

HONG KONG / JUDGMENT

HKSAR v. CHIU KWOK WAI CAESAR

COURT

Court of Appeal

DECIDED

13 November 2007

CASE / FILE NUMBER

CACC294/2006

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Before: Hon Stuart-Moore VP, McMahon J and Barnes J Date of Hearing: 13 November 2007 Date of Judgment: 13 November 2007 Date of Reasons for Judgment: 22 November 2007 J U D G M E N T Barnes J (giving the judgment of the Court):

Background

1. The applicant was convicted after trial of the following three offences before Deputy District Court Judge E. Lin: handling stolen goods, contrary to section 24 of the Theft Ordinance, Cap.210 (1st charge); possession of a false instrument with intent, contrary to section 75(1) of the Crimes Ordinance, Cap.200 (2nd charge); and resisting a police officer in the due execution of his duty, contrary to section 36(b) of the Offences against the Person Ordinance, Cap.212 (3rd charge).
2. The judge sentenced the applicant to four years imprisonment for the 1st charge; 12 months for the 2nd charge, with six months to run concurrently with the 1st charge; and four months for the 3rd charge, to run consecutively to the other two sentences. The Judge then gave a three-month reduction for the applicant's previous good character. The total sentence imposed was therefore one of 55 months (four years seven months).
3. The applicant sought leave to appeal against the conviction on the 1st charge and the sentences on all charges. We granted leave to appeal against conviction and sentence and treated the applications for leave as the actual appeal. In relation to the appeal against conviction, we allowed the appeal, quashed the conviction of handling stolen goods and substituted it with the offence of an attempt to handle stolen goods. We dismissed the appeal against sentence. We now give our reasons. Prosecution case

4. The prosecution case was relatively simple. Sometime in June and July 2005, Yat Tung Automobile Company Limited (Yat Tung) imported two second-hand Toyota Alphards from Japan one silver in colour () and one white (). Yat Tung handed V1-2 to Hop Hing Motors Company (Hop Hing) for repair. On 26 July 2005 an employee of Hop Hing parked the two vehicles in a public car park. He removed the computer connecting wires, locked up the vehicles before leaving. V1-2 were found stolen from the car park the next day.
5. During an operation on 27 July 2005, at about 5 p.m., the police found V1-2 parked at an open space by the hillside of Sai Kung. The police then laid ambush nearby, keeping V1-2 under observation.
6. After keeping watch for almost 30 hours, at around 23:30 hours on 28 July, the applicant (who was D2 at the trial) and another man (who was D1 at the trial) were seen arriving at the open space by cars. They were met by another man (who had since escaped). Both D1 and the applicant were wearing gloves. D1 boarded V1 and started the engine. The applicant boarded V2 and sat on the driver s seat. The police then made their presence known and effected arrest. The applicant put up resistance and pushed a police officer () to the ground. The applicant was finally subdued. PW3 sustained injury to his left arm and had to have stitches. PW3 was also given seven days sick leave.
7. The police found the ignition tumblers of both V1-2 dismantled. An extra vehicle computer was found connected to V2. Of the three sets of walkie-talkies found inside the car driven by D1, two sets were in working order and tuned to the police radio channel. There were also two sets of front and rear number plates inside that car.
8. Inside the car driven by the applicant, the police found, among other things, a pair of trade licence plates (T8812) which had expired six years ago. These licence plates were later confirmed to be forgeries. There was a bit of a twist during the trial. When PW19, who was listed as the licensee on the forged trade licence plates was about to give evidence, he indicated to the prosecution counsel that the applicant was his former employee. He later testified that the applicant worked for him for a few months in 1998 and 1999, and, as a driver, the applicant had the use of trade licence plates and had the opportunity of learning the particulars listed on the genuine trade licence plates.
9. The prosecution case was that the applicant and D1 dishonestly received stolen goods (i.e. V1-2), knowing or believing they were stolen goods. The applicant was also in possession of a false instrument (i.e. the forged trade licence plates) and he resisted a police officer (i.e. PW3) when he was in due execution of his duty. Defence case
10. The applicant gave evidence in his defence. His case was that he was a legitimate second-hand car dealer or trader who purchased and imported vehicles from Japan. He said at about 7 p.m. on 28 July 2005 D1 called him and sought his help in fixing two water-damaged cars. The applicant then borrowed two vehicle computers from a garage for the repair. He was met by the man who eventually escaped and was brought to the open space. He was asked to go into V2 to see what spare parts he could sell to or order for that man. When the

