

HONG KONG / JUDGMENT

HKSAR v. LAM SEE CHUNG,STEPHEN

COURT

Court of Appeal

DECIDED

3 September 2013

CASE / FILE NUMBER

CACC339/2012

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Before: Hon Lunn JA and McWalters J in Court Date of Hearing: 2 August 2013 Date of Judgment: 3 September 2013

JUDGMENT

Hon McWalters J (giving the judgment of the court):

Introduction

The applicant pleaded guilty in the District Court before Deputy District Judge A Tse to one count of theft, contrary to section 9 of the Theft Ordinance, Cap 210 and three counts of obtaining property by deception, contrary to section 17(1) of the same ordinance. On 10 August 2012 he was sentenced by the deputy judge to a total sentence of 32 months imprisonment, 16 months of which she ordered to be served consecutively to a sentence of sentence of 44 months imprisonment that the applicant was then serving. On 24 August 2012 the applicant applied for leave to appeal his sentences. At the hearing of his application we reserved our judgment which we said we would hand down at a later date. This we now do. The Charges The circumstances of the offence are quite straightforward. The applicant and his wife engaged the victim as a post-natal helper from 23 January 2011 to help take care of the applicant s wife and their new born baby at their residence at Tung Chung. Whilst the victim was working in the applicant s home she would place her handbag in the baby s room. She had a China Construction Bank Visa Credit Card which she kept in her purse and she kept her purse in her handbag. She recalled last using this credit card on 17 January 2011 and first noticed that her purse was missing from her handbag on 10 February 2011 and immediately reported the loss of the card to China Construction Bank Limited. Consequently, the first charge of theft pleaded that the offence occurred between 17 of January and 9 February. The victim s credit card was subsequently used on three occasions by a

person other than the victim on 9 and 10 February to purchase three smart phones from a shop trading as Vivaphoto. The three smart phones had a total value of \$15,240. Notwithstanding that the person using the victim's credit card was wearing a mask, which would have helped to conceal his identity, the applicant was identified as that person when his fingerprint was detected on one of the credit card payment slips. When he was arrested and interviewed under caution, he admitted to having stolen the victim's credit card and having used it to purchase the three mobile phones from Vivaphoto.

The Antecedent History of the Applicant This appeal is concerned not only with sentences imposed in respect of the offences the subject of the appeal but also with the treatment of the applicant by the deputy judge in ordering 16 months of his sentence to be served consecutively to his existing sentences. Much of the mitigation in this case and much of the judge's discussion in her Reasons for Sentence concerned events that transpired prior to him appearing in her court and how she should deal with the existing sentences that he was serving. In order to properly understand the arguments in this appeal and the deputy judge's Reasons for Sentence, it is necessary to set out in some detail the applicant's past history. At the time of sentence the applicant was 30 years old, married and with an 18-month-old child. He used to be a computer programmer earning about \$10,000 per month and was the sole breadwinner of his family. He had also helped support his aged parents and grandmother. It was put on his behalf that he had committed the present offences because he needed money to pay for his grandmother's medical expenses. However, this rather simple explanation for his current offending had to be placed in the context of his considerable past offending. He first became involved in fraudulent conduct sometime before 20 March 2009 for on that day he was sentenced to 7 months imprisonment for one count of obtaining property by deception and six counts of fraud. Presumably, he was in custody for most of 2009. He next came before the courts on 18 May 2010 charged with one count of fraud and one count of attempting to obtain property by deception. For these offences he was sentenced to two hundred hours of community service and ordered to pay compensation of \$10,000. His next offending was in September 2008 when he gave two dishonoured cheques in the sums of \$100,000 and \$150,000 to repay part of a debt owed by him to his then girlfriend. However, the charges that flowed from this conduct, namely two counts of evasion of liability by deception, were laid only on 11 November 2010. He first appeared in court on these offences on 18 November 2010 when he was placed on bail. He remained on court bail until he eventually pleaded guilty to both charges on 7 June 2011. His case was adjourned a number of times to allow him to pay compensation to his victim. It was re-fixed to 11 August 2011, but on that day the applicant failed to appear and a warrant was issued for his arrest. By the time he came to be sentenced for these two offences on 21 December 2011, and that sentence was 16 months imprisonment, he had committed a large number of other fraud offences. Around the same time as these offences were committed, that is, between September and November 2008, the applicant committed five offences of fraud when he induced, by deception, five different victims to make cash payments to him of amounts between \$1,500 and \$5,800. He was arrested for these offences on 26 May 2010, placed on police bail and charged for them on 11 May 2011. He was not sentenced for these offences until 8 February 2012. Defence counsel before deputy judge Tse categorized all these pre-2011 offences as the applicant's first batch of offences as they all occurred between 2007 and the end of 2008. These early offences were said to have been

