

HONG KONG / JUDGMENT

HKSAR v. NGUYEN VAN-TO

COURT

Court of Appeal

DECIDED

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Before: Hon Yeung JA, Yuen JA and McMahon J in Court Date of Hearing: 16 November 2007 Date of Judgment: 11 December 2007 J U D G M E N T Hon Yeung JA (giving the judgment of the Court):

Introduction

Wellcome Supermarket (Wellcome), a subsidiary of Dairy Farm Company Ltd (Dairy Farm), operates over 200 supermarkets in Hong Kong. Since 2002, Wellcome invited tenders from its list of registered concessionaires to operate fresh food, cooked food and flower stalls in its supermarkets, and whoever offered the highest percentage of business turnover to Wellcome as consideration would normally be awarded the concessionaire contracts. PW 3 Ko Wing-shing, Eddie () and his wife were the shareholders and directors of Wing Ko Food Ltd (Wing Ko). The applicant s wife was also registered as the shareholder and director of Faithful Trading (Asia) Ltd (Faithful). In 2002, Ko was one of the Wellcome s registered concessionaires and he operated roast meat stalls in eight Wellcome supermarkets. However, he was not offered concessions for two years after 2002. The applicant, an employee of Dairy Farm, was a regional manager of Wellcome and was responsible for overseeing store operations in North Kowloon and the New Territories. The prosecution alleged that the applicant offered to assist Ko to obtain roast meat concessionaire contracts from Wellcome and sought a percentage of the business turnover as his reward. At the end of 2004, Ko agreed to pay 3% of the business turnover a month to the applicant. In January 2005, Ko reached a similar agreement with the applicant on flower stalls and agreed to pay him 2% of the business turnover. Thereafter Ko, in the names of either Wing Ko or Faithful, successfully obtained concessionaire contracts to run flower stalls at Wellcome supermarkets in Heng On Estate, Ma On Shan and Kwai Chung Shopping Centre, and a roast meat stall at the Wellcome supermarket in Kwai Chung Shopping Centre. With the applicant s assistance and beginning in March 2005, Ko, in the name of Wing Ko, also secured a concessionaire contract to run mobile roast meat stalls at different Wellcome supermarkets and Ko agreed to pay the applicant a monthly sum based on the business turnover. Between March

and October 2005, the applicant, on eight different occasions, accepted cash or cash-cheque payments from Ko pursuant to their corrupt arrangement. On 1 November 2005, the applicant and Ko were arrested by the ICAC for corruption offences. Ko confessed whilst the applicant declined to be interviewed, and they were both released on bail. Between 16 and 29 November 2005, the applicant approached Ko directly or indirectly to persuade him to make a false IOU showing that he had borrowed money from the applicant. Ko then made an IOU, which purportedly showed that he had borrowed \$20,000 from the applicant, and each of them kept a copy of the false IOU. The applicant suggested to Ko that he should produce the false IOU in future criminal proceedings to explain why he had made the payments to the applicant. Ko was then secretly co-operating with the ICAC. The meetings between Ko and the applicant on the 23, 24 and 29 of November 2005 were monitored by the ICAC and recorded. The applicant was re-arrested by the ICAC on 29 November 2005 for perverting the course of public justice and a copy of the false IOU and a deposit slip of \$10,000 were recovered from his person. The Charges The applicant was charged with eight counts (1st to 8th charges) of accepting advantages and one count (9th charge) of doing an act tending and intended to pervert the course of public justice. The applicant pleaded not guilty to the charges and appeared before Deputy Judge Mackintosh (the judge) in the District Court for trial. The applicant was convicted of all 9 charges. The judge sentenced the applicant to 27 months imprisonment on each of the 1st to 8th charges to run concurrently, and 17 months imprisonment on the 9th charge. The judge ordered 12 months of the 17 months to run consecutively to the 27 months, making a total sentence of 39 months imprisonment. The applicant sought leave to appeal against both conviction and sentence. The Evidence The prosecution produced admitted facts relating to the banking evidence and the operation of the roast meat/flower stalls in the names of Wing Ko and Faithful, and their business turnovers as recorded by Wellcome. The admitted facts further stated that neither Dairy Farm nor Wellcome permitted their employees to accept advantages in connection with their business; that when the applicant was searched upon his arrest on 29 November 2005, a copy of an IOU showing a loan of \$20,000 to Ko on 8 June 2005, and a photocopy of a deposit slip of \$10,000 were found; and that Ko and the applicant both left Hong Kong for the Mainland on 22 October 2005. Edited transcripts of the taped conversations between the applicant and Ko during their meetings when Ko was co-operating with the ICAC were also admitted by consent. The former fresh food director and the operations director of Wellcome gave evidence. Not surprisingly, the direct evidence came from Ko who testified against the applicant under immunity. Ko described in detail his association with the applicant, saying that they first met in October 2002 through the introduction of a Dr Wong, the applicant s uncle. Thereafter they had social contacts together with Ko s associates, Leung and Chan (), and in due course, there were business dealings between them. Ko said on hearing his difficulties in getting new concessions at Wellcome, the applicant told him that the director responsible for awarding contracts did not like Ko, but if Ko paid him 5% of the business turnover, he could fix the problem. Ko subsequently counter offered 3%, which the applicant accepted. With information and assistance from the applicant, Ko successfully obtained contracts to run roast meat/mobile roast meat stalls in the name of Wing Ko and flower stalls in the name of Faithful at different Wellcome supermarkets. For the flower stalls, it was agreed that the applicant would be paid 2% of the business turnover for a trial

