

HONG KONG / JUDGMENT

HKSAR v. LAM KIN CHUNG

COURT

Court of Appeal

DECIDED

14 February 2007

CASE / FILE NUMBER

CACC27/2007

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bjbj CACC27/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 27 OF 2007 (ON APPEAL FROM DCCC164 OF 1997)

BETWEEN HKSAR Respondent and LAM KIN CHUNG (the Court) AUTONUMOUT The applicant, who appears in person, seeks leave to appeal against the sentence of six months imprisonment imposed upon him by Deputy Judge Tallentire in the District Court on 15 January 2007, following his plea of guilty on 10 January 2007 to a single charge of failing to surrender to custody without reasonable excuse, contrary to section 9L(1) and (3) of the Criminal Procedure Ordinance. After plea, but before sentence, the applicant stood trial on other charges of which he was acquitted, namely that on 18 November 1996, together with a co-accused he had stolen a wallet in the Chiu Chow restaurant in Lippo Centre, which contained \$280 in cash and two credit cards (charge

- 1) and that thereafter the applicant and his co-accused had used those credit cards to obtain dishonestly items of jewellery from two jewellery shops in Hennessy Road (charges 2 and 3). The facts AUTONUMOUT The charge of which the applicant was convicted on his own plea alleged that without reasonable excuse he had failed to surrender to custody on 27 May 1997. That was required as a condition of the grant of his bail pending trial as varied by a judge of the District Court on 25 April 1997. He was re-arrested in Tsim Sha Tsui on 18 September 2006. Reasons for sentence AUTONUMOUT In his oral delivery of sentence, the judge said simply that he was imposing a term of six months imprisonment, acknowledging that the applicant had served a substantial period of that sentence already. Grounds of appeal against sentence AUTONUMOUT In his self-drafted grounds of appeal against sentence the applicant complains that he was not afforded the one-third discount to which he was entitled having pleaded guilty to the charge of which he was then convicted and sentenced. In addition, he sets out an explanation for his failure to surrender to custody as required by the conditions of bail. He asserts that his conditions of bail were varied so that he was entitled to leave Hong Kong in order that he could visit his pregnant girlfriend in the Mainland. Whilst there, he contends that for a variety of reasons, including the need to look after his girlfriend and

their son, he determined to and did remain outside Hong Kong. The respondent's submissions AUTONUMOUT Robert Lee, on behalf of the respondent, acknowledges that the judge did not state any starting point taken for sentence but merely imposed a sentence of six months imprisonment. He accepts that the judge was in error in so doing. He contends that it is to be inferred that the judge had taken a starting point of nine months imprisonment in arriving at the sentence imposed upon the applicant of six months imprisonment. Noting that the maximum sentence of imprisonment that may be imposed for the offence under section 9L(1) and (3) of the Criminal Procedure Ordinance is 12 months imprisonment Mr Lee submits that a starting point of nine months imprisonment would have been entirely justified, given the period over which the applicant had failed to surrender to custody, namely nine years and four months. A consideration of the submissions AUTONUMOUT Clearly, the judge was in error in not articulating the starting point that he took for sentence. Whilst it was an unfortunate that the judge compounded that oversight by omitting to state in terms that he was affording the full discount of one-third to the applicant upon his plea of guilty to the charge we have no doubt that such an experienced judge would have had that matter in mind when determining the appropriate sentence to impose upon the applicant. In those circumstances, we accept Mr s submission that it is to be inferred that the judge took a starting point of nine months imprisonment. The issue that remains, therefore, is whether such a starting point was inappropriate. AUTONUMOUT As he has acknowledged in his grounds of appeal against sentence the applicant realised at the time that he determined not to surrender to custody, and thereby to commit this offence, that if he had stood trial on the charges that he faced and been found guilty of the one charge of theft and two charges of obtaining property by deception he would have been sentenced to an immediate term of imprisonment. In addition, as his criminal record reveals, at the time of the commission of this offence the applicant was the subject of a sentence of three months imprisonment that had been suspended for two years, which sentence had been imposed on 17 September 1996 for another offence of theft. Clearly, that factual background is highly relevant to a consideration of the culpability of the applicant in the commission of this offence. Furthermore, also of significant relevance is the fact that the applicant had succeeded for nine years and four months in avoiding the execution of the warrant for his arrest that was issued following his failure to surrender to custody. Finally, it is to be noted that the applicant did not surrender to custody to the authorities on his return to Hong Kong, rather he was re-arrested in the street and awaits other charges in a trial to be held in April 2007.

Conclusion

AUTONUMOUT In all those circumstances, we are satisfied that the imposition of a sentence of six months imprisonment on the applicant was entirely appropriate. In the result, the application for leave to appeal against sentence is dismissed. (Wally Yeung) Justice of Appeal (Michael Lunn) Judge of the Court of First Instance Mr Robert K.Y. Lee, SGC, of Department of Justice, for the Respondent The Applicant, 1udk 1udk &`#\$ P" (# 4or~ Rs~/ *fn (Q*<< jZS+ ,DGpH nPz- j^6* ~ B;

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