

HONG KONG / JUDGMENT

HKSAR v. KUM CHI WING RALPH

COURT

Court of Appeal

DECIDED

16 May 2007

CASE / FILE NUMBER

CACC445/2006

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Before: Hon Tang VP and Barnes J in Court Date of Hearing: 16 May 2007 Date of Judgment: 16 May 2007

J U D G M E N T

Hon Tang VP: The appellant was sentenced to 18 months imprisonment after pleading guilty to five charges of obtaining pecuniary benefits by deception and one charge of fraud . The offences arose out of the appellant s use of a forged Hong Kong Identity Card (HKID Card), the details in which, apart from his name and photograph, were false. The appellant used the forged HKID Card to obtained five credit cards from various banks, and one credit card from a credit card company in 2001. He used those cards until April 2005, when he surrendered to the police. Over the period of four years, he had made periodic payments in respect of those credit cards. Even so, as stated in the agreed facts, the total loss to the credit card companies amounted to about \$220,000, which, according to the appellant, was made up mostly of unpaid interests. Deputy Judge Woodcock, in what must be described as a sympathetic judgment, adopted a starting point of 3 years and gave the appellant a total discount of 50%. In adopting the starting point of 3 years, the learned Deputy Judge had regard to the case of HKSAR v Chan Yuk-kwan, unreported, CACC 26 of 2001. In Chan Yuk-kwan, the starting point adopted by this court was 4 years. Chan Yuk-kwan was also a case in which credit cards were obtained by the use of false identity. The credit cards were used over a period of 4 months and the amount involved was about \$148,000. In that case, however, more than one person was involved in the offence, and there was breach of fiduciary duties in the use of the assumed identities, so it could be regarded as more serious. But on the other hand, the period involved in the offences was only 4 months and the loss substantially less, since \$96,000 had been repaid making the net loss to the credit card providers to be about \$500,000. One of the submissions, which was made on behalf of the appellant, was

that because of the loss in this case consisted, according to him, mostly of unpaid interests, the court should not sentence him on the basis that the loss to the credit card providers was \$220,000. I cannot agree with that submission. The loss of unpaid interest is just as real a loss as the loss of principal. Credit is the life blood of commerce, and interest is the rent that one pays for the use of money. So the court has no right to regard the loss of interest as somehow not as serious as loss of principal. So I must proceed on the basis, as stated in the agreed facts, that the total loss to the credit card providers was about \$220,000. As I have said, the learned judge adopted 3 years as the starting point having regard to the circumstances of this case, and this is what she said in paragraphs 7 and 8 of her reasons and I read: The defendant, unlike many similar cases seen in court, went on for the next 4 years or so to try and repay the banks. Mitigation put forward on his behalf is that he in fact used the majority of his income over those years to try and repay those debts. I do not doubt what his income was and with six credit card debts to repay, I believe his income would have been almost solely used for this purpose. This is a man who out of desperation committed these crimes, and applied fraudulently for these six credit cards. Yet he was responsible enough to repay the debts as best he could for a long period of time. When he could not see any end in sight, which I accept would have been a case considering interest rates charged on credit card debts, he surrendered himself to the police. When he felt he had paid the principal debts incurred and was paying back interest charges only, he surrendered himself to the police, he must have come to the end of his tether. The learned judge also gave the defendant the usual one-third discount for his plea. She gave him a further discount of six months, making the total discount in the circumstances, 50%. The reasons were stated by her in para. 17 of her reasons: I would make a further deduction for these reasons. As I have said, I accept this was a desperate man acting alone but I am impressed that this desperate man nevertheless try to honour his debts despite the obvious financial hardship it must have caused him and his family for 3 to 4 years. He could have walked away from a much bigger debt and prayed he would not have been caught. I would deduct a further 6 months for the defendant's clear record, the element of partial restitution, the mitigation put forward, and most importantly, he surrender to the police. I have earlier given the appellant leave to appeal, and he is today represented by Mr Bedford. I am grateful to Mr Bedford for his helpful and detailed written submission, as well as his oral submission in court this morning. Mr Bedford has urged upon us every point which could possibly be made on behalf of the appellant. I have given Mr Bedford's submission careful consideration. And also I have considered carefully the written material provided by the appellant himself, including his affirmation dated 7 May 2007. The appellant is married with two children aged 11 and 4, his wife has left him, and has petitioned for divorce in November 2006. From the divorce petition, it appears that his wife did not wish to have the custody of the children. The children are looked after by the appellant's elderly parents, one of whom is wheel-chaired bound. I understand they are supported by means of social assistance. As I have said, the appellant surrendered to the police in April 2005 and they have accepted that had he not done so, they would have difficulty in locating him. The judge has mentioned that in her reasons. But this is not a case where the crime would have gone undetected otherwise. It would only have meant that the police would have to find the appellant, and he would become a fugitive from justice. So the case of *R v Claydon* [1994] 15 Cr App R (S) 526, referred to by Mr Bedford in his written

submissions, is not really directly in point. A point which has been strongly urged before us, but which the judge had not mentioned expressly in her reasons, is that the appellant surrendered himself in April 2005, and it was only in June 2006 that he was first brought to the court. Accordingly to the appellant, he had resigned from his job, thinking that he would go to prison shortly, and there was undue delay which has caused him both financial and mental hardship. He said that he had provided the police with all the evidence in his possession, and that the police should not have taken so long. Mr Ma, appearing on behalf of the respondent, has in his helpful skeleton submission, included a chronology of police enquiries. Looking at chronology, I cannot say that the police is to be blamed at all, or that there had been any excessive delay. Although a period of 14 months is substantial, I cannot overlook the fact that the police could not have brought the matter to court without proper investigation. That is for good reasons. The appellant might change his mind about pleading guilty, and the police must be ready to proceed, so therefore proper evidence would have to be obtained. In any event, even when dealing with matters in mitigation, the police has to be properly prepared. The police of course was entitled to investigate into the matter, so that the full extent of the appellant's criminality should be known. As I have said, looking at the chronology of police inquiries, I cannot say that the police could be faulted. But having said that, the fact remains, the defendant has been caused mental and financial hardship as a result of the delay. But the important question before this court is whether, in all the circumstances, the sentence of 18 months is manifestly excessive. Unless the sentence, when viewed in the circumstances of the case, could be regarded as manifestly excessive, the court cannot interfere. As I have said, the learned judge adopted a starting point of 3 years, she gave the appellant a discount of 50%, which as the authorities show, is very much on the high side for a person who is not a super grass. I am of the view that a sentence of 18 months, in the circumstances of this case, cannot be regarded as manifestly excessive. The offences were committed over a number of years, and involved the use of forged HKID card, and they had resulted in substantial loss. Admittedly, the appellant was forced by circumstances into crime, but unfortunately, that is not uncommon because criminals tend for one reason or another to be in desperate straits. But I think the learned judge, both in adopting a starting point of 3 years, and giving a 50% discount, has treated the appellant with leniency, and this court is not entitled to interfere. So I would dismiss this appeal. Hon Barnes J: I agree. (Robert Tang) Vice-President (Judianna Barnes) Judge of the Court of First Instance Mr Richard Ma, SGC, of the Department of Justice, for the Respondent. Mr Nigel Bedford, instructed by Messrs Lo, Chan & Leung, assigned by Director of Legal Aid, 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 (#p# "0 "0 "0 i\$&`G @\$ _Rs Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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