period. As for the mobile roast meat stalls, the originally agreed 2% rebate was reduced to 1.5% for two to three months, then reverted back to 2% in June 2005. Ko said he had paid a total rebate of \$54,000 to the applicant between March and October 2005. The March payment of \$4,000 (the 1st charge), representing the rebate for January and February 2005 was paid in cash in March at the Regal Airport Hotel and the April payment of \$3,000 (the 2nd charge) was also made in cash. The payments, made in May, June and July (3rd to 5th charges), were made by cash cheques. Ko said he personally endorsed the cheques at the applicant's request to avoid the need of the applicant to reveal his name and identity card number to the bank cashier. The August payment of \$7,000 (the 6th charge) was also made in cash at the Regal Airport Hotel. Ko said he slipped the wad of bank notes into a menu and passed it to the applicant who then placed the menu against his jacket pocket to allow the cash to slip out. The ICAC officer, who monitored the meeting, gave evidence that he saw the applicant place the menu in his jacket pocket and then remove it. The September payment of \$10,000 cash (the 7th charge) was deposited into an account the number of which was written by the applicant on a yellow sticker. Ko had the deposit slip with the sticker in his wallet when he was arrested on 1 November 2005. The final payment for October of \$13,000 (the 8th charge) was made in the Mainland. Ko alleged that the applicant invited him to go to the Mainland and in the washroom of the Crystal Hotel in Yuen Zhou Town in Dongguan; he paid \$13,000 in cash to the applicant. Ko also gave evidence as to what had happened after his arrest by the ICAC. He said he had meetings with the applicant on the 23, 24, and 29 November 2005 when he was wired. Ko said having learnt that he had confessed to the ICAC and that the deposit slip had been seized by the ICAC, the applicant suggested they should meet for drinks later. During those meetings, the applicant appeared to have made admissions as to the alleged corrupt conduct and they agreed to cover up or explain Ko's possession of the deposit slip by way of a false IOU, made in duplicate, one of which was seized from the applicant at the time of his arrest. According to Ko, at the applicant's request, he obtained a copy of the deposit slip from the ICAC to give to the applicant. This was the copied deposit slip seized from the applicant when he was re-arrested on the 29 November 2005. Ko admitted that he had business dealings with the applicant. In particular, Ko admitted that he and his partners of Tung Tai Roast Restaurant (Tung Tai) in Shauiwan had borrowed money from Dr Wong and the applicant, each of \$140,000 because of losses from an unsuccessful restaurant business. As evidence for such loans, Ko signed an IOU for \$140,000 (D11), which was witnessed by the applicant, in favour of Dr Wong, and Leung signed another IOU for \$140,000 in favour of the applicant. It was their agreement that Ko would be responsible to repay the \$140,000 to Dr Wong whilst Leung and Chan would be responsible to repay the \$140,000 to the applicant. Ko denied that he had verbally guaranteed the loan or that he was liable for the loan from the applicant. Ko said he had repaid the \$140,000 to Dr Wong by five instalments of \$30,000 each, the extra \$10,000 being interest for the loan. Ko denied that there was any other loan from the applicant. He expressly denied that the eight payments, the subject matters of the 1st to 8th charges had anything to do with any loan obtained from the applicant. Ko was questioned about a cheque payment of \$10,000 () drawn on Wing Ko's account and deposited into the applicant's account in March 2005. Ko said it was a repayment to the applicant for the expenses of a trip to the Mainland to celebrate the applicant's promotion.