committed because the applicant got into the habit of overspending. However, on his release from prison in 2009, the applicant resolved to turn over a new leaf. The applicant then started a computer business with his wife and his finances returned to normal. He did not commit any further offences until the offences the subject of this appeal which, it was said on his behalf, were prompted by his need for money to pay for expenses arising from his grandmother having suffered a stroke. In chronological order the next offences to be committed by him were the ones the subject of this appeal as they occurred between January and February 2011. These offences were committed whilst he was on court bail for the September 2008 bounced cheque offences and on police bail for the September to November 2008 fraud offences. Thus, by the time he committed the offences the subject of this appeal he had already committed sixteen offences of which he had been convicted of nine. There was then a temporary hiatus in the applicant's offending until June 2011. In that month he obtained three amounts of money totalling \$27,000 from the same victim by fraud. This conduct subsequently was charged as three counts of fraud. Coinciding with his imminent fraud spree was his failure to face up to the charges for which he was already being prosecuted. On 17 August 2011 the applicant failed to attend court as required on the adjournment of his five fraud offences that he committed between September and November 2008 and a warrant issued for his arrest. Between 23 to 31 August 2011 he bought three second-hand cars from the same victim and paid for them by means of post-dated cheques totalling \$184,341, all of which were dishonoured. This conduct was subsequently charged by three counts of obtaining property by deception. In the same month, August 2011, he obtained two payments totalling \$18,500 from a victim by means of deception and this conduct became the subject of two counts of fraud. He also obtained from the same victim a loan of \$5,000 by another fraudulent representation and this also became the subject of a charge of fraud. In November 2011 he obtained monies from two different victims by means of deceptions and this conduct became the subject of two counts of fraud. On 16 and 19 December 2011 the applicant bought two second-hand cars from two different victims and paid for both of them by post-dated cheques in the sum of \$48,000 and \$45,000 respectively. Both of these cheques were subsequently dishonoured and in respect of this conduct the applicant was charged with two counts of obtaining property by deception. On 21 December 2011 the applicant was sentenced to 16 months imprisonment for his September 2008 bounced cheque offences. On 8 February 2012 he was sentenced to 3 months imprisonment in respect of his five fraud offences dating back to September to November 2008. The magistrate hearing this case ordered that 2 months of the 3 months imprisonment sentence run consecutively to the sentence imposed on 21 December 2011 for the bounced cheque offences. On 25 May 2012 the applicant was sentenced to 4 months imprisonment to be served consecutively to his existing sentences for the three offences of fraud committed in November - December 2011. This made a total sentence of 22 months that the applicant was then serving. This was the position when the applicant came before Mr Dufton, Permanent Magistrate, on 4 July 2012 for sentence in respect of all the fraud offences that made up his crime spree between June and December 2011. The thirteen offences were contained in four different informations and involved seven different victims. Mr Dufton sentenced the applicant to a total of 26 months imprisonment but ordered that 4 months of this sentence be served concurrently with his existing sentences. Mr Dufton's sentence was in effect a consecutive

