

HONG KONG / JUDGMENT

HKSAR v. LI KWOK MING

COURT

Court of Appeal

DECIDED

13 December 2007

CASE / FILE NUMBER

CACC5/2007

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bjbj

Before : Hon Ma CJHC, Hon Stuart-Moore VP and McMahon J in Court Date of Hearing : 4 December 2007 Date of Judgment : 4 December 2007 Date of Reasons for Judgment : 13 December 2007

REASONS FOR JUDGMENT

McMahon J (giving the reasons for judgment of the Court) : AUTONUMOUT The applicant was convicted, after a trial before Deputy Judge Ernest Lin in the District Court, of an offence of procuring the making of an entry in a bank record by deception, contrary to section 18D of the Theft Ordinance, Cap. 210, for which he was sentenced to three years imprisonment. He sought leave to appeal that conviction and on 4 December last we dismissed the application and now give our reasons for doing so. PROSECUTION CASE AUTONUMOUT The prosecution case was that the applicant was a director and bank account signatory of an established family company in Hong Kong, Lison Chemicals Ltd (Lison), which was involved in the import and export of chemicals. Following the emigration of a number of Lison s directors to Canada in the mid-1990s the applicant became the effective managing director of the company. AUTONUMOUT Over the next few years the company s profitability deteriorated and in April 1999, as a result of the applicant s instructions, documentation purporting to evidence a sale of chemicals to a company China Anneng Construction Corporation (Anneng) was presented to Hang Seng Bank in Hong Kong under a letter of credit issued by Anneng s bank, China Construction Bank, in Zhejiang. AUTONUMOUT The documents supporting the letter of credit, detailing the shipment of some 214.5 tons of Toluene Di-Isocyanate () from Hong Kong to Ningpo on the mainland by a vessel J. Truster on 22 April 1999, were bogus. There was no such shipment and there had been no such sale of chemicals to Anneng by Lison. AUTONUMOUT The Hang Seng Bank, where Lison had maintained a bills discounting facility for a number of years, credited Lison s account although

its staff had noticed a discrepancy in the documents provided; notably that instead of a copy of the bill of lading as required by the letter of credit, Lison had provided only a cargo receipt. Because of Lison's hitherto excellent credit worthiness the bank staff were prepared to make the funds under the letter of credit available short of strict compliance with the terms of the letter of credit. AUTONUMOUT Those funds of US\$411,840 (HK\$3,127,467) were, within two days, transferred to Lison's account with the China & South Sea Bank Ltd in Hong Kong where they, in large part, were used to pay off an outstanding liability Lison had with that bank. AUTONUMOUT When the Hang Seng Bank forwarded the 90-day letter of credit and its supporting documents to China Construction Bank in Zhejiang for payment, that bank refused to accept the documents because of the absence of a bill of lading as required by the letter of credit. Hang Seng Bank through its credit officer, who gave evidence as PW3 at trial, requested the applicant to provide the missing bill of lading. Instead he, through his secretary PW2, provided four bills of lading relating to unconnected transactions but particularising in total a similar tonnage of the same chemical TDI. Those bills of lading were in their terms wholly inconsistent with the transaction as evidenced by the other supporting documentation and, unsurprisingly, in November 1999 the China Construction Bank in Zhejiang finally notified Hang Seng Bank that the letter of credit remained unaccepted, returned all the documents to Hang Seng Bank and closed their files on the matter. AUTONUMOUT The applicant had left Hong Kong a few weeks earlier in October 1999 for Canada from where he was extradited in 2006 to Hong Kong and arrested in respect of this matter. Hang Seng Bank in the meantime had been able to recover only about HK\$800,000 of the \$3,127,467 advanced to Lison under the letter of credit. DEFENCE CASE AUTONUMOUT The applicant gave evidence. His case was that there was in fact a sale transaction as evidenced by the letter of credit and its supporting documentation, though he had not been closely involved in the preparation of the documentation relating to the sale and shipment of the chemicals to Anneng, but had allowed a person, Law, who was an employee of Anneng provide those details to PW2, who then acted upon them in preparing the documentation for which Lison was responsible. PW2 denied this was so in her evidence. AUTONUMOUT The applicant's version of events was also that in addition to the transaction reflected in the letter of credit documentation there was a separate underlying agreement involving the person Law which included the provision of a security payment of RMB4 million in respect of the 200 odd tons of TDI shipped to Ningpo, and a surplus tonnage of the chemical shipped which was not reflected in the documentation. He suggested in his evidence that the four bills of lading were provided to Law in respect of that agreement and Law was responsible for them thenceforth. AUTONUMOUT In other words the inconsistencies and omissions in the commercial documents which formed the prosecution case were accepted by the applicant at trial but explained by him as being brought about by the involvement of Law. AUTONUMOUT The judge rejected the defence case and accepted the case for the prosecution. GROUNDS OF APPEAL AUTONUMOUT Grossman SC for the applicant advanced two grounds of appeal which can be stated as follows :

- (1) the judge's interventions during the whole of the evidence prevented the applicant from receiving a fair trial; and

