

HONG KONG / JUDGMENT

HKSAR v. LI CHEUK KWAN

COURT

Court of Appeal

DECIDED

15 November 2007

CASE / FILE NUMBER

CACC351/2005

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Before: Hon Yeung JA and Beeson J in Court Date of Hearing: 8 November 2007 Date of Judgment: 8 November 2007 Date of Reasons for Judgment: 15 November 2007

REASONS FOR JUDGMENT

Beeson J (giving the Judgment of the Court): This Applicant applied for leave to treat his previous Notice of Abandonment of Appeal against sentence as a nullity and if such leave was granted, sought leave to appeal against a sentence of imprisonment imposed on him in the District Court. On 8 November 2007 we dismissed the application and advised that we would hand down our written reasons at a later date. These are our reasons.

BACKGROUND

On 19 July 2005 the Applicant was convicted of 24 charges on his own plea before Deputy District Judge Chainrai. The prosecution elected not to proceed on a further seven charges, which he denied; those charges were left on file, not be proceeded with without leave of the court, or the Court of Appeal. The charges of which the Applicant was convicted were:

- (1) 11 counts of Obtaining Property by Deception, contrary to section 17 of the Theft Ordinance, Cap. 210;
- (2) 6 counts of Obtaining Services by Deception, contrary to section 18(A) of the Theft Ordinance, Cap. 210;
- (3) 1 count of Failing to Surrender to Custody, contrary to section 9L (1) and (3) of the Criminal Procedure Ordinance, Cap. 221;

- (4) 1 count of Possession of a Forged Identity card, contrary to section 7A (1) of the Registration of Persons Ordinance, Cap. 177;
- (5) 1 count of Forgery of a Document, contrary to section 111 (1)(b) of the Road Traffic Ordinance, Cap. 374;
- (6) 1 count of Assaulting a Police Officer in the due Execution of his Duty, contrary to section 36(b) of the Offences against the Person Ordinance, Cap. 212;
- (7) 1 count of Theft, contrary to section 9 of the Theft Ordinance, Cap. 210;
- (8) 1 count of Possessing a False Instrument with Intent, contrary to section 75(1) of the Crimes Ordinance, Cap. 200; and
- (9) 1 count of Possession of an Offensive Weapon in a Public Place, contrary to section 33(1) of the Public Order Ordinance, Cap. 245. Charges 1 to 16 related to his abuse of 2 credit cards which did not belong to him and by which he obtained property and services to the value of \$607,254.92. The other charges arose from criminal activities peripheral to those offences and to events which occurred on, or after, his arrest. The Applicant claimed in mitigation that he committed the offences to assist his mother. At the time of his arrest the Applicant was aged 31, had a significant number of previous convictions and had not made any restitution. No restitution was ever made. The judge considered the offences in the light of HKSAR v Sun Chun Lei CACC 476 of 2002 and found the Applicant had played an active role in the operation, but did not find any elaborate planning or an international dimension, although she noted that the amount obtained by the Applicant was greater than in that case. She took a starting point for each of charges 1-16 of 5 yrs imprisonment which, with a 1/3 reduction for plea, was 3 years 4 months for each charge. The judge assessed an appropriate sentence for each of the remaining charges and considered the totality principle before ordering the sentences to be partly concurrent and partly consecutive. The judge set out in her Reasons for Verdict the manner in which she adjusted the sentences for totality and it is not necessary to repeat her account. Suffice it to say that at the end of the exercise the total sentence imposed on the Applicant for the 24 charges, was 5 years 2 months imprisonment. Sentencing took place on 2 August 2005 and the Applicant filed grounds of appeal against sentence on 19 August 2005. He claimed that he had cooperated fully with the authorities thus saving court time and money and complained that the judge had adopted a starting point for sentence as if he had entered a Not Guilty plea. He requested a reduction of sentence. A mention date was fixed for 21 November 2005. The Applicant was refused Legal Aid on 29 September 2005 and he abandoned his appeal against sentence on 24 October 2005. By affirmation dated 28 February 2007 the Applicant sought to restore his appeal against sentence. He had not applied for Legal Aid by 2 April 2007. At a listing call-over on 1 June 2007, the Applicant advised that he had not yet applied for Legal Aid and was told to do so. Legal Aid was refused on 16 July 2007. In written submissions in support of this application, the Applicant stated that he withdrew his original appeal because he had been refused Legal Aid and he could not afford private representation. Further, he had

insufficient legal knowledge to represent himself; he feared he would waste time and resources and for that reason would not be regarded favourably by the court. He felt that his lack of legal knowledge would make things worse for himself. He claimed that he had been advised in the interim since sentence by many friends with legal knowledge and some professionals . He thought he had good grounds of appeal, but did not set out what those were; presumably relying on the brief grounds he had filed in August

2005. He asked to restore his appeal and the date of hearing was fixed for 8 November 2007. The Applicant appeared in person at the appeal and repeated the matters in his written submissions, with particular emphasis on what he considered the judge's failure to consider totality properly. He compared his case with that of another (unnamed) person who had pleaded not guilty and had been sentenced from a starting point of 6 years; whereas he, who had pleaded guilty to all charges, had been given overall the same starting point. He felt that he had been treated as a mastermind when he considered himself an employee, albeit one with an important role. He submitted that because his bail had been estreated, presumably for his failure to surrender to custody, that the sentence for that offence (Charge
- 21) should be reduced. The issue for this court was whether the abandonment arose from a deliberate and informed decision. If Notice of Abandonment has been filed before the appeal hearing the appeal is deemed to have been dismissed. Although in certain circumstances the court has a discretionary power to permit the Applicant to withdraw an abandonment and treat it as a nullity, that can be done only if there was no reasoned and informed decision by the Applicant, so that his mind did not go with his act. There is nothing other than his bare assertion to show that the Applicant's mind did not go with his act, or that he did not know the consequences of what he was doing when he signed the Notice. By the time he was sentenced the Applicant was aged 31 and had accumulated 34 convictions spread amongst 15 separate court appearances. In light of his court and prison experience we find it inherently improbable and do not accept that he was misled, or mistaken, about the effect of the abandonment, or that he was unable to represent himself on an appeal against sentence. It is not possible to see how the Applicant could be regarded as not having his mind linked to the realities of his situation when he abandoned his appeal. A very good reason for abandoning his appeal might have been to avoid the likelihood of the appeal court increasing his sentences. In our view the Applicant was fortunate to escape with an overall sentence that could be regarded as lenient, given the number of charges and the seriousness of the offences. There was no mitigation apart from his plea. Accordingly we refused this application for leave to treat the abandonment of his appeal against sentence as a nullity; the application was dismissed. We wish to make it clear that even had we ruled otherwise, we would not have allowed the appeal against sentence. The individual sentences were appropriate and the judge had taken account of totality. The total sentence period of 5 years 2 months could not be seen as excessive or wrong in principle. The application was dismissed. (W. Yeung) (C-M Beeson) Justic 1udk 1udk U V A B C D E F G H I J K L M N O P Q R S T U V i\$&`G hca.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc

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