

HONG KONG / JUDGMENT

HKSAR v. LI CHI YAT

[2019] HKCA 458

COURT

Court of Appeal

DECIDED

30 April 2019

CASE / FILE NUMBER

CACC189/2018

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Before: Hon Cheung and Zervos JJA in Court Date of Hearing: 26 April 2019 Date of Judgment: 26 April 2019 Date of Reasons for Judgment: 30 April 2019

REASONS FOR JUDGMENT

Hon Zervos JA (giving the Reasons for Judgment of the Court): On 26 June 2018, the appellant was sentenced to 2 years and 3 months imprisonment by Deputy District Court Judge Kathie Cheung (the judge), following his conviction on his own plea to an offence of theft of a credit card (Charge 1), an offence of obtaining property by deception by use of the credit card (Charge 2), and two offences of attempting to obtain property by deception by use of the credit card (Charges 3 and 4). He appealed against his sentence with leave. At the hearing of the appeal, we allowed the appeal, and said we would hand down our reasons for doing so at a later date. These are our reasons. The background facts The appellant worked as a dispatcher for a transportation company. On 10 May 2017, one of the owners of the company left his wallet in a vehicle that the appellant later used to do a delivery job. The appellant admitted that on that day he stole the owner s credit card which he later used in an attempt to purchase certain items. He went to Sincere House in Mong Kok that afternoon and attempted to purchase at a technology shop an item in the sum of \$10,464 but was unsuccessful because he was requested to produce his Hong Kong identity card for verification of identity. He then went to another shop where he successfully used the credit card to purchase a mobile telephone in the sum of \$7,917. It was a result of this transaction that the owner was notified that his credit card had been used, whereupon he immediately informed the bank that the transaction had not been made by him. The appellant later in the evening went to Fortress and attempted to purchase an item in the sum of \$7,288 but this transaction was unsuccessful. There was a police investigation and enquiries

were made of the appellant on 11 July 2017 who admitted his wrongdoing to them. He identified himself on CCTV footages that had been retrieved by the police from the cameras at the shops where the transactions took place. He explained that after he purchased the mobile telephone he sold it and used the proceeds to buy food and play mahjong. He said that after the last unsuccessful transaction, he threw away the credit card. The reason for sentence In sentencing the appellant, the judge noted that he was 29 years old, single and previously worked as a driver. She also noted that the appellant had one previous conviction for the offence of theft for which he was fined \$5,000 and ordered to pay compensation in the sum of \$1,900 on 13 June 2017. She disregarded this previous conviction for the purpose of sentencing in the present case. She further noted that the appellant acknowledged his wrongdoing and explained that he committed the present offences out of greed. In her reasons for sentence, the judge reviewed the relevant sentencing authorities in relation to credit card fraud offences as follows:

9. In *R v Chan Sui To and anor* [1996] 2 HKCLR 128, the Court of Appeal laid down the various factors to be considered in sentencing this type of offence, which included the size and planning of the operation, whether there is any international dimension and the role played by the defendant. In *HKSAR v Tu I Lang*, CACC 464/2006, the Court of Appeal stated that 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 offence to a larger operation, then a starting point of 3 years imprisonment or less would be appropriate (see para 10 of judgment). In *HKSAR v Lam See Chung, Stephen*, CACC 339/2012, the Court of Appeal stated that the aforesaid sentencing principles were equally applicable to credit card fraud in which genuine cards are used. As for Charges 2, 3 and 4, the judge adopted a starting point of 3 years imprisonment which she reduced by one third for the appellant's guilty plea to 2 years imprisonment. She explained the basis of the sentence on these charges as follows:
10. In this case, one genuine credit card was involved and used on 3 occasions without any marked degree of planning or organization. Further, there is lack of international element. The total value of goods obtained is not high. Although the defendant has one previous conviction record for offence involving dishonesty, I will not enhance the sentence by reason of his previous conviction record. In the circumstances, I consider it appropriate to adopt 3 years as the starting point for each of charges 2-4. Given the defendant's guilty plea, the sentence for each of these charges is reduced to 2 years imprisonment. As for Charge 1, the judge adopted a starting point of 9 months imprisonment which she reduced by one third for the appellant's guilty plea to 6 months imprisonment. She then applied the totality principle and considered that a sentence of 2 years and 3 months imprisonment appropriately reflected the culpability of the appellant in the offences he committed. She ordered that the sentences on Charges 2, 3 and 4 run concurrently, with 3 months from the sentence on Charge 1 to run consecutively to the concurrent sentences on Charges 2, 3 and 4. The grant of leave At the leave hearing, the appellant was unrepresented and appeared in person. Leave was granted on the issue as to whether the nominal starting point of 3 years imprisonment on each of Charges 2, 3 and 4 was excessive in the circumstances. The

respondent had raised two matters that it considered may have had a bearing on the sentence. The first was whether the theft of the credit card was part and parcel of the offence of obtaining or attempting to obtain property by deception, and whether the sentence on the theft offence should be concurrent or consecutive or partially consecutive to the sentences on the obtaining or attempting to obtain property by deception. The second was whether the issue of the potential loss in the present case was not of a substantial amount. The grounds of appeal