sentence of 22 months imprisonment thereby resulting in the applicant then serving a total sentence of 44 months imprisonment. So the position of this applicant on 10 August 2012 when he came to be sentenced by the deputy judge Tse is that he was serving a sentence of 44 months imprisonment. With the further 16 months imprisonment that she ordered to be served consecutively to his existing sentences the result for the applicant was that he was then facing a total sentence of 60 months imprisonment. To round off the applicant's history we should mention that he appealed Mr Dufton's sentences to the High Court but on 7 March 2013 Deputy High Court Judge Wright dismissed his appeal. So, the position of the application at the hearing of this appeal is that he is serving a sentence of 60 months imprisonment. The Reasons for Sentence The deputy judge rehearsed the mitigation and traced the applicant's offending history. She characterised the theft of the credit card as a breach of trust because of the way the applicant had abused his position as an employer of the victim to steal from her whilst she was working for him in his house. For the credit card offences she observed that even small-scale credit card fraud attracted sentences as long as 3 years imprisonment. In respect of the applicant she noted that by the time he committed these offences he had already committed sixteen others, all relating to dishonesty, and was, therefore, properly to be regarded as a persistent offender. She then said: The defendant committed these offences within months of his last sentence. He committed the last three offences in the present case within the space of two days. All these factors are aggravating features of sentence which warrant increase in the appropriate starting point. She then indicated her starting points as being 6 months imprisonment for the theft offence and 4 years imprisonment for each of the obtaining property by deception offences. Reducing these starting points by one-third to allow for the guilty plea resulted in sentences of 4 months for the theft offence and 32 months for each of the three obtaining property by deception offences. She said that as the sentences were part and parcel of the same scheme she would order them to be served concurrently, thus making a total sentence of 32 months. The deputy judge then went on to address the issue of totality. In doing so she considered what a District Court Judge might have adopted as his starting point if the whole series of cases had been brought before a single judge in the District Court Her conclusion was that a starting point of 7 years imprisonment after trial would properly reflect the defendant's criminality in all eight cases The eight cases to which she was referring were the September 2008 bounced cheques case (sentenced on 21 December 2011 to 16 months imprisonment); the September - November 2008 fraud case (sentenced on 8 February 2012 to 2 months consecutive); the November - December 2011 fraud case (sentenced on 25 May 2012 to a further 4 months consecutive), Mr Dufton's cases (sentenced on 4 July 2012 to 22 months consecutive) and the case before her. . Seven and a half years when reduced by one third, becomes 60 months. As the applicant was already serving a sentence of 44 months the deputy judge ordered 16 months of her sentence to be served consecutively to the applicant's existing sentences in order to reach her desired total of 60 months. The Grounds of Appeal At the hearing of the appeal Mr Hemmings, counsel for the applicant, applied to amend his grounds of appeal by adding a further ground. His application was unopposed and we granted leave to him to do so. The new ground of appeal was that the sentences for charges 2 - 4, which related to the fraudulent use of the credit card, were manifestly excessive. These sentences of 32 months resulted from the deputy judge adopting a starting point

of 4 years imprisonment. The other grounds of appeal related to the period of time, 16 months, that the deputy judge ordered to be served consecutively to the applicant's existing sentences and the means by which the deputy judge determined what, to her, was an appropriate totality for the whole of his criminality arising from the seven previous cases together with the case before her.

Discussion Mr Hemmings argued that the applicant should not be subject to the usual sentences imposed on those who used counterfeit credit cards as that was a more serious form of credit card fraud than the fraudulent use of genuine credit cards. He submitted that the appropriate sentencing tariff for the applicant was that applicable in breach of trust theft cases. He referred us to *HKSAR v Cheung Mee Kiu* [2008] 1 HKC 113 where this Court devised sentencing bands for such cases based upon the value of the property stolen. Given the value of the property obtained by the fraudulent use of the victim's credit card, the applicant would fall into the less than \$250,000 band which attracts a sentence of less than 2 years imprisonment. The problem with Mr Hemmings' argument is that it is premised on two assumptions, neither of which is correct. The first is that the applicant's offences should not be treated as credit card fraud because they do not involve the use of counterfeit credit cards. The second is that because the applicant abused the trust of his employee in stealing her credit card, his subsequent dishonest use of that card entitles him to be sentenced as though his offences were breach of trust theft cases. His first assumption is wrong because it is based upon a misconception of the sentencing cases relating to credit card fraud. True it may be that the earlier cases dealing with sentencing for credit card fraud were concerned with the use of counterfeit credit cards and many of the aggravating features listed in cases such as *R v Chan Sui To & Anor* [1996] 2 HKCLR 128 were peculiar to syndicated counterfeit credit card fraud. But these aggravating features will not be present in the type of simple, small scale use of forged credit cards for which a sentencing tariff of 3 years imprisonment or less has been said to be appropriate. In *HKSAR v Tu I Lang* CACC 464/2006; unreported, 18 2007, McMahon J said at paragraph 10 of the judgment: Where the facts of the offence point to a small unsophisticated operation, involving only one or a few forged cards uncomplicated by other evidence materially linking the offender to a larger operation, then a starting point of three years imprisonment or less would be appropriate. Those judgments which lay down a sentence of 3 years imprisonment or less for cases of simple credit card fraud are based on a number of sentencing principles and considerations. They are that counterfeit credit card offences require deterrent sentences; there is a need to protect the integrity of the credit card system; and the potential for loss is great and often will be far greater than the actual loss. In fact, it is precisely because of this last consideration that the actual loss will not necessarily be an important factor when it comes to sentencing a credit card offender; rather it is this potential for losses which is the most important consideration. These sentencing principles and considerations are equally applicable to credit card fraud offences in which genuine credit cards are used and we can see no good reason why the three year starting point for simple cases of counterfeit credit card fraud should not also apply to simple cases of credit card fraud where stolen genuine credit cards are used to commit the offence. In respect of the Mr Hemmings' second assumption it is true there is an element of abuse of trust in the applicant's conduct. But, the abuse of trust cases relate to situations where a person is, by virtue of the trust reposed in him, authorized to deal with property belonging to another and, in abuse of that trust,