Defence Case The defence case was that the alleged payments of \$54,000 made to the applicant by

Ko between March and October 2005 were not corrupt payments, but repayments of a loan. The applicant was unable to remember the exact amounts and the dates of the payments, however, it was not suggested that Ko had not made those payments. The defence suggested that Ko lied about the purpose of the payments and his motive was three-fold, namely (1) that he wanted to keep the ICAC happy; (2) that he and his business lost a lot of money in the restaurant venture; and (3) that he had grudges against the applicant because the applicant had refused his request for a loan of \$200,000. As for the manufacture of the IOU to be used in subsequent criminal proceedings, the defence suggested that it was just a foolish and misguided attempt to promote the truth. The applicant claimed to have met Ko in 2002. He said at the end of 2002, Ko, together with his two friends, Leung and Chan, set up Tung Tai. The applicant said he was invited to invest in a Shanghai restaurant called the Riviera Spring, which was due to be opened in February 2003. As the business need further capital, he invited Ko and his friends to join. They then agreed to invest \$240,000 in the name of Tung Tai. The applicant said Tung Tai was only able to raise \$180,000 and he decided to lend them \$60,000. The applicant said the sum was part of the \$80,000 that he had withdrawn from one of his bank accounts, and it was subsequently repaid by instalments plus interest of \$2000. The applicant said the business venture was unsuccessful and the restaurant closed in April 2003, resulting in substantial losses. The applicant alleged that as a result, Ko had borrowed more money from him to support Tung Tai. An initial loan of \$140,000 was obtained from the applicant at Ko's request and Ko signed an IOU for that amount. There was also a subsequent loan from Dr Wong and a similar IOU was signed. The applicant said that Ko made the payments into his account, mostly in cash, as repayments of the loan. In particular, the deposit slip seized from Ko at the time of his arrest was simply one of the repayments. The applicant referred to the two IOUs (and), each for \$140,000, dated 23 October 2003 and 29 September 2003 respectively. D12 witnessed a loan from the applicant to Chan on behalf of Tung Tai. The applicant said Ko had verbally guaranteed this loan and that was why Ko took on the repayment responsibility by making payments into the applicant's account. The applicant produced a detailed schedule of repayment and his bank statements showing the cash payments, which he said were the repayments of loans. The applicant also referred to a cheque payment by Chan and Ko (D10) to demonstrate that the deposit slip found on Ko on his arrest was simply one of the repayments of the loan. The applicant admitted to have met Ko on the three occasions in November 2005. The applicant said he was just trying to explore what Ko had falsely said to the ICAC. He said that the IOU was designed, if clumsily and somewhat inaccurately, to reflect the true position, namely that the payment slip was part of the repayment of a loan. He said the original IOU had been lost or thrown away after repayment had been made. The applicant said he never intended to ask Ko to lie to the ICAC. The applicant called Chan to give evidence as a defence witness. Chan mentioned the various aspects of the financial relationship between the parties. Chan agreed that Tung Tai had invested in the Riviera Spring Restaurant and suffered losses and that he had signed D12 after obtaining a loan from the applicant to cover the losses. Chan insisted that Ko obtained a similar loan from Dr Wong and it was agreed that Ko would be responsible for the loan from Dr Wong whilst he and Leung would be responsible for the loan from the applicant. Chan said that as between he and Leung, they each contributed \$7,500 a month to make up \$15,000 and repaid the applicant the \$150,000 over a period of 10 months

