

HONG KONG / JUDGMENT

HKSAR v. LAI CHI WAI**COURT**

Court of First Instance

DECIDED

5 July 2007

CASE / FILE NUMBER

HCMA108/2007

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Before: Deputy High Court Judge Line in Court Date of Hearing: 5 July 2007 Date of Judgment: 5 July 2007

J U D G M E N T

This is an appeal against a conviction for fraud. Basically, the prosecution s case was that the Appellant used his cousin s identity to apply for a loan. The loan was paid into an account which had been set up by the cousin, who was PW5 at the trial. PW5 said it was set up in the presence of and at the behest of this Appellant, and he said that he had nothing to do with the application for the loan and was a complete stranger to it. That was the way the case was conducted by the prosecution below. The defence that was put was You were involved in the matter; it was your loan . He denied that. Three points are taken on appeal today. The first arises because there was evidence of a similar application being made at a time when this Appellant was not in Hong Kong and it raises the prospect of someone else being involved because the same modus operandi was used, and the same fax machine was used to fax a similar loan application. Ground 1 of the grounds of appeal complained that the magistrate had moved the goalposts because, when he convicted the Appellant, he said that he had done it, in effect, with others. Complaint was made that the charge was never amended. My judgment on this ground is that the goalposts were not moved. The defence all along knew of the prospect of someone else being involved and the realistic question that it gave rise to was whether or not that involvement necessarily excluded the Appellant. Of course it did not because they could have been in it together. I do not think the goalposts were moved and there is nothing in Ground 1. Ground 2 alleged that there was no prejudice caused. I can deal with that very shortly. The Bank parted with its money. There was evidence from the Bank saying, If we had known the true identity of the Applicant, we would not have parted with the money and that, in my judgment, is prejudice. A complaint was made that

the magistrate called it a risk of prejudice . I think it was actual prejudice and that is how the case was particularised below. There is nothing in Ground 2. Ground 3 is the ground which has really been the substance of the appeal. What Mr Chandler has been able to do, by looking at the evidence and the transcript of PW5 s evidence and the exhibits together, in a very competent way, has been to demonstrate to me today that the likelihood is that PW5 was involved along with the Appellant in the crime. In particular, he points to an answer given by PW5 that the Bank contacted him, asking him whether he was applying for the relevant loan, which is the subject of the charge, and he replied that he was not. Mr Chandler says why was the loan made then, which is a fair point, but more than that, he says, how would they have known to contact him by telephone if this was a fraud being committed by his cousin, the Appellant, to the exclusion of PW5, the relevant telephone number not appearing on the application. He can also point to the fact that there were two substantial cash withdrawals made from the account into which the loan had been deposited, which would have needed the signature of the person making the withdrawal and proof of identity. Prima facie, even though we do not have the withdrawal slips and the like, it looks like PW5 must have made those withdrawals. He admitted in his evidence to one withdrawal in a much lesser sum. The magistrate dealt with the shortcomings of PW5 s evidence by saying these were mistakes, they were general mistakes he made about detail. But in fact, he never addressed - because, in fairness to the magistrate, the point was not made to him - the telephone number point and it is difficult perhaps to see how mistake does explain away those cash withdrawals, and also a signature on the change of address form which alerted the Bank to the address used in the loan application. The fact is, the material that the magistrate said was explained by mistake, I believe, in my judgment, is more readily to be explained by the two acting criminally together; very probably with the Appellant playing the major role and the cousin playing a subsidiary role. So it comes to this: I judge a crime was committed; I judge this Appellant was involved in it but not in the way that the case was put below. The case conducted below was in very stark terms, that PW5 has nothing to do with this at all and that was the issue, whereas, in fact, I believe the reality of it is that PW5 was involved. Whether he was involved significantly enough that it would have been worthwhile to prosecute him is a question I do not need to address. But it raises this, that the findings of the magistrate to the effect that there was a mistake here, I do not think are ones that are tenable. So what do I do? If this man had been out on bail, I would have sent the case back for a retrial to be conducted on the basis of the reality of it. He did not give evidence in the trial below. How it would have been if the case had been put differently, I do not know. The live question in this case is should I send the matter back for a retrial? The fact is, he was sentenced to 18 months imprisonment and he has been in custody now for just over 7 months, so he has served something that is approaching a year s equivalent with remission. There was an appeal against the sentence. I have not been addressed about that but it seems to me that the bracket for this sort of crime is between 12 to 18 months. I have to look at the public interest, the difficulties that there would be in a trial on the basis I have described, and also to the fact that he has served 7 months. In those circumstances, I judge that the public interest does not require a retrial. I shall quash this conviction and the Defendant will have his liberty. I suspect he might have been rather lucky in the way things have actually turned out, but it would be moving the goalposts unacceptably now for me to seek to uphold his

conviction on the basis that this was a joint enterprise undertaken by him with the major prosecution witness, PW5, when that was an issue which never figured in the trial below and when it should have done. I want to make it absolutely clear I have no criticism of the magistrate. On the way it was presented to him and on the material he had, I can quite understand why he came to the conclusions he did. (P Line) Deputy High Court Judge Representations: Mr Harish Melwaney, Senior Government Counsel of the Department of Justice, for the Respondent Mr James P Chandler, instructed by Eddie Lee & Co., for the Appellant PAGE - PAGE - CRT22/5.7.2007/ CC HCMA108/2007/Judgment 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 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 &`#\$ &`#\$ bZ < =RM/L\$t\ [g\k [g\k =RM/ Normal.dot setup Microsoft Word 9.0 judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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