applicant approached V2, but before he boarded it, police appeared. The applicant denied pushing the policeman. He said he was assaulted by the police with a hard object and he sustained injury. The applicant said he did not see the forged trade licence plates that night and that he had never made duplicate trade licence plates.

11. The applicant also called his girlfriend and another friend to give evidence. The former to support his contention that he was running a legitimate business at home, and the latter to testify that the applicant had borrowed trade licence from him. Appeal against Conviction
12. Mr Daniel Marash, SC, leading Mr Jonathan Kwan advanced the following sole ground of appeal on behalf of the applicant : The burden of proof being on the prosecution to prove that the stolen vehicles had not been restored to the lawful possession of the Hong Kong Police Force, the learned judge erred in holding to the contrary.
13. The applicant relied on section 26(3) of the Theft Ordinance, Cap.210 which reads :
 - (3) No goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the theft .
14. It is common ground that whether the stolen goods had been restored to lawful possession or custody is a matter of fact. The case of Attorney General s Reference No. 1 of 1974 [1974] QB 744 is a leading authority on this issue.
15. At the hearing before us, Ms Polly Wan for the respondent conceded though no such evidence was led before the judge that the police were aware V1-2 were stolen vehicles when they kept the two vehicles under observation.
16. Since the police were aware V1-2 were stolen cars when they kept them under observation, it is inconceivable that the police had not taken constructive custody of the two vehicles in the sense that they would not have allowed others to remove them, and would have brought V1-2 into actual physical police custody at a later stage at the conclusion of their operation whether the police managed to catch the suspects or not. V1-2 ceased to be stolen goods by virtue of section 26(3) and the applicant could not be guilty of the full offence of handling stolen goods.
17. However, as rightly conceded by Mr Marash after it was suggested to him, what the applicant had done amounted to an attempt to handle stolen goods.
18. For this reason, we allowed the appeal, quashed the conviction for the full offence and substituted it with an attempt to handle stolen goods. Appeal against sentence
19. Mr Marash submitted that the sentence imposed on the applicant was manifestly excessive, particularly when the applicant is a first offender.