ending in October 2004. Contrary to what was suggested to Ko, Chan said he personally received the loan payment in the form of a cheque from the applicant. Chan was adamant that the \$140,000 loan from the applicant was repaid by monthly payments of \$15,000 over ten months by him and Leung. The Judge's Findings The judge mentioned the discrepancies between Ko's evidence and his statements to the ICAC with regard to the actual amounts, the modes of payment, and the time and circumstances in which he first met the applicant, and their subsequent association. The judge took into consideration the defence's attack on Ko's credibility. The judge did not find such discrepancies to have undermined the credibility of Ko. The judge pointed out that the deposit slip and Chan supported Ko's evidence in that the responsibility to repay the applicant fell upon Leung and Chan whereas Ko's responsibility was to settle the loan from Dr Wong. In particular, the judge pointed out that the monthly sum of \$7,500 from Chan was consistent with their respective shareholdings in Tung Tai. The judge referred to the unchallenged evidence of the manner in which the applicant received the money (with the money) from Ko at the Regal Airport Hotel in August 2005 and opined that the applicant's act, which he claimed not to be able to remember, was only explicable if Ko was telling the truth. The judge said there was no tenable reason for Ko to manufacture his allegations against the applicant. The judge pointed out that Ko was not offered immunity immediately and there was nothing to suggest that his account was devised to avoid his own prosecution. The judge referred to the taped conversation between Ko and the applicant, in particular, the applicant's concern about the need to have a legitimate reason for the deposit slip and to fix up the matters; how the \$20,000 loan was arrived at and how to backdate the IOU; and the absence of any reference to the \$140,000 loan. The judge concluded that such evidence was consistent with Ko's allegation against the applicant. The judge said there was no acceptable explanation for the applicant not to insist on an IOU in respect of the alleged \$60,000 loan and he was unable to produce a reliable record of its repayment. The judge pointed out that the record kept by the applicant did not support his case. The judge said the applicant was willing to shift ground in the course of his evidence in accordance with what was put to him. The judge was of the view that the applicant's behaviour during the monitored meetings with Ko simply was inconsistent with his claim of innocence. The judge rejected the applicant's evidence. Despite the lack of direct evidence, the judge concluded that the applicant, in his senior position at Wellcome, was somehow in a position to assist Ko in obtaining the concessions. The judge concluded that the payments, the subject matters of the 1st to 8th charges, were paid by Ko as advantages to the applicant in his capacity as an agent of Dairy Farm as inducements, rewards or payments on account of his assisting Ko to obtain concessionaire contracts from Wellcome. The judge also concluded that what the applicant did at the meetings with Ko in November 2005 was to persuade Ko to retract what he told the ICAC and to give false evidence, and to create a false IOU to be used in any subsequent criminal proceedings in order to explain what would otherwise be highly incriminating evidence. The judge therefore convicted the applicant on all 9 charges. Grounds of Appeal Mr Andrew Leung, on behalf of the applicant, raises three broad grounds of appeal against conviction, namely that (1) the judge was wrong to accept the evidence of Ko; (2) the judge was wrong to reject the applicant's evidence; and (3) the judge was wrong to conclude that the taped conversation between the applicant and Ko could support charges other than charges 7

