

HONG KONG / JUDGMENT

HKSAR v. LEE YUM SANG, VASCO

COURT

Court of First Instance

DECIDED

26 March 2007

CASE / FILE NUMBER

HCMA855/2006

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bjbj HCMA855/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 855/2006 (ON APPEAL FROM ESCC 1117/2006)

BETWEEN HKSAR Respondent and LEE YUM SANG, VASCO (D1) Appellant

Coram: Deputy High Court Judge Line in Court Dates of Hearing: 23 & 26 March 2007 Date of Judgment: 26 March 2007

J U D G M E N T

1. This is an appeal against conviction for conspiracy to commit an offence, contrary to section 31(b) of the Prevention of Bribery Ordinance, which makes it an offence to disclose the identity of a person being investigated, and the sentence of 4 months imprisonment, which followed.
2. The respondent's case was that in April 2005 the Appellant, a manager working for the Hospital Authority, made a complaint to the ICAC against his senior manager, Madam Chan, intimating corruption by her in the course of her work. He gave a total of two witness statements and supplied some documents to the ICAC for their investigation. He was warned that any disclosure of the investigation could constitute an offence under the Ordinance. The ICAC commenced an investigation into the complaint and approached various staff of the Hospital Authority for information.

3. On 16 September of 2005 the ICAC made an appointment with Madam Chan for an interview to take place on 22 September. The Appellant became aware of the appointment and contacted the 2nd Defendant, a friend and former colleague. The Respondent suggested that the two of them then conspired to disclose the subject and details of the ICAC investigation to the public by faxing a letter to news media companies, which letter disclosed that Madam Chan was being investigated by the ICAC for a bribery matter.
4. At about lunchtime on 22 September 2005 the 2nd Defendant faxed a letter out to a number of news media companies by using a fax machine at a 7-Eleven convenience store. The ICAC investigation was reported by nine newspapers on the next day. The fax bore the title, HA senior staff will be investigated by ICAC today, and it read thus: A series of jobbery incidents which recently took place in the Hospital Authority were really outrageous. I would like to offer further information on those greedy and redundant staff of the Hospital Authority. It had all along been covered up until the matter was recently taken over by the ICAC for investigation. At 2.30 pm today Chan Kung Wai-ying, Chief Public Affairs Manager of the Hospital Authority was summoned by the ICAC to the ICAC Headquarters in Central to investigate her previous abuse of authority, showing favour to familiar contractors by awarding promotion projects to them, whereby advantage was received. Besides, Cheng Man-yung also assisted in the investigation. It may be put as, The fish which nibbles at every bait will be caught, and it might be just the tip of the iceberg. It is hoped that the mass media, in a bid to find out more about the matter, will force the Hospital Authority into facing the problem squarely and impose severe punishment on staff members who breach the law instead of further tolerating them and wasting public funds.
5. It was signed a reliable source, the word, Urgent then appears and it is dated 22 September 2005.
6. The defence took many points at trial but only four today arise on appeal: firstly, ground 1 claims that at the time of the disclosure there was no ongoing ICAC investigation involving Madam Chan as a subject person; ground 2 complains that the Appellant was not proven to have known or suspected that the ICAC were still investigating Madam Chan as the subject person; ground 3 claims that the Appellant had a reasonable excuse to make the disclosure; and, ground 4 claims that the Magistrate unjustifiably took the view that the Appellant had falsely fabricated the original complaint and that this, therefore, wrongly coloured his evaluation of the Appellant and the evidence which he gave.
7. Was there an ongoing investigation involving Madam Chan? The thrust of the argument here was that at the date of the disclosure the ICAC was merely making a general inquiry and there was no investigation at all, let alone one into Madam Chan; that Madam Chan was only a witness and not a suspect or a subject of the investigation; that any investigation which may have started had petered out due to a lack of interest and activity and that the proposed interview with Madam Chan was merely tidying up loose ends and amounted only to the taking of a witness statement and was not properly to be described as investigation.

