

HONG KONG / JUDGMENT

HKSAR v. CHOY TSZ KEUNG

COURT

Court of First Instance

DECIDED

26 July 2007

CASE / FILE NUMBER

HCMA274/2007

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bjbj HCMA274/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 274 OF 2007 (ON APPEAL FROM ESCC NO. 4861 OF 2006)

BETWEEN HKSAR Respondent and CHOY TSZ KEUNG (P[:]) d on his own pleas of the following offences :

- (a) three counts of prescribed officer accepting an advantage , contrary to section 3 of the Prevention of Bribery Ordinance, Cap.201 (Charges 2, 4 5); and
- (b) one count of carrying unauthorised articles out of a prison , contrary to section 18(1) of the Prisons Ordinance Cap.234 (Charge 7). The appellant was sentenced to a total of six months immediate imprisonment. He now appeals against sentence. Admitted facts AUTONUMOUT The admitted facts disclosed that the appellant was a serving prison officer at the material time. He telephoned an ex prisoner (Cheng) on 16 April 2006 to ask for a loan of \$3,000. Cheng transferred \$3,000 into the appellant s bank account on the next day and informed the appellant by phone. The appellant requested a further loan of \$6,000 to which Cheng refused. Cheng finally agreed to lend \$1,000 to the appellant and transferred the amount on 19 April 2006 (Charges 2 and 4). AUTONUMOUT On 16 May 2006, a serving prisoner () approached another serving prisoner (), asking the latter to lend \$6,000 to the appellant. Lee agreed. Acting upon D2 s suggestion, Lee wrote a letter to his grandmother (Wong), instructing her to give \$6,000 to someone named Tung it is a fictitious name to conceal the appellant s true identity. Lee also wrote on a piece of paper the name and telephone number of his grandmother and gave it to D2. The purpose of the note was to assist the appellant in contacting Wong. AUTONUMOUT When the appellant met up with Wong on 18 May 2006, Wong gave \$6,000 to the appellant after the latter showed her the letter written by Lee. The appellant was arrested by officers of the ICAC. The letter and note written by Lee were found on the appellant s person (Charges 5 and 7). AUTONUMOUT The appellant had not applied for permission to solicit or accept the loans from Cheng and Lee. The letter and note were unauthorised articles and the appellant took them out of prison without authorisation.

Reasons for sentence AUTONUMOUT The magistrate called for a background report and a CSO suitability report prior to sentence. The CSO suitability report was favourable. Having heard mitigation advanced the magistrate imposed an immediate custodial sentence of six months. The magistrate was aware, citing the case of R. v. Chan Wing-leung, HCMA29 of 1987 that there was no general principle that persons convicted of section 3 offences must be sent to prison in the normal course of event. He was nevertheless of the view that the offences committed by the appellant were serious and the appellant's conduct grossly improper. The magistrate was of the view that in accepting loans from prisoners, the appellant had undermined his authority as a prison officer and opened himself up for blackmail by the lenders and possibly others. The magistrate concluded that a deterrent sentence was called for. Grounds of appeal AUTONUMOUT Andrew Raffell, counsel for the appellant, submitted that the overall immediate custodial sentence of six months was manifestly excessive and wrong in principle. AUTONUMOUT It is his contention that having accepted there was no corruption in this case there was no reason for imposing an immediate custodial sentence, particularly when available authorities and information before the magistrate showed that a fine was the normal sentence for a Section 3 offence. The magistrate had gone beyond the admitted facts and hinted there was in reality some ulterior motive present. Bearing in mind that Cheng was an ex prisoner, even if the appellant could have put pressure on Lee, it is hard to see how the appellant could have any power over Cheng, Mr Raffell submitted. AUTONUMOUT Raffell complained that no reason has been advanced for the magistrate to impose a deterrent sentence, nor for the finding that the appellant's behaviour was so grossly improper AUTONUMOUT Raffell submitted that in all the circumstances, the appropriate sentence is one of a fine, or CSO, or a suspended sentence of a shorter term. Respondent's response AUTONUMOUT Marco Li, senior government counsel for the respondent, accepts that according to Chan Wing-leung, there is no tariff or guidelines in sentencing Section 3 offences. AUTONUMOUT Li submitted that the role played by Section 3 is preventative in nature, citing R. v. Ng Yiu-man, Cr. App. 239 of 1980 in support. AUTONUMOUT Accepting there is a wide variety of Section 3 offences, Mr Li divided them into two broad types :

- (a) superiors accepting advantages from subordinates; and
- (b) people who have dealings with prescribed officers working in government. AUTONUMOUT Li submitted that the court viewed the second type more seriously as the offending prescribed officers are more vulnerable and may be tempted to abuse their official position. Mr Li referred to a number of cases to show that an immediate prison term sentence is an option open to the sentencing court. AUTONUMOUT While the risk arising from the ex prisoner may be low, the loan from the serving prisoner did create problem for the appellant and the magistrate had not speculated about the possibility of Lee blackmailing the appellant, Mr Li submitted.

