

HONG KONG / JUDGMENT

HKSAR v. CHIU KA KIN

COURT

Court of Appeal

DECIDED

20 November 2007

CASE / FILE NUMBER

CACC158/2007

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Before : Hon Ma CJHC, Stuart Moore VP and Beeson J in Court Date of Hearing : 20 November 2007 Date of Judgment : 20 November 2007

J U D G M E N T

Hon Ma CJHC (giving the judgment of the Court) : The Applicant seeks leave to appeal against sentence out of time. The apparent reason for the lateness is that he was not able to obtain legal advice during the relevant period and only came to know about the court's power to extend time recently. On 12 April 2006, the Applicant was sentenced to 16 months imprisonment on a charge of using false instruments contrary to section 73 of the Crimes Ordinance, Cap. 200, he having pleaded guilty. This sentence was imposed together with a sentence of 24 months for two counts of burglary (the burglaries took place a month after the false instruments offence). The judge (Deputy District Judge Thomas) ordered that 12 months of the sentence for the use of the false instruments be served consecutive to the 24 months for the burglary charges. It was not until 16 2007 that the Applicant applied for leave to appeal against the 16 month sentence (there is no application regarding the sentences for the burglary charges). He is therefore out of time in applying for leave by about a year. No explanation is given as to why he did not earlier seek the assistance of the Director of Legal Aid or other bodies which can provide free legal advice (such as the Bar's Free Legal Service Scheme). The explanation for the delay goes nowhere near enough to enable the court to grant the indulgence that is being sought. That, however, is not the end of the court's discretion in the matter. The court can also look at the merits of the appeal for which leave is sought to see whether in the circumstances, leave out of time ought in the interest of justice be given. It is an exceptional course and an indulgence that is not lightly given. I do not understand *R v Wong Kong & Anor* [1990] 1 HKC 279 relied on by Mr Robert Pang (for the Applicant) to be authority for a different approach. The present charge involved the use of false

documents (being an employment letter and salary record from a non existent employer, and also a false letter purportedly issued by PCCW IMS Limited in relation to the provision of internet services). With these documents, the Applicant successfully procured a loan of \$30,000 from Promise (HK) Company Limited. This loan was never recovered. In our judgment, leave to apply out of time ought not be given in the present case As stated earlier, the explanation for the delay is insufficient. On the merits, while the starting point of 24 months can be said to be on the high side (and it is fair to point out the Applicant would have been dealt with in the Magistrates Court but for the two burglary charges which he wanted to have dealt with at the same time), it was not manifestly so in the circumstances. The Applicant has a very poor record. He has been convicted previously of the following offences : offering for sale infringing copies of copyright works, possession of dangerous drugs, possession of an obscene article, theft and attempted theft. His sentences have ranged from imprisonment to treatment at the Drug Addiction Treatment Centre. In the present case, the amount lent to the Applicant has been spent and is now irrecoverable. It is also pertinent to bear in mind the totality of the sentence imposed on the Applicant in relation not just to the false instruments charge, but the two burglary charges as well. The judge had in mind an overall sentence of 36 months (it will be recalled that 4 months of the sentence for the false instruments charge was made concurrent with the sentence for the burglary charges even though the incidents giving rise to the offences were quite different). We are of the view that the overall sentence of 36 months was not manifestly excessive or wrong in principle. For the above reasons, the application is dismissed. (Geoffrey Ma) (Michael Stuart-Moore) M Beeson) Chief Judge, High Court Vice President Judge of the Court of First Instance Ms Mary Sin of the Department of Justice for the Respondent Mr Robert Y H Pang, instructed by the Legal Aid Department for the Applicant

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