- (2) the judge wrongly took judicial notice of established business practice in Hong Kong and China in arriving at his verdict.
- (1) Judicial interventions AUTONUMOUT The fundamental complaint of Mr Grossman in this regard was that the judge had descended into the arena to an impermissible degree and, as a result of the volume of the judge s interventions and their nature, the defence case was prejudiced. AUTONUMOUT Grossman led us through the transcript of a considerable portion of the evidence at trial and in some detail pointed out those parts which he submitted supported his complaint in this regard. We have ourselves spent some time going through the same areas of evidence relied upon by Mr Grossman and we accept that there were, in total, a greater number of interventions than might be considered ideal. But in large part those interruptions were minor and often were to clarify the evidence of a witness or, as frequently, to rephrase and simplify the questions of counsel. A considerable proportion were of the sort which occur in every criminal trial where the judge has not heard a question or an answer clearly and wishes all or part of it to be repeated. AUTONUMOUT An additional and not unimportant factor in this case was that the evidence in large part was concerned, in both the prosecution and the defence cases, with the technical details of a letter of credit transaction and the procedures involved. It is quite apparent from a reading of the various witnesses evidence, including that of the applicant, that the judge was anxious to properly understand what was being said by the witnesses before him. That was additionally so in respect of the applicant s evidence, because it is fair to say that his case was based on a rather convoluted version of events involving a separate security agreement and an attempt to explain its relevance to the four apparently unconnected bills of lading submitted to the Hang Seng Bank as supporting documents for the relevant letter of credit. AUTONUMOUT But having said that, we accept that on occasion there is some merit in Mr Grossman s criticism of the judge unnecessarily intervening and that some of those interventions verged on the flippant or sarcastic. AUTONUMOUT No doubt the judge was on occasion frustrated by, on the one hand, his quite proper desire to ensure he had the details of the evidence properly understood and, on the other, the somewhat opaque evidence given by both the prosecution witnesses and the applicant as to those details. Even if that were so however we wish to emphasise that neither sarcasm nor flippancy in dealing with witnesses could ever be of any assistance to the court in achieving its proper purposes, and are to be wholly discouraged. AUTONUMOUT Whether a judge s interventions fall on one side of the line of permissibility or the other is, to put it tritely, a matter of degree. But one important consideration in this case as in others is how the interventions of the judge affected the presentation of the defence, whether in cross-examination of prosecution witnesses or, perhaps more materially, during the evidence of the applicant himself. Importantly in the present case, while there were instances where the judge expressed difficulty in understanding the applicant s evidence, his comments were not such as to contradict the factual basis of the defence as occurred in both HKSAR v. Wong Kam Tong (unreported), CACC522/2005 and HKSAR v. Chan Kwan Kan [1998] 1 HKLRD 495. AUTONUMOUT In Chan Kwan Kan and R. v. Lau Hing On [1987] 1 HKC 89 and on many other occasions this court has

adopted with approval the words of Denning LJ in *Jones v. National Coal Board* [1957] 2 QB. The judges part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure: to see that advocates behave themselves seemly and keep to the rules laid down by the law; to exclude irrelevance and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth and at the end to make up his mind where the truth lies. If he goes beyond this he drops the mantle of a judge and assumes the robe of an advocate and the change does not become him well. In our view the position in the present case is that the judge's material interventions, in very large part, can properly be characterised as clarificatory or attempts to have counsel couch their questions in proper terms or were designed to exclude repetitive evidence.

AUTONUMOUT On the rare occasions where the judge went beyond this it was not to a degree which diminished the applicant's ability, with the assistance of his counsel, to present his case. Mr Grossman was unable to point to any particular aspect or matter which was unable to be properly elucidated in evidence on behalf of the applicant, and we are satisfied that, unnecessary as some of the judges' interventions were, in the context of the trial as a whole, it cannot be said the applicant was prejudiced in the conduct of his defence. AUTONUMOUT This first ground must fail.

- (2) Judicial notice AUTONUMOUT When giving his reasons for verdict the judge said this in rejecting the applicant's evidence. It is not necessary to list every absurdity of the defendant's testimony. Some of the things he said were in blatant defiance of common sense and established commercial practice. Some were contrary to the terms of the related documents. Some of them were illogical or simply absurd. [Emphasis added] and later. Rather curiously, the defendant insisted that he had received four sets of bills of lading in triplicate and had handed over a set to Law, keeping the remaining two sets as records. This is contrary to common sense and established practice. One would expect the seller and shipper each to retain a copy, with the last copy being sent to the buyer for the furtherance of the transaction. [Emphasis added] AUTONUMOUT The applicant's complaint is that the judge in referring to established practice was taking judicial notice of established business practice either in Hong Kong or mainland China or both and was wrong to do so. AUTONUMOUT With respect to that argument we think it reads far too much into the words of the judge. The judge had listened to a large body of evidence concerning the practice and procedure relating to the conduct of transactions by way of letters of credit. That evidence had come from, in the prosecution case, PW2, the secretary of the applicant at Lison and PW3, the credit officer at Hang Seng Bank who dealt with Lison's bills facility at the bank. Both had given evidence as to the details of the procedures involved in processing payments by way of letters of credit. Additionally the applicant gave evidence generally confirmatory of the evidence of PW2 and PW3 in this regard. His case of course was not that the evidence of PW2 or PW3 was wrong in what they said the established procedures for such transactions were, but that he had adopted a somewhat unusual course so far as the particular transaction was concerned. AUTONUMOUT Given all that it seems to us that the judge's

comments were not any indication that he was taking judicial notice of some extra-evidential business practice in Hong Kong or China, but that by referring to established business practice he was simply referring to what he had heard of in evidence as to the procedures involved in letters of credit transactions. Those procedures were not, in any event, in issue at trial. AUTONUMOUT There was nothing in this final ground and for the reasons we have now given the application was dismissed. (Geoffrey Ma) (M. Stuart-Moore) (M.A. McMahon) Chief Judge, High Court Vice-President Judge of the Court of First Instance Mr Robert S.K. Lee, SADPP of the Department of Justice, for the Respondent Mr Clive Grossman, SC, instructed by Messrs Waller Ma Huang & Yeung, for the Applicant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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