8. PW5 was the ICAC officer who took over the case in July 2005. He gave unequivocal evidence that from the time of the Appellant's complaint in April 2005 until 22 September of that year, Madam Chan was one of the subject persons of the investigation. The Magistrate found the witness to be honest and reliable. Not only that, he could point to the fact that on 1 August 2005 he had interviewed Madam Chan's superior and asked about her involvement with the procurement of materials and services and also he interviewed the officer directly concerned with such procurement. It was also the fact that he had been seeking an interview in the month preceding 22 September 2005 with Madam Chan.
9. In my judgment, the Magistrate was right to find that there was an ongoing investigation of which Madam Chan was the subject and I would make the same finding on the evidence. I agree with the Respondent's argument that the fact that the ICAC could have taken other steps in the investigation acted with more dispatch is neither here nor there. An investigation is an investigation whether it be slow or quick. The evidence simply did not support the claim that any investigation had ceased and, on the contrary, it supported the finding that the investigation was ongoing. In a word, the evidence of PW5 was entirely acceptable and it was supported by all of the circumstances, the prominent circumstance being that he was about to interview the very subject of the Appellant's complaint.
10. Did the Appellant know or suspect that Madam Chan was still being investigated by the ICAC? The Appellant claimed in evidence that he neither knew nor suspected that Madam Chan was being investigated. He said that nobody from the ICAC took the initiative to contact him and tell him about the progress of the matter and that he felt the ICAC would not inform the person to be interviewed in advance, as was the case with Madam Chan, when they conduct an investigation and that there were rumours that she was off the hook.
11. It was the case that on 27 August 2005 the Appellant telephoned the ICAC. He told them that Madam Chan had been told by a colleague that she was to be interviewed and that he had heard from those working above her in the Hospital Authority that she would be off the hook. The Appellant admitted that he asked if they were still investigating the case and that he was told, and I quote his words, It was under investigation. The claim to a lack of knowledge or suspicion of ongoing investigation into Madam Chan at the time of the disclosure in the following month was thus, in my view, completely unrealistic. This piece of evidence was deadly by itself to the Appellant's claim.
12. This evidence on the topic, however, did not stand alone. The 2nd Defendant pleaded guilty and gave evidence for the Prosecution at trial. The Magistrate characterised her evidence as being, and I quote, Crystal clear, consistent throughout and without any exaggeration. She was adamant that in her discussions with the Appellant over the drafting of the fax that he used the word, investigate, to her. It is the case that the document bears the heading, HA senior staff will be investigated by ICAC today. The word, investigate, or investigation, appears three more times in the text. The Magistrate made the good point that the 2nd Defendant had left the Hospital Authority a year before and how was she to know the state of play between the ICAC and the Appellant's superior if it was not from the Appellant's mouth?

13. When the Appellant was arrested and cautioned he was asked whether or not he had disclosed to other persons that the ICAC was investigating Madam Chan. The Appellant said he had disclosed the matter to the 2nd Defendant and that apart from the 2nd Defendant there were other persons who knew that Madam Chan was being investigated by the ICAC . He also said he had learned about one week or so before 22 September, from a man called Patrick Wong, that Madam Chan was, and I quote, being investigated by the ICAC. The fact that on other occasions in the interview the Appellant referred to Madam Chan being interviewed in a way that was interchangeable with being investigated, did not, in my judgment, rob these sayings of their obvious significance.
14. In my judgment, there was overwhelming evidence that the Appellant knew or suspected that Madam Chan was the subject of an ICAC investigation at the time of the disclosure. In coming to that judgment I have not needed to rely on the Magistrate s assessment of the Appellant as a witness. His assertions to the contrary simply could not live with the weight of evidence against him on the point. I mention this as it is argued in the fourth ground that the Magistrate may have been in error in his assessment here.
15. Did the Appellant have a reasonable excuse for making the disclosure? The thrust of the argument here was to the effect that, given the primary purpose of the section was to protect the investigation and that subsection (2) enables disclosure on the happening of certain events that would alert those who knew of them to some detailed investigation, the Appellant was justified in agreeing to and making the disclosure because others at the Hospital Authority, including Madam Chan, were aware of the ICAC interest and activity. I regard the argument as untenable.
16. In the circumstances that existed, the ICAC were entitled to secrecy. For instance, the position of the suspected provider of an advantage to Madam Chan, not an employee of the Hospital Authority, had to be considered. But leave that aside, it is established that the reputations of those investigated by the ICAC have protection under this section. One only has to look at the terms of the fax that was sent to perceive a desire to hurt Madam Chan. The nature of this emotive disclosure to the world with the admitted accompanying desire to have photographers capture her picture at ICAC Headquarters, demonstrate to me, for sure, that the conduct was not to be reasonably excused.
17. Even if the motive for disclosure was only to put pressure on the Hospital Authority, that would not provide a reasonable excuse. I say that because what he did, involving personal hurt, was wholly disproportionate to the alleged goal or aim. It was boldly asserted that disclosing the coming interview of Madam Chan to the world by that fax was a reasonable step to take in putting pressure on the Hospital Authority- I disagree. However, I do not for a minute accept that such was the Appellant s sole motive. I share the Magistrate s view that at least one of the things he wanted was to cause trouble to his superior.