dishonestly misappropriates that property. Here that is not the situation. The applicant was the employer, not the employee, and he was never authorized to deal with his employee's property. As with most employees, this victim was required to work at her employer's premises, here his home and so, whilst she performed her duties she had to leave her personal possessions unattended. By virtue of her circumstances she had no choice but to trust in her employer not to interfere with her personal property. Properly analysed this is not an abuse of trust case but rather an abuse of position an opportunistic exploitation of circumstances by the victim's employer. The theft of the credit card in the circumstances in which it occurred provides no justification for treating the offences arising from the subsequent use of the credit card as equivalent to breach of trust theft cases. On the relevant credit card authorities the appropriate starting point for each of charges 2 - 4 was 3 years imprisonment. This was a starting point to which the deputy judge adverted in her Reasons for Sentence though it is not clear that she, in fact, adopted it as her unenhanced starting point. But, there is no doubt that whatever her preliminary starting point was, she enhanced it to allow for the aggravating features present in the case. These aggravating features she identified as being that the applicant was a persistent offender, the offences were committed whilst the applicant was on bail, the offences were committed within months of his last sentence and He committed the last three offences in the present case within the space of two days It is unclear quite what she meant by this last comment but we assume she took it as further evidence of his persistence as an offender. In truth, most of the matters she has mentioned relate to his persistence as an offender and care must be taken when separating them out as aggravating factors not to, in effect, punish him twice for what is really the same aggravating factor. It seems to us that on the material before her, the deputy judge was perfectly entitled to conclude that the applicant was a persistent offender and for that reason to enhance her starting point. Indeed, the need for his punishment to contain additional deterrence is clearly illustrated by the fact that that these offences were committed whilst on bail. However, accommodating these sentencing demands must not result in a punishment that is disproportionate to the criminality. The punishment must still fit the crime. We are of the view that from whatever starting point the deputy judge commenced, to enhance it to 4 years imprisonment is to impose on the applicant a punishment that is, ultimately, disproportionate to his culpability. We believe a starting point of 3 years 6 months imprisonment is just for this applicant. Reduced by one-third for his plea of guilty, the final sentence for charges 2 - 4 becomes 28 months imprisonment and those are the sentences we impose. We do not disagree with the deputy judge's order that all the sentences be served concurrently. But the next issue is how much of this 28 months should be ordered to be served consecutively to the sentences the applicant was then serving. The approach of the deputy judge was to consider the total criminality of the applicant as represented by the sentences the applicant was then serving. The criticism that is now made of this approach is that the deputy judge did not have before her sufficient information in respect of those other offences to properly assess what total sentence was appropriate for those offences and the offences before her. As we have mentioned it was her view that 7 years after trial would have been an appropriate total starting point which, reduced for the applicant's pleas, became 60 months. We believe there is some merit in the applicant's complaint. The reality is that an after-the-event attempt to reach an overall view of the applicant's

culpability is no substitute for one judge having before him all the applicant's offences and dealing with them at the same time. Undoubtedly, this is what should have happened here, at the very least in respect of the offences dealt with by Mr Dufton. It is clear from a chronology prepared by the respondent that the Magistracy cases sentenced by Mr Dufton and the District Court case were proceeding in tandem. In respect of the Magistracy cases the applicant pleaded guilty to them on 30 May 2012 and they were adjourned for sentence to 28 June 2012. In respect of these District Court offences the applicant pleaded guilty to them on 19 June 2012 and they were adjourned for sentence to 5 July. They were further adjourned to 3 August and then finally 10 August when Reasons for Sentence were delivered. Thus, by the time the deputy judge came to sentence this applicant the only way she could obtain a feel for the applicant's overall criminality was by reliance on information provided to her by counsel, neither of whom had been involved in any of the earlier proceedings. It is very difficult for a sentencing judge to accurately assess what will be an appropriate total sentence when he or she has to take account of offences sentenced by another judge. This Court has said on many occasions that it is highly desirable that one court deal with all the offences committed by the person before it. Splitting up his offending and having different offences sentenced by different judges is only productive of injustice and frequently leads, as has happened in the present case, to aggrieved defendants and unnecessary appeals. The purpose of the totality principle is to achieve a just and balanced sentence that will not punish the defendant twice for the same conduct and will not be crushing to him. It is clear that a just and balanced sentence is one that is not concerned solely with the rehabilitation needs of the offender but also accommodates other relevant sentencing principles, such as retribution, that is, the need to punish an offender for his misdeeds; where deterrence is needed in respect of a particular offender or offence, to appropriately deter him and others; the need to denounce the conduct and, where an offender preys upon the community, to protect it from his depredations. It is well to remember that at times a severe sentence will be an appropriate sentencing response and just because a sentence is severe does not mean that it is not just and balanced. In reaching a view of this offender's overall culpability sight should not be lost of the fact that though he has committed a large number of fraud offences very few of them have been on a particularly great scale. On our calculations in his offending between September 2008 and December 2011 the applicant committed twenty one offences against fifteen victims involving a total amount of \$612,851. The bulk of the offending, however, occurred between June and December 2011. In that period the applicant committed sixteen offences against ten victims involving a loss of \$343,741. This is, perhaps, where some assistance can be gleaned from the sentencing bands for breach of trust theft cases. Under the Cheung Mee Kiu sentencing bands a defendant would have to steal between \$3 million to \$15 million to attract a sentence of 5 to 9 years. Even though we have said these sentencing bands are not relevant to credit card offences they do help to provide us with some perspective of the seriousness of this applicant's conduct within the wider context of offences of dishonesty resulting in financial loss. What this applicant requires is meaningful punishment for his offences but not a total sentence which is disproportionate to his culpability. We are of the view that a total sentence, after plea, of 5 years imprisonment is disproportionate and that an appropriate sentence is one of 4 years and 3 months imprisonment.

