

HONG KONG / JUDGMENT

HKSAR v. OU KA CHI

COURT

Court of Final Appeal

DECIDED

19 April 2007

CASE / FILE NUMBER

FAMC63/2006

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bjbj FAMC No. 63 of 2006 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MISCELLANEOUS PROCEEDINGS NO. 63 OF 2006 (CRIMINAL) (ON APPLICATION FOR LEAVE TO APPEAL FROM CACC NO. 369 OF 2005)

Between HONG KONG SPECIAL ADMINISTRATIVE REGION Respondent OU KA CHI Applicant

Appeal Committee: Mr Justice Bokhary PJ, Mr Justice Chan PJ and Mr Justice Ribeiro PJ Date of Hearing: 19 April 2007 Date of Determination: 19 April 2007

DETERMINATION

Mr Justice Chan PJ: The applicant was convicted after trial before a Recorder and a jury of two counts of conspiracy to defraud. They were conspiracies to misappropriate certain funds of two subsidiary companies by means of bogus invoices for the purpose of funding the acquisition of the shares of their parent company held by one Yau Lee Investment Ltd (count 1) and for paying bribes to the staff of the Housing Department (count 2). The Defence was that the applicant was not aware of the falsity of the invoices or the use to which the misappropriated funds were put. In support of his application for leave to appeal to the Court of Final Appeal on the substantial and grave injustice ground, Mr Plowman SC leading Mr Derek Chan relies on 2 main grounds of appeal. In respect of the first ground, it is contended that the Recorder should have given a direction with regard to the evidence given by the applicant in accordance with the judgment of Brennan J in the Australian case of *Liberato & Others v R* (1985) 159 CLR 507. That decision was approved by the Court of Final Appeal in *HKSAR v Sze Kwan Lung* (2004) 7 HKCFAR 475 and *Jim Fai v HKSAR* (2006) 9 HKCFAR 85. It is submitted that such a direction was necessary in the present case as a result of what the learned Recorder had said in his summing up on how they should consider the applicant's evidence. It is said that the combined effect of the Recorder's

direction was to invite the jury to choose between the evidence of the applicant and that of PW4, Mr George Kwok, a co-conspirator who had pleaded guilty to the charges and testified under immunity. The failure to give a Liberato direction in these circumstances, counsel submits, amounted to a non-direction and had given rise to a realistic danger that the jury might have rejected the applicant's evidence even if it might be true and had raised a reasonable doubt in the prosecution case. This ground of appeal was dealt with and in our view, rightly rejected by the Court of Appeal in paragraphs 6 to 11 of its judgment. The Recorder's direction must be viewed in its context and when it is considered in context, we do not think it had the effect as submitted by the applicant. The Recorder had repeatedly reminded the jury to be sure of the prosecution case before they could convict the applicant. We are not satisfied that there was any real risk that the jury would have made any finding against the applicant contrary to his evidence if it had given rise to a reasonable doubt. In respect of the second ground, it is submitted that the Recorder was erroneous on a few factual matters and had made unwarranted and unfair comments to the jury on these matters. First, the Recorder is said to have wrongly directed the jury that there was no sufficient evidence to show that the shares held by Yau Lee Investment Ltd which the conspirators wanted to acquire using the misappropriated funds had changed hands prior to the conspiracy and that this comment had misled the jury. We do not think there is anything in this submission. The essence of the charges is the agreement to misappropriate the funds using bogus invoices. There is clear evidence that the relevant invoices were false and that funds had indeed been misappropriated by means of these bogus invoices. The jury were evidently sure that the applicant was involved in the conspiracies and it was not necessary to prove exactly for what purpose the misappropriated funds were to be applied and whether the conspirators had succeeded in achieving their purpose. The matter complained of was fully canvassed at the trial. The Recorder's comment, considered in this context, was merely a warning to the jury that they should be careful before coming to any conclusion on this matter. The second matter relates to a report of an internal investigation conducted at the direction of the new management of the company in which one Mr Zuric Chan and the applicant were involved. The report contained an explanation which was said to have been given by the applicant to Mr Zuric Chan regarding the payment of the funds in question which was inconsistent with evidence given by the applicant as to what he told Mr Chan. It is submitted that there was a material irregularity in that the Recorder should not have admitted the report in evidence and should have directed the jury to ignore the findings made in the report and the prosecution's submission on this aspect of the evidence. The truth of the matter is that it was the applicant who sought to adduce the report in evidence during his re-examination for the purpose of supporting his own case and this was not opposed to by the prosecution. Once the report was adduced in evidence, it could be used both for and against the applicant. It was quite legitimate to use the report to show any inconsistencies which appeared in the applicant's evidence. That was what in essence counsel for the prosecution said in his address to the jury on this point. We do not think this can be a valid complaint. The third matter complained of by the applicant is that the Recorder was wrong to have directed the jury to in effect ignore the previous frauds committed by PW4 which, it is submitted, must be relevant in deciding whether to accept his evidence. Even assuming that this is a valid criticism, we are not satisfied that this had resulted in any prejudice to the applicant.

The jury knew that PW4 had pleaded guilty to these charges and were well aware of his involvement in the alleged conspiracies. The fact that PW4 had committed other conspiracies which did not concern the applicant would not have affected their assessment of his credibility. Having dealt with Mr Plowman's points in detail, and having come to the conclusion that there are good specific answers to them, we wish to guard against giving the impression that an application for leave to appeal on the substantial and grave injustice ground is to be properly founded on criticisms of particular slips and omissions made by the trial judge which when viewed in the round cannot be said to have caused any substantial and grave injustice. We take the view that the proposed grounds of appeal are not reasonably arguable. For this reason, the application for leave to appeal is dismissed. (Kemal Bokhary) Permanent Judge (Patrick Chan) Permanent Judge (R A V Ribeiro) Permanent Judge Mr Gary Plowman SC and Mr Derek Chan (instructed by Messrs Ko & Chow) for the applicant Mr Robert S K Lee and Ms Teresa Kam (of the Department of Justice) for the respondent - PAGE - PAGE & `#\$ FAMC No.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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