and 9. Mr Leung suggests that Ko had reason to lie against the applicant to avoid his own prosecution or that of his wife and when the judge said there was no tenable reason for Ko to manufacture his allegation against the applicant, he had failed to take into account that there could be a third party involved in the corrupt transaction when according to Ko, the applicant had said that the bowl of rice was eaten by 3 persons. Mr Leung emphasizes that the applicant had no power to influence the concessionaire matters, and that other Dairy Farm staff, who had the authority, might be involved. Mr Leung suggested that Ko could have manufactured the allegation (1) in order to protect the true recipient of the advantages; (2) to keep the ICAC happy to protect his wife and to avoid his wife finding out his improper conduct; and (3) to minimize his chances of going bankrupt. Mr Leung suggested that Ko could have manufactured evidence against the applicant because the applicant had refused his request for a loan. Mr Leung points out the discrepancies in Ko's statements to the ICAC and that he was eager to obtain the immunity. Mr Leung suggests that Ko was not a credible witness, having regard to the imprecise nature of his allegation in respect of each of the charges, in particular how the figure of the sums payable to the applicant was rounded up, his conflicting evidence as to when exactly he first met the applicant, and whether he had borrowed money from the applicant. Mr Leung further suggests that Ko had indeed embellished the prosecution case by trying to convince the court that the corrupt payments to the applicant was the only reason that enabled him to obtain the concessionaire contracts when he was in fact able to do so without the applicant's assistance. Mr Leung submits that Ko had lied to the ICAC and that his reason for paying the \$10,000 (D10) to the applicant in March 2005 for the applicant's promotion celebration was not true, as Wellcome had never promoted the applicant. In the circumstances, the judge was wrong to rely on Ko's evidence to convict the applicant. Mr Leung suggests that there was a logical reason for the applicant not to have asked for an IOU in relation to the \$60,000 loan, bearing in mind that \$60,000 was a small sum to the applicant and that an IOU could have an adverse impact on his business partner's trust. Mr Leung further suggests that there was a good reason for D32 to refer to Leung only as the borrower in respect of the \$170,000 loan and in so far as the judge rejected the applicant's evidence because he found the applicant's explanation on those matters unconvincing, the judge was in error, and that he was also wrong not to accept the applicant's explanation with regard to the \$140,000 loan. Mr Leung argues that even if the judge was right in concluding that the taped conversations between the applicant and Ko supported the prosecution case, they only supported charges 7 and 9 and not the other charges as the applicant, in manufacturing the IOU, was only trying to justify the payment of the \$10,000 under charge 7. In so far as the judge found that the taped conversation also supported the other charges, Mr Leung suggests that he was wrong and that Ko could have exaggerated the case against the applicant in order to increase his chance of becoming an immunised witness. Discussion The prosecution did not put forward Ko as a completely truthful witness. In particular, it was never the prosecution case that what Ko told the ICAC in his initial statement was the complete truth. Clearly Ko had something to hide at that stage and was perhaps trying to minimize the extent of his illicit conduct. The judge was aware of Ko's shortcomings as a witness. The judge reminded himself of the fact that Ko gave evidence under immunity and that he might have testified to avoid his own prosecution and therefore the need to approach his evidence with caution. The judge had

referred to the internal conflicts in his evidence and the conflicts between his evidence and his statements to the ICAC. The judge carefully analysed such conflicts and concluded that Ko's allegations against the applicant had not been undermined. The judge had dealt with practically each and every aspect of Mr Leung's complaints against Ko's credibility and reliability. The judge was clearly entitled to conclude that Ko's allegations against the applicant were true and could be relied upon. It is important to bear in mind what was in issue was not whether Ko and the applicant had any business dealing. What was in issue was whether Ko was telling the truth when he said the applicant solicited and then accepted the various payments by promising to assist him to secure the concessionaire contracts. There can be no doubt that Ko had made those payments to the applicant as the undisputed bank records supported some of those payments. The applicant did not expressly deny those payments, but said they were repayments of a loan. If they were indeed repayments of a loan, why would Ko say they were corrupt payments? Why would Ko lie and in so doing not only was he unjustifiably making a false accusation against the applicant, he was at the same time unnecessarily incriminating himself in serious criminal offences? If the payments were repayments of a loan, Ko could simply tell the truth, and neither he nor the applicant would be in any trouble. Ko would not need to fabricate a story against the applicant to avoid his own prosecution because if he told the truth as alleged by the applicant, there could never have been any prosecution. There was no logical explanation for Ko to lie against the applicant in the manner as alleged. The suggestion that Ko could have lied to protect his wife and to avoid other troubles was far-fetched. If Ko lied by making up the corrupt payments he said he made to the applicant, he would just end up in much more trouble, and it made no sense for him to do it. A trial judge, who has the benefit of hearing and seeing the witness in court, is in the best position to resolve the issues of credibility. An appellate court would not, except in the most exceptional circumstances, interfere with a finding which depended on the credibility of a witness. (See *R v R E Low* [1961] HKLR 12, *R v Godber* [1975] HKLR 340, *R v Chan King-man & Others* [1980] HKLR 105 and *R v Sheikh Abdul Rahman and Others* CACC 756/1981) Mr Leung suggests that Ko could have bribed other staff of Wellcome. But there was no evidence to show that Ko had made any payment to any other Wellcome staff. Indeed, it was never the applicant's case that Ko lied about the applicant in order to protect other Wellcome staff. Mr Leung criticizes Ko's evidence in relation to how the payments were calculated. Ko admitted that the payments were less than the corresponding amounts calculated in accordance with their agreement. Ko had given his explanation and we noted that the amounts of the payments corresponded broadly with the agreed percentage of the turnover of the business, but in round figures. Indeed, if the payments made no reference to the turnover, but were just repayments of a loan, one wonders why the amounts were so irregular, ranging from \$3,000 to over \$10,000. On the evidence before the judge, he was right to conclude that there was no tenable reason for Ko to manufacture his allegations against the applicant. The judge had carefully analysed the evidence. The judge found Ko to be a truthful witness in his allegation against the applicant and rejected the applicant's evidence. On the evidence, the judge was right to do so. In any event, there were ample reasons for the judge to reject the applicant's evidence. His own witness, Chan did not support his case and instead, as rightly observed by the judge, Chan supported Ko's evidence. The irregular and varying amount of each of the payments did not support the defence case that they were

