

HONG KONG / JUDGMENT

HKSAR v. LI WAI HUNG

COURT

Court of Appeal

DECIDED

18 June 2009

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bjbj NgIP d Wright J in Court Date of Hearing: 18 June 2009 Date of Judgment: 18 June 2009 J U D G M E N T Hon Hartmann JA (giving the judgment of the Court): On 16 January 2009, having pleaded guilty to 31 counts of obtaining property by deception, contrary to s.17(1) of the Theft Ordinance, Cap. 210, the applicant was sentenced by Deputy District Judge Albert Wong to a term of three years and nine months imprisonment. He now seeks leave to appeal that sentence. It should be noted that the applicant also pleaded guilty to one count of possession of a controlled substance, some 10 tablets of Zopiclone, a drug used in the treatment of insomnia. No application is made in respect of the sentence imposed for that offence and it is irrelevant to his application. The applicant, who has numerous previous convictions for offences of dishonesty (including robbery, theft and making off without payment), committed his 31 offences of obtaining property by deception over a period of some three and a half months in the summer of 2008. The nature of the offences remained essentially the same. The applicant would approach young people on the street, many of them no more than 13 or 14 years of age, and solicit their sympathy with a made-up story that he had lost his money and was afraid that he would be punished by his parents. He would then suggest to each of his victims that if he could briefly borrow some items off them, say a mobile telephone, an Octopus card, cash or any other valuable he could see in their possession, he would be able to tell his parents that he had purchased those items himself, in that way avoiding punishment for the loss of his money. The applicant would promise to return the items within a few minutes but would not do so. Instead, he would sell them and keep the money. The summary of facts put before the court at the time of sentencing estimated the total value of the goods obtained in this manner by the applicant to be in excess of \$64,000. The deception employed by the applicant was a form of what is called street deception, one in which the applicant, to use the words of the sentencing judge, preyed on the gullibility of youngsters, exploiting their kindness, sympathy and trust. In assessing sentence, the judge proceeded in the following manner. First, he concluded that an appropriate starting point for the commission of the earlier offences should be nine months imprisonment. However, that starting point should be increased to 12 months at a suitable point to reflect the gravity of the repeated commission of the offence. As the judge put it: it is my view that there comes a point when the starting point should be raised to reflect the repeated illegal acts. The judge chose the suitable starting point to be charge 17. Second, the judge then gave credit for the applicant's plea of guilty, this being the

standard one-third discount. In the result, the judge calculated a period of six months imprisonment for charges 1-16 and eight months imprisonment for charges 17-31. Third, in seeking to ensure that the overall sentence was appropriate to the overall culpability of the applicant, the judge divided the charges into groups of concurrent sentences with each group, however, running consecutively. By that method, the judge came to a total sentence of 36 months; that is, three years imprisonment. However, the final assessment of sentence did not end there. That is because the prosecution made an application pursuant to s.27 of the Organised and Serious Crimes Ordinance, Cap. 455, to increase the severity of the sentence on the basis that the offences committed by the applicant were specified offences in terms of the Ordinance and that offences of street deception involving a pretence of borrowing, that is, offences of the same or a similar nature to those committed by the applicant, had become prevalent. The judge, on the basis of the evidence placed before him, accepted that there had been an alarming pattern in the increase of such offences and in the value of property stolen, particularly in respect of young people. As he observed: Victims of this type of deception cases were mostly young people. Between January 2005 and the end of October 2008, 77% of the victims were under the age of 20. The total loss suffered by this group of victims exceeded \$1 million. Being satisfied that the application made by the prosecution required him to impose a deterrent sentence, the judge increased the severity of the sentence imposed on the applicant by 25%, increasing the 36 months to a total of 45 months imprisonment, that is, to three years and nine months. In respect of that sentence, Mr Michael Leung, counsel for the applicant, had two submissions of substance, both relating to the 25% increase in severity of sentence. First, it was his submission that the judge's decision to increase the severity of the applicant's sentence was based on a misinterpretation of the data concerning the increased prevalence of street deception crimes. The data, said counsel, attributed the increase in such crimes to persons from the Mainland coming to Hong Kong to commit the offences. The applicant, however, did not fit that profile. There is nothing in this point. The judge was not concerned in identifying any particular group who were mainly responsible for the increase in street deception crime and nor should he have been. His concern was the alarming pattern of increase in such crime whether committed by local persons or by persons who had come into Hong Kong. It would have been wrong in principle in this case to impose an enhanced sentence on any particular social, national, ethnic or economic group but not on all perpetrators of the crime. Counsel's second submission was to the effect that the increase in severity of the sentence from 36 months to 45 months, even having regard to the increase in prevalence of the offences, had resulted in a sentence which was manifestly excessive. Counsel emphasised that no violence was employed by the applicant while the loss to each victim had not been great. However, Mr Leung accepted that a sentence of 36 months imprisonment, calculated by having reference to sentences for similar offences, was unimpeachable. We would agree. An increase in the severity of a sentence pursuant to a s.27 application has one fundamental reason, that is, to act as a deterrent to the continued growth of such criminal activity. That demands an increase in severity of sentence which has a deterrent effect. This Court, in its judgment in HKSAR v. Ma Suet Chun [2001] 4 HKC 337, at 343, accepted that, to deter an increase in street deception crimes, a 50% increase in sentence would be appropriate even when unconnected with Triad or organised criminal activity. That being the

case, we do not see how an enhancement of 25% in respect of this applicant can be criticized. For the reasons given, the application for leave to appeal must be dismissed. Before concluding this judgment, however, we should mention one matter. Although, as we have said, Mr Leung accepted that the sentence of 36 months (before enhancement) was unimpeachable, he was of the view that the judge, when calculating an appropriate starting point for each count, was wrong to increase the starting point from nine months to 12 months on the basis, not that the nature of the crimes themselves had increased in seriousness, but on the basis that the constant repetition of the criminal activity deserved to be marked by an appropriate rise in the starting point. While we would not necessarily criticise the judge, we do not think that, when considering a series of similar offences, it is particularly helpful in the great majority of cases to choose what must be an essentially arbitrary point in time to increase the starting point by reason of repetition alone. It adds an unnecessary layer of complexity. The issue of persistence of criminal activity can more easily, it seems to us, be considered when the judge applies the totality principle to achieve an appropriate relativity between the totality of the proven criminality and the totality of the sentences imposed. (M.J. Hartmann) Justice of Appeal (A.R. Wright) Judge of the Court of First Instance Mr Michael H K Leung, instructed by Messrs Tse Yuen Ting Wong, assigned by Director of Legal Aid, for the Applicant Ms Anthea Pang, SADPP of the Department of Justice, for the Respondent 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; < jFen & 6" Flora-template-ABC-Final (fair)1.dot Administrator Microsoft Word 9.0 Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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