Conclusion

In the result, we allow the application for leave to appeal against sentence and treat the hearing of the application as the hearing of the appeal. We quash the sentences of 32 months imprisonment imposed in respect of charges 2 to 4, offences of obtaining property by deception, and substitute sentences of 28 months imprisonment for each of those charges. Further, we quash the order that 16 months of the sentences of imprisonment imposed in respect of charges 2 to 4 be served consecutively to the sentences of imprisonment then being served by the appellant and order that 7 months of the sentence of imprisonment imposed in respect of charge 4 be served consecutively to those sentences. We do not disturb the order of the deputy judge that the sentences imposed in respect of charge 1 to 4 be served concurrently with each other.

(Michael Lunn) Justice of Appeal (Ian McWalters) Judge of the Court of First Instance Ms Fanny Wong SADPP, of the Department of Justice, for the respondent Mr John D. B. Hemmings, instructed by D.L.A., for the applicant He lodged a cheque with the court in compliance with its order but this cheque was dishonoured on presentation. See HKSAR v Lam See Chung, Steven HCMA 552, 553, 554 and 555/2012; unreported, 13 March 2013. Page 15K-L of the appeal bundle. Page 15L-M of the appeal bundle. The number 8 does not refer to the number of offences but rather the number of informations. The Magistracy cases involved 7 informations and so once this District Court case was added to them the total sentence of the applicant flowed from 8 cases. This case was followed by another division of the Court of Appeal in HKSAR v Chan Ka Chung CACC 379/2010; unreported, 13 June 2011. HKSAR v Cheung Ka Wo Johnny [2002] 2 HKC 517. HKSAR v Ng Swee Thiam & Ors [2000] 1 HKLRD 772 at 778. Page 14Q of the appeal bundle. See also the discussion by Stock VP in HKSAR Ngai Yiu Ching [2011] 5 HKLRD 690. His very first two offences accounted for \$250,000 and were bounced cheque cases where monies were not obtained but repayment of a debt was avoided. 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 gdV\ gdV\ gd*x gd*x h4(l h4(l h0-h gdUi gda\$ gd| gdV\ gdV\ gdV\ gdV\ gdV\ h0-h h0-h h0-h gdk\G gdk\G gdk\G hJ{0 h0-h hY7/ hY7/ hZF4 hZF4 hZ&r hZ&r hk\G hk\G gd*12 gdkd gdiN gdiN hz9! hz9! h/KH h/KH hz9! hk\G h*12 h*12 h*12 h- S h- S h- S h0-h h0-h h~<~ h~<~ h34u h<E- gdld rhc_c h34u gd4c gdZ70 gdE` h\*12 h\*12 h\*12 h\*12 qgb^b^bYbU hCir gd0-h 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 h#/p gdCir gdCir gdCir gdCir gdCir gdCir gdCir gdCir gdCir :pM=d [Content\_Types].xml Iw}, \$yi} \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%`#q x}r :TZaG I u3 L+M2 e\O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)` # R>QD =(K& =al-4vfa 0%M0 theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/ theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> v8c8Q tAXD wiSO setup CACC 283-2007.dot Judiciary Microsoft Office Word Judiciary Hong Kong Title <b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/

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