

HONG KONG / JUDGMENT

HKSAR v. LEE MING CHOI

COURT

Court of Appeal

DECIDED

22 March 2007

CASE / FILE NUMBER

CACC502/2006

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Before: Hon Stuart-Moore VP and Stock JA Date of Hearing: 22 March 2007 Date of Judgment: 22 March 2007 J U D G M E N T Stuart-Moore, VP (giving the judgment of the Court): On 24 November 2006, the applicant, aged about 44, was convicted of theft in the District Court following his plea of guilty before Judge Geiser to theft. Originally, the charge he faced was burglary but this was amended, no doubt in view of the somewhat technical nature of that offence in the circumstances which prevailed. The applicant was sentenced to 12 months imprisonment against which he now seeks leave to appeal. The facts were simple. On 14 July 2006, the applicant stole a screen protector worth \$30 from an audio shop in San Po Kong Plaza by putting an umbrella handle into the gap around the shop's entrance door to make it wide enough for him to insert his hand and take the item. This was done after business hours when the shop's door had been padlocked. No damage was done to the premises and the applicant has paid \$30 in compensation. The applicant has a long criminal record, having acquired nineteen previous convictions in twenty-two years. He has twelve theft-related offences and he has received immediate terms of imprisonment of up to 12 months on ten of his appearances in court. The judge remarked that the fact that on this occasion the applicant had apparently been drunk explained this rather pointless behaviour. He went on to say: it is right to say that his criminal record is relevant for sentencing purposes. The defendant is a repeat offender, certainly so far as thefts are concerned and I consider his past criminal record to be an aggravating feature which justifies the adoption of a higher starting point than I would otherwise have adopted. Were it not for the defendant's past criminal record I would have adopted a starting point of somewhere in the region of 15 months imprisonment. However, due to the aggravating feature of the defendant's record, I will adopt the higher starting point of 18 months imprisonment. This will be reduced by one-third to take account of his plea of guilty, coming to 12 months imprisonment. (Appeal bundle p. 7) Ms Susanna Ku on the applicant's behalf submitted that the starting point adopted by the judge for this offence was too high in that it was disproportionate to the gravity of the offence. She particularly emphasised in this regard the fact that the applicant had committed the offence on his own at a time when he was drunk, that the value of the stolen property was small and that

no damage had been done. It is significant, also, that when the applicant was arrested about three weeks after the offence on another matter, and having been recognised as the possible culprit for the present offence from closed-circuit television tapes, he immediately admitted this offence. Ms Ku suggested that the present facts might well be approached as being not unlike a case of shoplifting. In this regard, she made reference to HKSAR v Lam Kwai-wa HCMA 1078/2002 and HKSAR v Tai Man-lung HCMA 794/2003. In those appeals, sentences of 10 weeks imprisonment were substituted for the original sentences. These were shoplifting offences where pleas of guilty had been entered and where the offenders, who had long criminal records, had stolen property of only a small value. The applicant has now been in custody since 8 August 2006. This, in our opinion, is a term which has adequately punished the applicant for the offence. Indeed, Ms Mary Sin for the respondent did not seek to argue otherwise. Accordingly, we shall give the applicant leave and, treating the hearing as the appeal, we allow the appeal. The present sentence is quashed and, in its place, we substitute such a sentence as will result in immediate release so far as this sentence is concerned. However, the applicant is also subject to a consecutive 4-month sentence in respect of an offence of theft by shoplifting, committed on 31 July 2006, which the applicant will now have to serve. (M. Stuart-Moore) Vice-President (Frank Stock) Justice of Appeal Ms Mary Sin, SADPP, of the Department of Justice, for the Respondent. Ms Susanna Ku, instructed by Messrs K H Yuen & David Cheung, assigned by Director of Legal Aid, for the Applicant. 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 i\$&`G Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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