have been desirable for Li to have been called, but it is not fatal to the prosecution's case if he was not. I therefore see no merit in this ground of appeal. In ground 8, Counsel complains that the immunity given to PW8 did not cover the present trial. There is no merit whatsoever in this ground because a reading of P170 shows that the immunity covers evidence PW8 would give in the trial or trials of Cheng Chun-wai in connection with two alleged offences of misconduct in public office. The learned Magistrate had very properly found PW8 to be a credible witness as far as the fact that Li had handed him some questions and answers, some of which subsequently had appeared in his examination. The learned Magistrate's reasoning cannot be faulted. As for ground 9, the learned Magistrate was fully entitled to conclude from all the evidence that the only irresistible inference he could draw from the facts proved was that the appellant had committed the offences. In ground 10, Counsel for the appellant argues that the elements of the offence of misconduct in public office had not been made out by the evidence. The learned Magistrate had fully considered the elements of the offence at paragraphs 9 to 16 of his Statement of Findings, and it was also clear that he was particularly alive to the fact that prior to 2004, all examination papers were held to be confidential although this restriction was lifted in 2004. And as for the appellant's mens rea, the learned Magistrate relied on the admissions of the appellant in P124 and 126. There is also no merit therefore in this ground of appeal. In conclusion, I find that there are no grounds to interfere with the learned

Magistrate s findings, and the appeal against conviction is therefore dismissed. Appeal against sentence The learned Magistrate had considered the mitigation and the innumerable letters of support for the appellant s good character from both his colleagues and friends amounting to a total of about 189 letters. On the other hand, the learned Magistrate had considered, quite properly, that these offences are very serious indeed and could have dire consequences if unqualified persons passed the registration examination. The learned Magistrate then arrived at a starting point of 18 months imprisonment and reducing the sentence on each charge to 15 months in view of the mitigating circumstances. The learned Magistrate had neglected to consider that this type of offence is an old common law offence and rarely brought in the courts in Hong Kong. The situation was finally clarified in the Court of Final Appeal decision in Shum Kwok-she (2002) HKCFAR 381. Further, through no fault of the appellant, he was sent back for a retrial after his appeal against conviction was successful in October 2005. It is clear therefore that the appellant had had this case hanging over his head for a considerable period of time. In the circumstances, because of this exceptional history and that there is no evidence that the appellant had gained any advantage, monetarily or otherwise, I find that the sentence in this case is manifestly excessive and I therefore rule that the sentence be set aside. I understand from learned counsel that the appellant had so far served nearly 7 months of imprisonment, I therefore sentence him on each charge to the term of imprisonment that would allow for his immediate release from custody. (E Toh) Deputy High Court Judge Mr I C McWalters, SC, DDPP, for the Respondent Mr Cheng Huan, SC leading Mr Lawrence Hui, instructed by Messrs Yaddy Cheung & Co, for the Appellant. PAGE - 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 1udk 1udk i\$&. HCMA.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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