- (a) The starting point on the deception charges The appellant's first ground of appeal is that the judge erred in adopting a starting point of 3 years for each of the Charges 2, 3 and 4. Ms Olivia Tsang, for the appellant, argued that in light of the sentencing authorities in relation to credit card fraud offences, cases involving the use of a single genuine credit card by a sole individual who obtained the credit card opportunistically, should be categorised, in terms of its operation or planning, at the low end of the scale. She relied on the following comments in *HKSAR v Tu I Lang*, CACC 464/2006, 18 May 2007, unreported, to emphasise that the Court of Appeal did not preclude a starting point of less than 3 years imprisonment for credit card fraud offences, particularly where the circumstances warranted such an approach, which she submitted were present in this case. Small scale credit card offences cannot be subjected to strict guidelines. That is because the facts of such offences can vary significantly in a number of ways, the number of cards possessed or used been perhaps the most obvious factor.
10. 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 3 years imprisonment or less would be appropriate. Characteristically, the issue of potential loss is an important consideration when sentencing an offender for a credit card fraud. Ms Tsang contended that this factor had become much less significant because of technological advancement since the decision of *HKSAR v Lam See Chung*, Stephen [2013] 5 HKLRD 242, where the Court of Appeal explained the rationale of a starting point of 3 years imprisonment or less for cases of simple credit card fraud as follows: 39. 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 Tsang submitted that an example of the technological advancement is the notification system by credit card companies to the cardholder of transactions conducted on the card, and that this initiative, if the transaction is fraudulent, can result in the immediate cancellation of the card. There were three problems with this argument. First, no empirical evidence or data was submitted to the Court to establish the nature of the change in technology, if any change had occurred, and if it had, how it had curtailed or limited the potential loss to a cardholder or credit card company. Secondly, the issue was about the potential loss, which by its nature would depend on a variety of factors, including the credit

limit of the card, if there is one. Thirdly, the loss in this instance was limited because of the intervening variable of notifying the cardholder, who in this instance received the notification and responded to it. If it was not for this intervention, the loss could have been greater, as high as the credit card limit would allow. There is the additional factor that there were two failed attempts to use the card, one before and one after the successful transaction, involving amounts of about \$10,000 and \$7,000, respectively. The true essence of the complaint under this ground was that in the circumstances of the case, the starting point of 3 years imprisonment was manifestly excessive. Ms Tsang supported her submission by highlighting the fact that the case involved a single credit card, the stealing of the credit card was opportunistic, and the potential loss was significantly limited. Mr Prakash Daryanani, for the respondent, argued that the starting point for the fraudulent use of a single genuine credit card should be at least 3 years imprisonment. He submitted that where there was a high credit limit or use of multiple cards, the starting point should be enhanced. He relied on the following paragraph in *Lam See Chung Stephen* which followed the one that we have already quoted, where the court said:

40. 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. Reliance on this paragraph alone, ignored that in the preceding paragraph the court had stipulated the starting point should be 3 years imprisonment or less and further ignored the comments of the court in *Tu I Lang* where it stated that the small scale credit card offences cannot be subjected to strict guidelines.
- (b) The sentencing of the theft charge The appellant's second ground of appeal is that the judge erred in ordering 3 months of the sentence on Charge 1 to run consecutively to the concurrent sentences on Charges 2, 3 and 4. Ms Tsang submitted that the theft offence was part and parcel of the other offences which all arose in the course of a single transaction and that the sentences on all the charges should therefore run concurrently. Mr Daryanani submitted that the judge was correct to order 3 months of the sentence on the theft charge to run consecutively with the other sentences. He argued that the theft charge was a separate and distinct offence to the other deception charges and the sentence for this offence should be consecutive, subject to the totality principle.
- (c) The sentence was manifestly excessive The appellant's third ground of appeal is that the sentence imposed by the judge was manifestly excessive. This ground in turn depends on the outcome of the other two grounds. Discussion In sentencing, it is important not to lose sight of the criminality involved as reflected by the charge or charges for which the defendant stands convicted. This case involved the theft of a single credit card by the appellant who successfully used it to purchase an item in the sum of a little under \$8,000 after two failed attempts to purchase other items, one before the successful transaction in the sum of about \$10,000 and one after in the sum of about \$7,000. All the offences occurred

