

HONG KONG / JUDGMENT

HKSAR v. PIKE JAMES EDWARD

COURT

Court of Appeal

DECIDED

9 August 2007

CASE / FILE NUMBER

CACC486/2006

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bjbj CACC486/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 486 OF 2006 (ON APPEAL FROM DCCC 550 OF 2006)

BETWEEN HKSAR Respondent and PIKE JAMES EDWARD Applicant

Before : Hon Stuart-Moore VP and Suffiad J in Court Date of Hearing : 9 August 2007 Date of Judgment : 9 August 2007

J U D G M E N T

Hon Suffiad J (giving the judgment of the Court) AUTONUMOUT On 27 November 2006, the applicant was sentenced to a term of 20 months imprisonment by District Court Judge Yuen in the District Court having pleaded guilty to one count of fraud contrary to section 16A of the Theft Ordinance, Cap.210, Laws of Hong Kong. AUTONUMOUT The applicant now seeks leave to appeal against that sentence. The facts AUTONUMOUT The facts relating to that one offence of fraud to which the applicant pleaded guilty were set out in the Summary of Facts which was admitted and agreed by the applicant when he pleaded guilty. The contents of the Summary of Facts can be summarized as follows. AUTONUMOUT The applicant is an American citizen living in Hong Kong. AUTONUMOUT The two victims of the fraud were Diane Roche, a cousin of the applicant, and her husband, James Roche, who lived in Boston Massachusetts in the United States. AUTONUMOUT In July 2001, the applicant wrote to the Roches inviting them to invest in an investment fund that he was establishing, saying that he was looking for investors among his family and close friends and that he could bring a decent return for those who invested with him. AUTONUMOUT In August 2001, the applicant had dinner with the Roches in the USA, further explaining to them that he was in the process of setting up a capital management company in

Hong Kong to invest in stock index, foreign exchange, and US Treasury bond derivatives, claiming he could achieve high returns on capital with his unique investment strategies. AUTONUMOUT The Roches trusted him and decided to invest with the applicant's fund. By an email dated 22 August 2001 the applicant gave details to the Roches how they could send money to his bank account in Hong Kong. AUTONUMOUT On 31 August 2001, the Roches transferred US\$25,000 from their account in the USA to the applicant's bank account in Hong Kong to invest with his fund. AUTONUMOUT In October 2001 the Roches received a letter from the applicant on notepaper headed Cloverleaf Capital Management. In the letter the applicant claimed to have registered Cloverleaf Capital Management in September 2001 and also told the Roches that they would receive quarterly statements showing the progress of their investment. AUTONUMOUT In January 2002 the Roches received a quarterly statement from the applicant headed Cloverleaf Capital Management which purported to show that their original investment had increased by 16.2%. AUTONUMOUT Encouraged by this, the Roches decided to increase their investment with the applicant and on 15 January 2002 they transferred a further US\$35,000 from their account in the USA to the applicant's bank account in Hong Kong. AUTONUMOUT During the next nine months, the Roches continued to receive from the applicant quarterly statements, newsletters, comments on the financial markets and notes on his investment strategies, all of which were headed Cloverleaf Capital Management. AUTONUMOUT Further encouraged by the apparent success of the investment with the applicant, the Roches again decided to increase their investment by transferring a further US\$22,000 from their USA account to the applicant's bank account in Hong Kong on 16 October 2002. AUTONUMOUT Totally the Roches had transferred US\$82,000 to the applicant's bank account, which is equivalent to approximately HK\$639,000. AUTONUMOUT Between October 2002 and March 2004, the applicant continued to send quarterly statements and other material to the Roches showing that their money was safely invested and accruing interest at a favourable rate. AUTONUMOUT In March 2004, the Roches indicated their wish to withdraw the money they had invested with the applicant on an urgent basis. AUTONUMOUT For the several months following, there were frequent requests from the Roches for repayment but the applicant did not make any repayment of the money sent to him by the Roches for investment purposes. AUTONUMOUT The applicant was arrested on 12 September 2005. When interviewed, the applicant admitted having received the money from the Roches, but said it was a personal loan. The applicant also admitted that he had never set up an investment fund in Hong Kong and that Cloverleaf Capital Management had never conducted any business transactions but was set up as a sole proprietorship for the purpose of renting a flat to live in. AUTONUMOUT Investigation showed that the money sent to the applicant by the Roches was used by him to cover his daily living expenses. Sentence by the judge AUTONUMOUT In sentencing the applicant, the judge took a starting point of three years and reduced that to two years on account of his plea of guilty. AUTONUMOUT The judge further reduced that two years by four months for the applicant's good character and his help to society by having acted as a bullion trade expert giving evidence in court for the prosecution in some other criminal trials previously, being matters put forward by way of mitigation on behalf of the applicant. This was, in our view, a remarkably generous discount, and we doubt, with respect, that the discount was in these circumstances merited at all. AUTONUMOUT Thereby the judge arrived at the sentence

of 20 months imprisonment. The grounds of appeal AUTONUMOUT Perfected grounds of appeal was settled by Mr Graham Harris of counsel who did not appear in this appeal, on behalf of the applicant. Mr Boyton who now appears today for the applicant has indicated that paragraph 4(b) of the Perfected Grounds of Appeal settled by Mr Harris is no longer relied upon by him. The grounds of appeal which are now relied on may be summarised as follows :