18. It is also the case that many an ICAC investigation will come to the knowledge of those with some association to the investigation's subject matter before being in the public domain. Even if more than a handful of the people that the Appellant could actually name knew of the ICAC interest at the Hospital Authority, that could not begin reasonably to excuse the type of disclosure to the media that the conspirators undertook here. Taking the kindest view of the Appellant's motivation and claimed belief in this regard, there was no reasonable ground to support it. Of course, by a phone call to the ICAC, the Appellant could have checked whether he was right to think everyone knew of the investigation and that disclosure to the world was justified. He did not do that. I judge the reason to be that he knew full well what the answer would have been to his proposal and it is revealing to remember the anonymous 7-Eleven source of the fax.
19. The claim to reasonable excuse was not put exclusively on the basis that others at work already knew of the ICAC interest. It was rolled up with the claims that the Appellant believed that any inquiry had fizzled out and that Madam Chan was only to be interviewed as a witness as opposed to being a subject of the investigation, being forewarned of the interview by the ICAC itself. I have dealt with these matters under the earlier grounds. I am quite sure that the Appellant timed the disclosure to alert the world to his allegations in the most sensational way he could because he knew a step in the investigation was about to take place. As already seen, that was just how the conspirators describe the situation in the fax. There is no possibility on the evidence in this case of confusing this Appellant with a right-minded man taking reasonable steps to ensure that corruption was exposed.
20. Did the Magistrate wrongly find that the original complaint to the ICAC was knowingly a false one and, if so, with what effect? Whether or not the original complaint by the Appellant to the ICAC was false was not an issue at the trial. Accordingly, nothing was said about it to the Magistrate. He delivered his verdict with full reasons and without reference to it. Counsel mitigated thereafter and submitted that there had been no suggestion by the prosecution that the report was other than a bona fide one, whilst noting that at the end of the day it had been found to be unsubstantiated. He rightly made the point that such a finding did not convert the report necessarily into a malicious one.
21. The Magistrate retired for a short time and came back to pass sentence saying, and I quote, Briefly, the facts were that the 1st Defendant was unhappy with his superior, Mrs Chan, and so fabricated a complaint to the ICAC to say that Mrs Chan had possibly had corrupt dealings with a contractor. The sentence of 4 months imprisonment was passed. Defence counsel asked for bail pending appeal and was refused. He then asked for a review of the sentence on the basis that the Magistrate had erred in finding that the Defendant fabricated a complaint to the ICAC as there was no evidence in the case to support it. The Magistrate responded by saying, That is my inference, but then pointed out that his use of the word, malicious, had not been in relation to laying the complaint but publishing the facts. Defence counsel then pointed out that it was the remark in passing sentence that he was talking about. The Magistrate then identified that and said that he was prepared to and would

substitute the word, fabricated, in his reasons for sentence with the word, made.

22. It is now argued on behalf of the Appellant that there was a finding that the original complaint was false and that this was in error and unjustified and its effect is such that it may have coloured the Magistrate's view of the Appellant in his evidence in such a way that I should not rely upon his findings in that respect. The Appellant's counsel also points to paragraph 2 of the written reasons for sentence, which said that, and I quote, D1 was unhappy with his superior, Mrs Chan, and so made a complaint to the ICAC to say that Mrs Chan had possibly had corrupt dealings with the contractor.
23. There is nothing in this point. Firstly, even if the Magistrate was in error, as alleged, and did make a finding that the original complaint was false, I have no need to rely on his perception of the Appellant or his evidence. The weight and nature of the evidence in the case was such that I rejected his assertions and found to the contrary for the reasons already given.
24. Secondly, the material before me does not support the claim that the Magistrate made a finding that the original complaint was false. The word, fabricate, may or may not involve the suggestion of making up something falsely as opposed to simply making something. When its use was pointed out to the Magistrate, he was prepared, without the need for further persuasion or argument to amend it to, made. This was an experienced Magistrate and to take the use of just one of his words, which he was immediately willing to amend, to support a claim that he had made a significant finding about a matter which had never been in issue and upon which he had heard no evidence, is, in my judgment, going a step too far.
25. Thirdly, what is apparent to me from looking at all the Magistrate said is that he judged that part of the Appellant's motivation all along was a dislike of his superior. It was open to the Magistrate, when it came to sentence, to take that view. It is one I share. The terms of the fax show the conspirator's attitude to her in the clearest light. Given his talk about Madam Chan being a fierce person and given the conspiracy and its nature, the inference that his obvious dislike of her extended back from disclosure a mere six months to the time of complaint, is not unreasonable.
26. Fourthly, the matter arose only in the context of sentence. Full and sufficient reasons had already been given for the conviction without reference to the matter.
27. I shall now turn to sentencing. People in Hong Kong know that the commitment of the ICAC is such that they will turn no deaf ear to a report or whisper of corruption. It is not difficult to set in train an investigation. It follows that those who are the subject of investigation deserve and have protection of their reputations until such time that it is right for the public to be made aware of it. Those who make complaints, such as the Appellant, are warned about disclosure constituting an offence.
28. This Appellant made a report, which turned out to be unsubstantiated, against his superior at work. On the day she was due to be interviewed by the ICAC he and his co-conspirator did what they could to disclose to the world, through the mass media, that she was being

