

HONG KONG / JUDGMENT

HKSAR v. CHEUNG WING SUM AND ANOTHER

COURT

Court of Appeal

DECIDED

9 March 2007

CASE / FILE NUMBER

CACC321/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj S O N S F O R J U D G M E N T

Beeson J (giving the Reasons for Judgment of the Court):

BACKGROUND

Both Applicants pleaded guilty in the District Court before Deputy Judge Anthony Kwok to one count of Burglary, contrary to sections 11(1)(b) and (4) of the Theft Ordinance, Cap. 210. Each was convicted of that offence. A1 was sentenced to 26 months imprisonment and A2 was sentenced to 24 months imprisonment. Both applicants applied for leave to appeal against the sentences imposed. On 28 February 2007 we granted A1 s application for leave to appeal against sentence and treating that hearing as the appeal, quashed the sentence of 26 months imprisonment imposed on her and as a matter of principle substituted for it, a sentence of 24 months imprisonment. At the same hearing we dismissed A2 s application for leave to appeal against her sentence of 24 months imprisonment. We stated we would hand down our reasons at a later date and now do so.

FACTS OF OFFENCE The Admitted Facts which were the basis of the applicants pleas of guilty, showed that this was a burglary of domestic premises. A1 obtained possession of keys to a flat belonging to the very elderly parents of an erstwhile colleague, PW2. His parents lived in the flat with their maid, each occupying one of the 3 bedrooms. The way A1 obtained the keys was disputed; PW2 denied having given them to A1 to enable her to collect pills for him, as she claimed when questioned by police. He said he had lost his keys some days before the burglary the implication being either that A1 had found and kept them, or had stolen them. A1 formed a plan to burgle the flat and asked her friend, A2, to accompany her to take what money, valuables and useful items they might find there. The applicants used the keys to enter the flat at 3 a.m. waking PW2 s father, who was 81 years old and unable to walk without assistance. He saw them taking items of property and shouted, pressing the bell for the maid. The applicants fled with property worth, in total, about \$1,540.00. The maid alerted the watchman of the building and police investigated. A2 had supplied her correct identification particulars to the watchman

when she and A1 entered the building at 2.55 a.m. This enabled the police to trace her address and a few hours later they attended A2's residence. They found her there with A1 and some of the stolen property. A1 handed over 2 keys which proved to be keys to the premises. Police later recovered other stolen items from A1's residence. Under caution A1 told the police she had obtained the keys about a month earlier from PW2, who had asked her to obtain some pills for him from his home, he being in hospital at the time. She had met PW2 at the Sauna where they both worked and referred to him as her godfather. She had not given the keys back to him and formed the plan to take items of value from the flat. Under caution A2 admitted that she had been introduced to PW2 by A1 about a year before the burglary. A1 had called her suggesting they took items of value, or items they needed, from the flat and she had agreed to accompany her. A2 used the keys to enter the flat and each applicant had taken the items they wanted. PW2, in his witness statement, agreed that he had known A1 since 2002 when they worked together at a Sauna. He denied ever giving his keys to the applicants or asking them to collect anything from the premises for him. His keys to the flat went missing about 4 or 5 days before the incident. In the Admitted Facts put before the court the applicants agreed to the account given by PW2.

PERFECTED GROUNDS OF APPEAL - 1st APPLICANT The perfected grounds of appeal can be paraphrased as a litany of alleged errors by the Judge who is said to have been wrong in:

- (a) not making a Community Service Order (CSO) despite having obtained a CSO report;
 - (b) failing to give weight to mitigating factors set out in the report;
 - (c) placing too much weight on A1's perceived absence of remorse/breach of trust/premeditation and pre-planning/more serious role than A2;
 - (d) adopting too high a starting point;
 - (e) attaching too much weight to A1's attempt to resile from the Admitted Facts;
 - (f) wrongly attributing a greater role to A1 than A2. Miss Moosdeen, who appeared as counsel for A1, endeavoured to persuade us that a CSO was worth trying given A1's age, remorse and clear record, but submitted that in any event the starting point adopted was unjustifiably high and that there should be no distinction between the sentences passed on A1 and A2.
- GROUND OF APPEAL 2nd APPLICANT A2 was represented at trial but appeared in person on this appeal. She filed a single ground of appeal, complaining that her sentence of 24 months imprisonment was too long. At the appeal she did not produce any additional grounds, but sought a reduced sentence, because after being remanded in custody in July 2006 she had discovered she was pregnant. Subsequently she had given birth to a daughter and she wished to have a non-custodial sentence in order to care for her.
- JUDGE'S CONSIDERATION OF SENTENCE When sentencing, the Judge knew that both applicants were first offenders; A1 was aged 23 years and A2 was aged 22 years at the date of the offence. Apart from their pleas of guilty there was no other significant mitigation. On the urging of the applicants' legal representatives he obtained probation and Community Service Order (CSO) reports before sentencing; but warned the applicants that his doing so was not a promise to impose a CSO. The reporting officer assessed A1 as a borderline possibility for a