- (a) the judge erred in categorizing the offence as one which might have tarnished Hong Kong's reputation as an international financial centre when the facts of this case concerned a private financial arrangement between family members; thus the starting point of three years used by the judge was manifestly excessive and wrong in principle;
 - (b) the judge failed to consider viable and sensitive alternatives to an immediate and substantive prison sentence which was wrong in principle; and
 - (c) the judge failed to attach sufficient weight to the applicant's mitigation. Private financial arrangement of family members AUTONUMOUT Under the 1st ground of appeal it was submitted that the judge erred in emphasizing that the offence was a serious breach of trust and would have impacted in a negative way upon the reputation of Hong Kong as an international financial centre when in fact the case only involved a private arrangement between the applicant and members of his family. AUTONUMOUT In doing so, it was said that the judge failed to distinguish between the present case and other fraud cases which involved the investing public at large and allowed herself to be unduly influenced by a consideration which was unsupported by the evidence. AUTONUMOUT We note first of all that it matters not whether this was indeed a breach of trust case. AUTONUMOUT Even accepting that this offence arose out of an arrangement between the applicant on the one hand, and his cousin and her husband on the other hand, it is clear from the facts admitted by the applicant that he had put himself forward to them as acting for them in a professional capacity, namely that of a professional investment consultant and both victims had clearly relied on him in that professional capacity acting for them. AUTONUMOUT As for the matters complained of under this ground, what the judge said in sentencing was and I quote from paragraph 15 and 16 of her Reasons for Sentence
15. I do accept that this is not a case where the defendant publicly advertised for a fraud scheme thus affecting general members of the public or other overseas investors. Nevertheless the court's attitude in sentencing this type of offence would certainly affect and might ultimately influence the confidence of foreign investors on the fairness of the Hong Kong system.
16. Though the defendant meets the 6 factors set out in *R v Brown* (1981) 3 Cr App R (S) 294, I do not consider a community service order appropriate on account of the seriousness of the offence and the risk of impact of confidence a foreign investor may have when investing in a Hong Kong company. AUTONUMOUT It is quite clear from the words used by the judge quoted above, that she well realized and accepted that the applicant had not publicly advertised such fraudulent scheme to the general public or overseas investors. AUTONUMOUT This, coupled with paragraph 2 of her Reasons for Sentence where she

stated expressly that the victims in this case are the cousin and cousin law of the defendant , it is also clear that the judge well knew that this offence affected or involved only members of the applicant s family. AUTONUMOUT What the judge said about the impact on confidence of foreign investors was said not of the offence itself, but rather of the court s attitude in sentencing and of the fairness of the Hong Kong system. That is quite different from what the applicant now complains of. AUTONUMOUT Moreover, that was said by the judge by way of reason as to why she did not consider it appropriate to make a community service order in this case. In our view, a community service order would have been wholly inappropriate for an offence of this gravity. AUTONUMOUT The judge recognized the seriousness of this offence. It was initiated by the applicant inviting the victims to invest. Whatever else may have been the state of mind of the applicant at the outset of his invitation to the victims, it is clear that by the time the applicant issued the letter in late October 2001, falsely representing that Cloverleaf Capital Management had been registered in September as a consultancy service, his intention to deceive and defraud the victims was manifested and continued at least up to March 2004. AUTONUMOUT The starting point adopted by the judge was within the range contemplated by this court (differently constituted) in the case of HKSAR v. Cheung Mee Kiu [2006] 4 HKLRD 776 where it was laid down that the starting point would be from two to three years involving amounts of HK\$250,000 to HK\$1 million. AUTONUMOUT In all the circumstances of this case, and considering the amount involved, the starting point of three years used by the judge was neither manifestly excessive nor wrong in principle. Mitigating factors AUTONUMOUT The other two grounds of appeal can be dealt with together. AUTONUMOUT There can be no question, as we have indicated, that an immediate custodial sentence was appropriate in this case. AUTONUMOUT The only issue raised in submission was whether in the circumstances the judge ought to have given a greater reduction in respect of the mitigating factors put forward by the applicant than she did. AUTONUMOUT It was submitted, as it had been in the court below, that there were exceptional circumstances in this case as follows :

- (a) the applicant s original intention was to use the monies to the advantage of the victims, and he did not set out to defraud them;
- (b) the inability to carry through the original investment plan was beyond the applicant s control;
- (c) using the money for the basic support of his family was due to falling upon hard times, and not to live a high lifestyle;
- (d) the applicant was the sole breadwinner of the family and hitherto was of impeccable character;
- (e) the impact of the conviction upon the applicant and his family, his remorse as shown by his guilty plea;

- (f) the applicant's state of health and medical problems, having suffered a brainstem stroke in May 2006 as well as psychological stress over this matter; and
- (g) since being sentenced by the judge, the applicant had tried but failed to contact the victims to express his regret. AUTONUMOUT As for points (a) to (c) above, whatever the state of mind of the applicant at the outset, such would have been superseded and overtaken by his systematic and continuous defrauding of the victim from October 2001 up to at least March 2004 when, during that period of time, the applicant chose to misrepresent to the victims that he had registered Cloverleaf Capital Management and to have sent them the false quarterly statements. AUTONUMOUT As for his previous good character, the judge had already taken that into consideration when she reduced his sentence by the further four months, after the usual one third reduction for his guilty plea. AUTONUMOUT In respect of his failing health and his attempt to express his regret to the victims after the event, they cannot count for much by way of mitigation in all the circumstances of this case. AUTONUMOUT We do not consider that the sentence was manifestly excessive. AUTONUMOUT Accordingly leave to appeal is refused and the application is dismissed. (M. Stuart-Moore) Vice-President (A.R. Suffiad) Judge of the Court of First Instance Mr Man Tak Ho, Jonathan, SGC of the Department of Justice, for the Respondent Mr Boyton David Rex, instructed by Messrs Brian Kong & Co., for the Applicant PAGE 1udk 1udk &`#\$ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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