

HONG KONG / JUDGMENT

HKSAR v. KWOK YING KIT

COURT

Court of First Instance

DECIDED

22 May 2007

CASE / FILE NUMBER

HCMA341/2007

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bjbj HCMA341/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 341 OF 2007 (ON APPEAL FROM TWCC 3328 OF 2006)

BETWEEN HKSAR Respondent and KWOK YING KIT (by the appellant against the sentence of nine months imprisonment imposed upon him by Mr So at Tsuen Wan Magistrates Court on 9 March 2007 after trial of one charge of offering an advantage to an agent, contrary to section 9(2) (a) of the Prevention of Bribery Ordinance, Cap. 201. AUTONUMOUT The prosecution case was that the appellant had made a total of 13 deposits, totalling \$26,000 into the HSBC bank account of a Mr Chan Man who was an employee of Mid-Stream Holdings (Hong Kong) Limited (Mid-Stream) between 24 April 2003 and 23 August 2004 as an inducement to or reward for or otherwise on account of the said Chan Man doing or having done an act in relation to his principal s affairs and/or business, namely, contracting and allocating cargo handling jobs to (the appellant) and offering assistance to (the appellant) in relation to matters concerning the cargo handling jobs AUTONUMOUT One of the core businesses of Mid-Stream was running port services relating to the loading and unloading of containers. Mid-Stream engaged subcontractors to operate a fleet of barges to undertake this container cargo handling work. The joint venture with a barge subcontractor was operated on a contract basis renewable annually by Mid-Stream subject to satisfactory performance by the subcontractor. The subcontractors were paid on a monthly basis depending on the size of their allotted barge. AUTONUMOUT Chan Man, the man to whom the money was paid by the appellant, was employed by Mid-Stream as its barge operations manager. He was responsible, inter alia, for allocating job orders and monitoring the performance of the barge subcontractors. Although Chan did not himself have the power to determine the annual renewal of contracts with subcontractors he was in a position to make recommendations to those who made such a decision. AUTONUMOUT During the relevant period the appellant and his girlfriend owned all the shares of a company known as Poly Billion Investment Limited which was a barge subcontractor of Mid-Stream. Like other barge subcontractors the appellant, through the medium of Poly Billion, carried out container handling work under the supervision of Chan Man or his deputies. AUTONUMOUT The appellant admitted

that he had made the total of 13 deposits, each of \$2,000, into Chan's bank account with HSBC between April 2003 and August 2004. AUTONUMOUT The magistrate was satisfied that the purpose of the appellant in making the monthly payments to Chan Man was to make Chan show favour towards him and his company in his work. In particular he was satisfied that the payment of the money was to make sure that Chan would support him and make favourable remarks in regard to the annual renewal of his contract and that the payments were intended to affect the daily work of Chan in allocating cargo handling jobs and, if necessary, making the appellant's life easier by offering assistance to him in matters relating to work. Sentence AUTONUMOUT In so far as the sentences are concerned, the magistrate took into account the considerable mitigating circumstances. The appellant is a man of 38 with a clear record. He has a five year-old child for whom he had sole care after his wife left him. He has been in this industry since his schooldays. There had been a long history of such payments in the industry. The appellant did not instigate the offence. He was asked to pay and did so. Chan himself has never been prosecuted for receiving the rewards. AUTONUMOUT The appellant originally appealed against conviction but abandoned that part of the appeal prior to the hearing. He now only appeals against his sentence. AUTONUMOUT Although he was represented by counsel at the trial he is unrepresented before this court. He says the sentence was too severe. He has written a letter to the court in which he says he now regrets his actions. He alleges that this was a practice that had existed in the trade in the past and he simply wanted to earn a living. AUTONUMOUT His submissions fall into two categories : his personal circumstances; and the disparity between his sentence and the sentences imposed on other barge owners who offered rewards to Chan Man. AUTONUMOUT In so far as his personal circumstances are concerned, he says his five year old son for whom he is now responsible originally lived with his parents in a flat in Kornhill Gardens after he separated from his wife, but he later rented a flat in Tseung Kwan O so that his son could be cared for by his girlfriend. At the time of his imprisonment he entrusted his girlfriend with his bank account containing savings and shares worth about \$100,000 to be used for the monthly rent of the Tseung Kwan O flat, the mortgage on his parents Kornhill Gardens flat and his son's living expenses. He says he has learned that his girlfriend has withdrawn all his money and shares, but has not been paying the rent on the Tseung Kwan O flat or his parents mortgage. She no longer visits him. He has reported the matter to the police. He is unsure who is now looking after his son. AUTONUMOUT In so far as disparity is concerned, the appellant says that two other persons sentenced to similar offences received sentences of two months imprisonment after plea. AUTONUMOUT Daryanani who appears for the respondent has helpfully made enquiries into those other two cases. They concerned two other barge operators who offered rewards to Chan Man in similar circumstances to the appellant. AUTONUMOUT One such operator, Jackson Davis (TWCC3221/2006), had offered a total sum of \$8,000 over a period of 10 months. The magistrate adopted a starting point of three months imprisonment and discounted that sentence by one third to reflect the defendant's plea. AUTONUMOUT A second barge operator, Leung Tong (TWCC3220/2006), had offered \$46,000 over a period of four years and nine months. The magistrate adopted a starting point of six months imprisonment which he discounted by one third to reflect the defendant's plea and a further two months to reflect the defendant's frankness in his interviews with the ICAC. AUTONUMOUT Both these sentences were passed subsequent to