Judgment

AUTONUMOUT In the case of Chan Wing-leung, the defendant was a police sergeant. He borrowed some \$57,000 from his subordinates over a period of one year. He did repay some of the debts. While the subordinates were placed in the invidious position that they felt they had to lend money to their superior, corruption was totally absent from the case. The magistrate sentenced the defendant to three months imprisonment. Addison J stated the following general principle There is no general principle that persons found guilty of Section 3 offences should be sent to prison in the normal course of events. In fact, in the case of Lai Yuk-kui v. R. [1981] HKLR 691, the Chief Justice at p.694 was very careful to point out that the Court expressed no view as to the appropriate sentences for offences against Section 3 because the degree of criminal culpability was very much a matter at large. There is, as he said, a far wider range of moral culpability involved in the commission of Section 3 offences. AUTONUMOUT agree with the observation of Addison J. AUTONUMOUT In Chan Wing-leung, having found no immediate custodial sentence was imposed for Section 3 offences from the cases referred to him, Addison J suspended the prison term for a period of 12 months. AUTONUMOUT It is common ground here that there was no allegation of corruption. The appellant, being a prescribed officer, has failed to obtain permission before soliciting loans from two persons an ex prisoner and a serving prisoner. There is no evidence of coercion exercised by the appellant. One can hardly see what influence the appellant could possibly have over Cheng, the ex prisoner. The relationship between the appellant and the ex prisoner is not such that makes the Section 3 offence very serious. AUTONUMOUT The situation between the appellant and the serving prisoner is different. The relationship between them is such that the appellant had compromised his position and undermined his authority as a prison officer. Even if the chance of the appellant being blackmailed is remote, it remains a real possibility that the appellant feels obliged to treat his money lender more leniently or favourably than what would have been required of him in his performance of his duty as a prison officer. The Section 3 offence relating to the serving prisoner is indeed serious. AUTONUMOUT The appellant is a 35 year old man of previous clear record. He is married with an 11 year old son. His father was also a prison officer but has retired. There was no financial problem faced by the family. The reason for committing the offences was that the appellant incurred loans owing to extravagant life style. Although there was a reference to the appellant gambling, he denied that to the probation officer who prepared the background report and CSO suitability report. The probation officer recommended CSO with medium duration (i.e. 81 to 160 hours). The appellant will not only lose his job, but also his pension and other benefits. He has also shamed his family particularly his father who retired as a prison officer. AUTONUMOUT Having considered all the circumstances of the case in particular the criminality or culpability of the appellant, his previous clear record and his background, I do not agree that a financial penalty would have been proper. The court is certainly entitled to consider a custodial sentence here. The question is, does this case warrant an immediate custodial sentence? AUTONUMOUT The CSO suitability report speaks very favourably of the appellant. The appellant satisfied all six factors identified in R. v. Brown (1981) 3 Cr. App. R. (S) :

- (a) he is a first offender;
- (b) he comes from a stable home background and has a family;
- (c) he has a good work record (save of course the commission of these offences), nevertheless he is not lazy or idle;
- (d) though he will lose his job as a prison officer, he does has a realistic prospect of employment;
- (e) he has shown genuine remorse; and
- (f) he presents no more than a slight risk of re offending (given the lesson learnt from this case the risk of re offending is extremely low). AUTONUMOUT In my view, having regard to all the circumstances I have mentioned and the fact that all six factors are present, the appropriate sentence is one of a CSO as recommended. By performing unpaid work of benefit to the community in place of a custodial sentence, the appellant can make good the damage he has caused and he can redeem himself in the eyes of the community. AUTONUMOUT understand the appellant is willing to serve a CSO. For these reasons the appeal against sentence is allowed. I set aside the sentence of imprisonment and substitute it by a CSO of 160 hours. (Judianna Barnes) Judge of the Court of First Instance High Court Mr Li Kwok Wai, Marco, SGC of Department of Justice, for HKSAR Mr Andrew Raffell, instructed by Messrs Tang, Wong & Cheung, for the Appellant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$ 5_ga 5_ga 5_ga 5_ga 5_ga 5_ga 5_ga 5_ga 5_ga bUx'H),M bUx' & 6" setup ABC.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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