repayments of a loan. The taped conversations between Ko and the applicant certainly demonstrated that the applicant could not be telling the truth when he said he was innocent. By inviting Ko to create a false IOU, the applicant was clearly trying to cover up or fix up the matters, to justify the payment of the \$10,000. Once it was proved that the applicant was lying about the \$10,000 payment, his credibility collapsed. We do not agree with Mr Leung's submission that the taped conversations were consistent with the defence's case or that they only supported the 7th and the 9th charges, and not the rest. Quite apart from the fact that they had completely destroyed the applicant's credibility, the contents of the conversation generally supported Ko's allegation against the applicant. Mr Leung did not address us on the suspicious manner in which the applicant accepted the money at the Regal Airport Hotel. Such incident supported the suggestion that the applicant did accept corrupt payments from Ko, and it also bolstered Ko's credibility. We have considered submissions most ably put forward by Mr Leung on behalf of the application. None of the matters that he had advanced causes us any doubt about the guilt of the applicant. The applicant was rightly convicted of all the charges. His application for leave to appeal against conviction is dismissed. Sentence The judge adopted a starting point of 30 months imprisonment for each of the corruption charges and reduced it by one month to reflect the applicant's clear record and another two months for his admission of certain facts. The judge sentenced the applicant to 17 months imprisonment for the charge of perverting public justice and ordered 12 months to run consecutively. The total sentence was 3 years and 3 months. Mr Edmond Lee, Senior Government Counsel for the respondent points out that in adopting the aforesaid starting points, the judge took into consideration the following aggravating factors:

1. The applicant was a senior executive of Wellcome and was trusted by his employer; yet he broke the trust in a substantial manner by soliciting and accepting corrupt payments; The applicant was working with others, that there was a web of deceit and corruption of which the applicant was a part; The applicant actually promoted the corrupted idea and solicited payments; The applicant encouraged and propagated the corrupt practise; The amount involved, being \$54,000, was not insignificant and the offences lasted over nine months; and When the offences were exposed, the applicant persuaded Ko to retract his confession to the ICAC and engineer a false IOU to explain or justify the criminal conduct. Mr Lee emphasizes that each case must be considered on its facts and suggests that the starting points adopted by the judge are not manifestly excessive. Mr Leung on the other hand suggests that the starting points for the charges are manifestly excessive and that the applicant should be entitled to a greater discount for his previous good character than just one month. Mr Leung emphasizes that the total amount involved was only \$54,000 and he referred us to decisions in comparable cases where the starting points adopted were less than 30 months. Although there is no tariff sentence in corruption cases and each case must be determined on its own facts, it is still necessary to refer to comparable cases to see if the sentence imposed on the applicant is appropriate. At the outset, we wish to emphasize that corruption is a very serious offence and anyone convicted of corruption offences, whether he is in the public or the private sector, cannot expect mercy from the court. We wish to echo what Power VP said in AG v Leung Kin Wai CAAR 5/1996 at p 3-4 of the judgment: As I have indicated the trial