CSO, but found A2 unsuitable. The Judge reviewed the guideline cases in setting the starting point for sentence, noting that in the absence of exceptional circumstances an immediate custodial sentence of 3 years was usual for burglary of domestic premises. He found this particular burglary serious as it was committed in the early morning hours with the victim being of advanced age and bedridden, but he accepted that no violence had been used. He noted that neither applicant evinced any remorse for the offence, the existence of remorse being one of the 6 factors referred to in *R v Brown* [1981] 3 Cr App R (S) 294 which, cumulatively, might justify the imposition of a CSO. However, even if all 6 criteria were satisfied there was no onus on a judge to impose a CSO. (*Secretary for Justice v Lin Min Ying and Another* [2002] 2 HKLRD 823) The Judge when reading the reports saw, with concern, that the applicants when interviewed appeared to resile from the facts they had admitted on plea; he felt, with some justification, that this did not betoken genuine remorse. He sought to clarify the position through the applicants legal representatives and was assured that their original admissions stood. After considering the reports and the facts the Judge concluded that a CSO was not a viable sentencing option for either applicant; A1 being considered a borderline candidate and A2 wholly unsuitable by the reporting officer. Having had the opportunity of reading those reports there can be no quarrel with his decision not to make a CSO; the reports of both applicants are extremely poor. In our view it is surprising that A1 qualified even as a borderline case. As no exceptional circumstances existed (see also: *HKSAR v Wan Ka-kit* [2006] 3 HKLRD

- 9) which would justify the imposition of a CSO, the Judge assessed the appropriate term for an immediate custodial sentence. For A1 the Judge took a starting point of 39 months which was 3 months higher than the 36 months guideline. His reason for doing so was that, in his view, the offence was a breach of trust, A1 having improperly obtained or stolen the keys from PW2 who, she claimed, was her godfather. Further, the burglary had been instigated by A1 and although it was a joint enterprise, the Judge treated A1's role as the more serious. With full discount the final sentence for A1 was 26 months imprisonment. For A2 the Judge adopted the standard 36 months and after giving the full one-third discount for plea, sentenced her to 24 months imprisonment. In our view the putative relationship claimed by A1 vis-a-vis PW2, does not make this a breach of trust which would justify an increase in the usual starting point. A1 was not in a position of privilege and trust, in relation to PW2 which she then abused. Nor, on the facts, is there any justifiable distinction in the roles played by A1 and A2. Both applicants knew and agreed the plan beforehand, jointly put it into effect and shared the proceeds of the burglary according to their individual needs. The applicants are comparatively youthful first offenders and a three year starting point is, in our view more than adequate to deal with their criminality. Accordingly we granted A1 leave to appeal and treating the hearing as the appeal, quashed the sentence of 26 months and imposed a sentence of 24 months imprisonment. There were no grounds which would justify our interfering with the sentence imposed on A2. The application by A2 for leave to appeal was dismissed. (M. Stuart-Moore) (W. Yeung) (C-M Beeson) Vice-President Justice of Appeal Judge of the Court of First Instance High Court Mr Kevin P Zervos, SC, SADPP & Ms Teresa

Kam, GC, of Department of Justice, for the Respondent Ms Munira Moosdeen, instructed by DLA, for the 1st Applicant 2nd Applicant Lam Mei Ling, in person PAGE - 1udk 1udk 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 i\$&`G hca.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=57310

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-cheung-wing-sum-and-another-2007>

Prepared on 26 October 2026 · Esheria