20. In relation to the 4 years imposed on the 1st charge, Mr Marash submitted that the penalty for an attempt to handle stolen goods should not be as high as one for the full offence. He also submitted that the judge should not have sentenced the applicant on the basis that the latter was a used car dealer when the judge had earlier rejected such evidence.
21. In relation to the 2nd charge, Mr Marash submitted that the possession of forged trade licence plates was a part and parcel of the offence of attempting to handle the stolen goods and should have attracted a concurrent sentence with the 1st charge. Further, the fact that the applicant might have gained knowledge from his former employer was not an aggravating factor as there was no breach of trust. Mr Marash also submitted the starting point of 12 months was in any event too high.
22. Lastly, in relation to the 3rd charge, Mr Marash submitted the starting point of four months was too high in the circumstances and not in line with other authorities. He cited the cases of HKSAR v. Chan Hung-yau, HCMA 183/2002; HKSAR v. Mo Long, CACC 268/1999 and R. v. So Kam-ming, HCMA 728/2004 to support his contention.
23. In our view, the fact that the applicant is guilty of an attempt to handle stolen goods as opposed to the full offence had no bearing whatsoever on the sentence to be imposed. It was not because of anything the applicant had or had not done that resulted in the quashing of the full offence. It was solely due to the concession made by Ms Wan before us, leading us to conclude that, by the time the applicant and D1 arrived at the scene, V1-2 ceased to be stolen goods as they had been restored to lawful police custody, that the applicant had not committed the full offence. The acts of the applicant and his accomplices remained exactly the same. Their culpability also remained exactly the same. The applicant and D1 were caught red-handed. For the purpose of sentencing, the fact that the applicant and his accomplices had not benefited from the fruit of their crime was not a relevant matter to be considered in this case.
24. The judge expressly referred to the case of HKSAR v. Wong Kam Tat, CACC446/2001 when he adopted the four-year starting point on the basis that the applicant was a used car dealer who had the know-how about Japanese vehicles and access to a steady market for disposing of second-hand cars or used parts .
25. In Wong Kam Tat, the appellant was a genuine car dealer who used forged documents to hide from the authorities and the purchaser the fact that the vehicle to be sold was a stolen one. The appellant used his know-how in the trade to fool a purchaser. As a genuine car dealer the appellant had access to a ready market for disposal of stolen cars by mixing stolen vehicles in amongst genuine stock. He was not merely someone employed to deliver a vehicle. The appellant was as proactive as a handler could be in that case. He also added insult to injury by offering to return only part of the purchase price to the purchaser when the latter wanted to cancel the deal after learning that the chassis number of the car was suspicious. The trial judge adopted a starting point of four years for the offence of handling one stolen car.

26. On appeal the Court of Appeal ruled that the starting point of four years was not manifestly excessive. The Court of Appeal also noted that the trial judge had not taken into account the forgery element in arriving at the four years starting point.
27. In this case, the applicant's testimony that he was a legitimate used car dealer was rejected by the judge. The applicant's position was quite different from that of the appellant in Wong Kam Tat. On the other hand, the applicant was not just someone employed to deliver a stolen car either. Two stolen cars were involved here. The applicant was not a lone culprit, but acted in concert with others. There was a certain degree of planning and sophistication involved. To facilitate his attempt to handle stolen goods, the applicant also had in his possession the forged trade licence plates, which was an aggravating feature. In all the circumstances of this case, a starting point of four years could not be said to be excessive.
28. On the evidence before the judge, the applicant clearly intended to use the forged trade licence plates to avoid police detection. In that sense the possession was closely connected to the attempt to handle the stolen vehicles. The possession of the forged trade licence plates was nevertheless a separate offence and should either have been reflected in the sentence imposed for the attempt or, as happened in this case, by an additional sentence.
29. While the evidence clearly established that the applicant had made use of information he gained while working for his former employer to facilitate the making of forged trade licence plates bearing the particulars of that former employer, we do not agree with the judge's assessment that the applicant's conduct amounted to a breach of trust.
30. Nevertheless, in our view, a starting point of 12 months, with half of the sentence to run concurrently with the four years imposed on the 1st charge, was an appropriate sentence for the 2nd charge.
31. Resisting a police officer in due execution of his duty is a serious matter. There are different degrees of resisting and each case depends on its own facts. The applicant pushed the police officer in an attempt to evade apprehension. The police officer sustained injuries requiring stitches and was given seven days sick leave. Police officers carrying out their duties must be protected. The starting point of four months could not be said to be manifestly excessive.
32. Whilst there were arguable grounds of appeal on sentence and we gave leave, we did not consider that the overall sentence of 55 months (four years seven months) was manifestly excessive in all the circumstances. Accordingly, for the reasons we have given, the appeal against sentence was dismissed. (M. Stuart-Moore) Vice-President (Michael McMahon) Judge of the Court of First Instance (Judianna Barnes) Judge of the Court of First Instance Ms Polly Wan, SGC of the Department of Justice, for the Respondent Mr Daniel Marash, SC, leading Mr Jonathan Kwan, instructed by Messrs Chan & Tsu, for the Applicant 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 i\$&`G f"xb; Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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