the sentences passed on the appellant. AUTONUMOUT Daryanani has informed the court that due to insufficient evidence it was not possible to charge Chan Man with an offence of accepting the rewards. He has also informed the court that the prosecution had considered whether to consolidate the cases of the appellant and the other defendants but had decided against doing so on legal grounds, which included the fact that Chan Man had not been charged. If it had been possible to consolidate the cases and they had been heard by the same magistrate then the apparent disparity is unlikely to have arisen. AUTONUMOUT It is a well established principle that in the absence of most exceptional circumstances it is not proper for a court to consider a disparity submission which involves bringing in subsequent sentences passed on other accused by a different judge in another court : see R. v. Lam Mo Kwong, CACC175/1992. AUTONUMOUT The facts in the case of Jackson Davis (TWCC3221/2006) were sufficiently different both in terms of the reward offered and the time over which the offence occurred to justify a different sentence. Leung Tong (TWCC3220/2006) appears to have benefited from very lenient treatment at the hands of the magistrate. The case of Secretary for Justice v. Kwan Chi Cheong & Others, CAAR1/1999 would suggest that a starting point of at least nine months was warranted in his case. He also may have benefited from some double discounting from the starting point adopted by the magistrate. AUTONUMOUT This court should not reduce a proper sentence imposed on this appellant so as to avoid disparity with what appears to be an unduly lenient sentence imposed on another defendant. AUTONUMOUT The magistrate rightly took the view that corruption offences so undermine our society that a deterrent sentence was necessary. He was right in my view for that reason to rule out a community service order. This is not a case where there were exceptional circumstances. A suspended sentence was not appropriate. A sentence of immediate imprisonment was inevitable. AUTONUMOUT have some sympathy for the magistrate for settling upon nine months as an appropriate starting point in this case. It was the sentence that the Court of Appeal had said was warranted on the facts of the case in Secretary for Justice v. Kwan Chi Cheong & Others, CAAR1/1999. That was also a case where the acceptor of the rewards had solicited them and the offerors were dependent on him for their livelihood. That was however a case where the amounts of money offered were greater than in the current case, and the offering of rewards had gone on over several years. AUTONUMOUT In my view a starting point of six months imprisonment on the facts of this case would have been sufficient to meet the need for deterrence. AUTONUMOUT consider that there are now circumstances of personal mitigation which warrant a further reduction from that starting point. His wife had left him with responsibility for their five year old son. His girlfriend has apparently failed to pay the rent on the flat where she was to look after his son. She no longer visits the appellant and he has made a report to the police. He is worried as to who is now caring for his son, although it may well be that it is his former mother law. He does not know and is naturally worried. I consider a discount of one month is warranted in the circumstances. AUTONUMOUT allow the appeal against sentence and substitute a sentence of five months imprisonment. (P.K.M. Longley) Deputy High Court Judge Mr Prakash L. Daryanani, SGC of Department of Justice, for HKSAR Appellant in person, present 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 t"(& `#\$ "@AB & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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