investigated by the ICAC, naming her and giving her position in the context of claims of outrageous incidents, greedy and redundant staff, cover up, abuse of authority and showing favour in return for advantage received. The Appellant wanted the press present to photograph his superior attending the ICAC for interview. It was a shameful and nasty piece of conduct, in flagrant breach of the warning he had been given and the law he was told of. I share the view of the Magistrate that whatever he may have truly believed about his own complaint of corruption, a significant part of his motivation was the desire to make trouble for his superior, whom he did not like.

29. The maximum sentence of imprisonment for the substantive offence is one year. Statistics reveal eight previous prosecutions under the section going back to 1987, and not one of them attracted a sentence of immediate imprisonment. Save for one of those cases, which was very different from this one, I do not know the facts of the others. The Privy Council in Ming Pao case identified the need for secrecy in corruption investigations as being the primary concern of the section and that the protection of those investigated as being of secondary importance. The major mischief in this case clearly concerns the protection of the Appellant's superior. I remember that whilst the media did act on the disclosure, they sensibly omitted identifying the Appellant's superior by name.
30. It is not a case where the breach of secrecy can be seen to have damaged the process of the investigation. Of course, deliberate conduct, defeating or hampering an investigation, would normally attract charges of a graver nature. The Magistrate noted in his reasons for sentence that the Appellant had shown no remorse whatsoever and that the method of publication was at the worst end of the scale. He could not see how an immediate custodial sentence could be avoided and I agree with him.
31. On the facts as they were before the Magistrate, the sentence of 4 months imprisonment passed upon the Appellant was, in my judgment, merited by his behaviour. It is not easy to think of a case of disclosure which more completely embraced the secondary mischief which the section attacks. The sentence could in no way be described as a deterrent one, in the sense that it was longer than it otherwise would have been by reason of the need to deter others. However, it is important, in my view, that conduct such as this, is seen to be met by immediate imprisonment. Acting in breach of the section provides a very ready means to harm your neighbour. The enmity that would motivate someone to act in such a way must be powerful. If detection does lead to something other than immediate imprisonment, the prospect that such persons will think the risk worthwhile becomes a real one. That cannot be allowed to happen.
32. I have read the letters that have been handed to me in support of the mitigation advanced, some with multiple signatories to them, which ask for sympathy or mercy for the Appellant and speak in fulsome terms to his general good character. Of course, I bear in mind the factual matters that attend his good character but the weight of the opinions about his involvement in this crime and a subsequent claim of deep remorse is much diminished by the fact that he did not own up to it in the face of, what I regard to be, overwhelming

evidence.

33. One of the letters I received referred to the fact that Madam Chan had forgiven the Appellant for his behaviour. That letter was obviously written after the Magistrates Court proceedings and it was written for my benefit. I indicated that such a source was not the proper way to prove the victim's present attitude. Accordingly, over the weekend inquiries have been made by the ICAC in this regard. It is common ground, and confirmed by the ICAC and the Respondent, that Madam Chan has forgiven this man. In the circumstances of this case, that was an extremely generous gesture. I have to ask myself, in the light of that information, would I still pass the same sentence that the Magistrate passed, because I would have without it. The answer is that it does make some difference.
34. The courts have rightly tried in recent years to give greater weight to the reaction of victims to crimes committed upon them. It is something that works both ways. In this case, it will work in favour of the Appellant. I will reflect the forgiveness and I will reduce the sentence by a month because of it. Of course, these are public proceedings and not private ones. The public has an interest in seeing this law properly upheld and properly punished but that can be achieved by reducing the sentence to one of 3 months imprisonment.
35. The final thing I will mention in relation to the sentence is that I was impressed by the fact that the Appellant's employers had employed him whilst on bail, after his conviction, and the support he has from his superiors. A sentence of 3 months immediate imprisonment may mean that he can still hold his job because his absence from it will not be so protracted but of course that is a matter for his employers and not this court. Accordingly, the order I make is that the appeal against conviction is dismissed and the appeal against sentence is allowed but only to the extent of reducing the 4 months imprisonment to a term of 3 months imprisonment. (P Line) Deputy High Court Judge Representation: Mr William Tam, Senior Government Counsel of the Department of Justice, for the Respondent (HKSAR) Mr Christopher Grounds and Mr Trevor Beel, instructed by Messrs Tang, Wong & Cheung, for the Appellant
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