on the one day, 10 May 2017, and no further attempt was made by him to use the credit card. We have been informed by the respondent that the credit limit on the card was \$20,000. This information had not been provided to the judge when sentencing the appellant. We are in no doubt that given the judge's careful and thorough analysis of the sentencing principles and the facts of the case that she would have taken this information into account in determining the appropriate sentence. We considered in the circumstances of this case that a starting point of 3 years imprisonment was manifestly excessive. It is important to emphasise that the sentencing authorities in relation to credit card fraud cases recognise that small-scale credit card offences cannot be subjected to strict guidelines because they can vary significantly in a number of ways and that a starting point of 3 years imprisonment or less would be appropriate. In our judgment, this was a case of credit card fraud at the low end of the scale of criminality and this was clearly apparent by the fact that it involved the appellant acting alone in stealing opportunistically a single genuine credit card which he subsequently used or attempted to use on three occasions where the actual loss was a little under \$8,000 and the potential loss, as represented by the credit card limit, was \$20,000. There was no planning or elaborate operation, or any other aggravating factors that would elevate the criminality to a higher level of seriousness. We should point out, however, that credit card fraud offences require deterrent sentences in order to protect the integrity of the credit card system and to punish the offender for the loss and inconvenience to the credit card company and the cardholder, as the case may be. In the circumstances of this case, we were of the view that the appropriate starting point on each of the deception charges should be 2 years imprisonment. Ms Tsang relied on the one transaction rule to argue that the sentence on the theft offence should run concurrently with the other sentences. This rule states that if the number of offences have been charged arising from the one transaction or course of criminal conduct, then concurrent sentences should be imposed. As explained in *HKSAR v Ngai Yiu Ching* [2011] 5 HKLRD 690:

19. The one transaction rule was not developed as an inflexible rule of law. It was never intended as anything more than a practical rule of thumb to guide judges in the exercise of the power to impose consecutive sentences so that the final sentence was not one that was unfair to an offender. The Court stressed the importance of the totality principle and the need to ensure that the sentence reflected the true culpability disclosed by the offences of which the defendant has been convicted. So where a second offence added to the culpability of the first offence, the sentence for the second offence would normally run wholly or partially consecutive to that for the first, depending on the appropriate totality for the conduct as a whole. When dealing with multiple offences arising from an episode of criminal activity, the ultimate overall sentence must reflect the true culpability of the offender, although the sentencing court must first pass an appropriate sentence for each individual offence and then ensure that the offender has not been punished twice for the same conduct. We were satisfied that this is what the judge did in the present case. She correctly determined that the sentences on Charges 2, 3 and 4 should be concurrent to each other, involving the appellant fraudulently using or attempting to use the credit card on

three occasions within a short period of time. She also correctly determined that the sentence on Charge 1 of 6 months imprisonment, having adopted a starting point of 9 months imprisonment which she reduced by one third for the appellant's guilty plea, should run consecutively as to 3 months to the concurrent sentences on Charges 2, 3 and 4. The theft of the credit card was a separate and distinct criminal act on the part of the appellant from his subsequent fraudulent use of the card and therefore warranted a partially consecutive sentence to appropriately reflect the true culpability of the appellant. We therefore would not disturb the sentence the judge imposed on Charge 1 or the basis of its application with the concurrent sentences on Charges 2, 3 and 4. It followed from what we have said, we would adopt a starting point of 2 years imprisonment on each of Charges 2, 3 and 4 which we would reduce by one third for the appellant's guilty plea to 16 months imprisonment on each of the charges and order that they run concurrently. We agree with the judge's sentence on Charge 1 of 6 months imprisonment of which 3 months run consecutively to the concurrent sentences of 16 months imprisonment on charges 2, 3 and 4, thus resulting in a sentence of 19 months imprisonment.

Conclusion

Accordingly, we allowed the appeal, set aside the sentence of 2 years and 3 months imprisonment and substituted it with a sentence of 19 months imprisonment. (Peter Cheung) (Kevin Zervos) Justice of Appeal Justice of Appeal Mr Prakash L Daryanani, SPP, of the Department of Justice, for the respondent Miss Olivia Tsang, instructed by Johnnie Yam, Jacky Lee & Co, assigned by the Director of Legal Aid, for the appellant HKSAR v Li Chi-yat [2018] HKCA 887. The facts of that case involved the appellant keeping the sum of \$1,900 that had been left behind at an ATM machine. Pursuant to section 83V(1) of the Criminal Procedure Ordinance, Cap 221, the respondent adduced as fresh evidence without objection from the appellant the credit limit of the credit card in question. At paragraphs 18-23. See paragraphs 13 and 17 in Ngai Yiu Ching. 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 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 gdwe gdwe gdwe gdwe gdwe gdwe gdwe gdwe gdwe gdwe gdwe gdwe gdwe gdwe huwH.h.qb gdm/ gd\$ \ hv1: h5[h5[h5[h1(h1(h5[h -9 gdc{ gd Un gd_{S gdUX gduJ h1(h jS h Un h Un h Un h Un hc-{ hL&b h~jy h90v hU6h h90v hc-{ gdwe gdwe gdwe gd1Q| gduJ gd~jy gd90v h1Q| h"m; h"\ hoNq xohd h!mR h!mR h!mR h!mR [Content_Types].xml _rels/.rels theme/theme/ themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /EE} theme/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"/> setup hca.dot Windows User Microsoft Office Word Judiciary Hong Kong Title <?xml version="1.0" encoding="UTF-8"

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