judge found, and was perfectly right to do so, gross breaches of trust which involved commercial corruption. We note that there was no remorse on the part of the respondent. He vigorously contested the charges maintaining that wholly false allegations were being made against him. We do not need to state again the strictures repeatedly made by divisions of this court stressing the seriousness of commercial corruption. Such offences are properly likened to an insidious cancer secretly gnawing at the vitals of commerce. The aforesaid comments clearly apply to the present case. The applicant, making use of his senior position in Wellcome, actively sought corrupt payments from a concessionaire operator, who was not in a strong bargaining position. The applicant accepted regular payments from Ko over a long period of time. The case was quite a bad case of the type. Although the total amount involved was only \$54,000, the offences were meant to be continuous ones. If the applicant had not been arrested, he no doubt would have continued to accept the monthly payments and the amount involved would certainly have been much greater. However, comparing with similar cases, the starting point adopted by the judge appears to be excessive. Mr Leung has taken us to a large number of commercial corruption cases, including *R v Au Chan Fai*, Albert HCMA 1524/1994, *HKSAR v Luk Wai Lun* HCMA 188/1998, *HKSAR v Sidney Charles Pinches* HCMA 206/2000 and *HKSAR v Lai Chin Pang* HCMA 261/2001. In these cases, admittedly magisterial cases, the starting points adopted were around 12 months. In *HKSAR v Cheng Chong Shing* CACC 100/2003, the defendant, a senior freight officer of Qantas Airways Ltd, accepted \$330,000 from customers for showing favour in the reservation of cargo space. The defendant pleaded guilty to 2 charges of accepting an advantage, 2 charges of conspiracy to accept advantages and 1 charge of conspiracy to use a document with intent to deceive his principal. A total sentence of 2 years and 8 months was considered appropriate on a plea. In *R v Kung Ying-man*, Spencer CACC 513/1986, the defendant, the sales manager of Cathay Pacific Airways, pleaded guilty to 13 charges of accepting an advantage involving a total of \$315,000. A starting point of 27 months was adopted. Whilst we agree with Mr Lee's observation that the courts should take a serious view of corruption, we are persuaded that, compared with other similar cases, the starting point of 30 months imprisonment adopted by the judge when the amount involved was just \$54,000 was manifestly excessive and that a more appropriate starting point should be 24 months imprisonment. Whether a discount is given or not for good character depends on many factors, including the nature of the offence and the circumstances in which the offence is committed (see *HKSAR v Chu Sin Chung* CACC 111/1999). The applicant was placed in a position of trust, probably because he had no previous conviction and, therefore, such a factor should not be a strong mitigating factor. The judge, in our view, was generous in reducing the sentence by one month on account of the applicant's clear record, and another two months because he had admitted certain banking evidence. Nevertheless, we are prepared to give the same reduction to the applicant and therefore the sentence on each of the 1st to 8th charges should be 21 months imprisonment, to be served concurrently. The applicant had committed serious offences and when his crime was exposed, he sought to cover them up by creating a false document and by persuading Ko to lie to the ICAC. The applicant's highly reprehensible conduct must be deterred. On the other hand, what the

applicant did was just an attempt to try to get away from a difficult situation with no intention of causing harm to anyone else. We are persuaded that a 12-month sentence is adequate to reflect the serious nature of the perverting public justice charge. The corruption charges and the perverting public justice charge are wholly separate and distinct, and sentences in respect of them should be served consecutively. The total sentence on the applicant should be 33 months imprisonment.

Conclusion

We dismiss the application for leave to appeal against conviction, but grant leave to the applicant to appeal against sentence. We allow his appeal against sentence. The sentences on each of the 1st to 8th charges are reduced from 27 months to 21 months imprisonment to be served concurrently. The sentence on the 9th charge is reduced from 17 months to 12 months imprisonment, but to be served consecutively to the 21 months imprisonment. The total sentence on the applicant is reduced by 6 months, from 39 months to 33 months imprisonment. (W Yeung) Justice of Appeal (Maria Yuen) Justice of Appeal (M.A. McMahon) Judge of the Court of First Instance Mr Andrew CHY Leung instructed by Messrs Kenneth Poon & Co. for the Ap 1udk 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 1udk 1Vt^ H; < & 6" ABC final.dot setup Microsoft Word 9.0 Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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