

HONG KONG / JUDGMENT

HKSAR v. POON CHUN KIT AND ANOTHER

COURT

Court of Appeal

DECIDED

5 February 2007

CASE / FILE NUMBER

CACC161/2006

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bjbj S O N S F O R J U D G M E N T

Hon Tang VP (giving the reasons for judgment of the Court):

Introduction

The 1st and 2nd defendants were convicted after trial of conspiracy to defraud, contrary to Common Law and punishable under section 159C(6) of the Crimes Ordinance, Cap. 200. The particulars of offence were: Poon Chun-kit, being an employee of Shui On Construction & Material Limited (Shui On), and Yu Kwei-sun between the 1st day of January 2002 and the 30th day of September 2003, in Hong Kong, conspired together and with Nip Fung-sui, to defraud Shui On and such companies, firms or persons (bidders) who might tender for contracts of security services by dishonestly

- (i) concealing or failing to disclose to Shui On that the said Poon Chun-kit had a financial interest in HK-Asian Security Limited (HK-Asian); (ii) disclosing tender information of bidders to HK-Asian which the said Poon Chun-kit obtained in the course of his employment with Shui On; and (iii) causing or permitting Shui On to grant contracts of security services to HK-Asian. The trial lasted 5 days, and ended on 10 March 2006. On 28 March 2006, the Deputy District Judge Symon Wong delivered the Reasons for Verdict (the Reasons). The Reasons is 5 pages long and contains 28 paragraphs. The trial had been conducted in Chinese, and the Reasons was written in Chinese. On appeal, Mr Ching Y Wong, SC, who had not appeared below, appeared for the 1st defendant. Mr Wong addressed us in English. Mr Alex Lee, SADPP, for the Secretary for Justice, replied in English. The 2nd defendant was separately represented by Mr Wong Chi-wai. Basically, he adopted the submissions of Mr Ching Y Wong. That is why we give our reasons in English. At the conclusion of the hearing, we gave leave to appeal, treated the hearing as the appeal, and allowed the appeals of both defendants. These are our reasons. Duty to give adequate reasons We allowed the appeal

because we were of the view that the Deputy Judge had failed to give adequate reasons, in particular, he had failed to properly evaluate the evidence of the witnesses. The duty to give reasons is undoubted. It does not depend on section 80 of the District Court Ordinance, Cap. 336, which requires such reasons to be delivered orally, and reduced to writing within 21 days after the hearing of the trial, and the reasons so reduced into writing signed by the judge. In *Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority* [1997-1998] 1 HKCFAR 279 at 290J. The Chief Justice said: Where there is a duty to give reasons, it must be discharged by giving adequate reasons. What would amount to adequate reasons for a decision would depend on the context in which the decision maker is operating and the circumstances of the case in question. Furthermore we agreed with Beeson J who said in *HKSAR v Li Chi Shing* [2000] 4 HKC 168, that the following words of Chan CJHC (as he then was) in *Zhuo Cui Hao v Ting Fung Yee* [1999] 3 HKC 634 at 639 apply to criminal as well as civil proceedings: Generally speaking, a professional judge is under a duty to analyse in his judgment the material points in the evidence of the case and give reasons as to why he has reached a particular conclusion or decision. This is the only way to make people understand why their evidence is not accepted by the court and why they lose in a case. Only by this can justice be seen to be done. Furthermore, the losing party needs to be clear on whether there is any error in the reasons for the decision given by the court before he can decide whether to appeal or not, and, at a later stage, submit to the Court of Appeal his grounds of appeal in order to seek to set aside the original decision. A professional judge is under a duty to give adequate reasons for any decision which he has made. This is a principle of paramount importance in the common law system. This principle is quite clear. We would also repeat the oft quoted words of O Connor J in *Lam King-ming*, Cr App 601 1979, that: The reasons for verdict should, in manner appropriate to the circumstances of the case, illustrate the salient points in the case and demonstrate that the evidence has been evaluated. Significant inconsistencies and conflicts should be dealt with in such manner as to indicate how those matters were resolved. There is no simple formula for what ought to be in a judgment as it must be related to the circumstances of the particular case. The magistrate should state his reasons to such an extent as will inform the parties as to how and why the particular verdict was arrived at and furthermore will enable an appellate court to perform its duty. Particulars of the offence As may be noted, para. (ii) of the particulars of offence does not state, by whom, to whom, when and what tender information of bidders were disclosed. Nor does para. (iii) identified the contracts of security services which Shui On was said to have been caused or permitted to grant. Such details, however, were supplied in a Summary of Facts, which served as the prosecution's opening at trial. The last (fourth) paragraph of the Summary of Facts reads as follows:

4. In the first half of 2002, D1, D2 and PW1 wanted to apply to Shui On for HK-Asian to become Shui On's approved security contractor. In around June 2002, D1, who had access to quotations and other confidential information of existing security contractors of Shui On, disclosed such information to PW1 and D2. D2 then instructed PW1 to prepare a quotation to Shui On by making use of the information which D1 provided. Shortly afterwards, D1

submitted a comparison report on HK-Asian and three other contractors to Shui On's management without disclosing his financial interest in HK-Asian in spite of his obligation to do so. With D1's assistance, HK-Asian became an approved security contractor of Shui On and obtained contracts from Shui On. The evidence At the material time, the 1st defendant was employed as a Supervisor in Security, Q-N (Lam Leung-yau). On 3 July 2006, PW1 and PW3's son transferred all the shares to PW3. It was the prosecution's case that the shares registered in the name of Wong Yuk-kei, were held by him as trustee for the 1st defendant. The principal prosecution witnesses were PW1 (Nip Fung-sui), and PW3 as well as PW4 (Lee Chi-hang), a senior employee of Shui On. PW4 was referred to as PW6 in the judgment, because that was the number which was given to him in the list of witnesses, although at trial, he was PW4. We will refer to him as PW4. The prosecution's case essentially depended on PW1, whose evidence was supported to a certain extent by PW3. Neither defendant gave evidence. The Deputy Judge in his judgment accepted the evidence of PW1 and PW3. In paras. 15 to 22 of the Reasons, the Deputy Judge gave reasons why he accepted the prosecution's evidence. In relation to the evidence of PW1, he said: 0& GW g NOP N s^GW N6^nm 0 0 ,{ NI N \iQ !q k !qHYKN \iQ JT(W Q-NEQvu hQ!q2n 0 0 r, in para. 15 of the Reasons, the Deputy Judge said that he had considered the evidence of every witness independently, and reminded himself that both PW1 and PW2 were accomplices who had been given immunity by the Secretary for Justice, and he had given himself the usual warnings. The Deputy Judge did not find PW2's evidence to be helpful. Nothing turned on PW2's evidence. In order to consider whether such conclusions of the judge on the credibility of PW1 and PW3 are adequate, it is necessary to go more deeply into the prosecution's case. At trial, much of the time and evidence was devoted to the quotation in June 2002 (Exhibit P6) supplied by HK-Asian to Shui On, and in particular, the help or instructions which the 1st defendant was alleged to have provided to PW1 in respect of the quotation. The evidence about the quotation given by PW4, the senior employee of Shui On was that PW1 was the general manager of a company called Wise Security Ltd (Wise). Wise was a provider of security service to Shui On. According to PW4, at the end of 2001, Wise and three other companies, including HK-Asian, had put in bids for the security service jobs for 2002. Eventually, Shui On awarded most of the 2002 jobs to Wise and another company and HK-Asian was only given some inspection or patrol (}t^-N 1\ grU0W OvQ-N N1\ - OvuBf TbO1\p s1\sS TbOh e/fNN & & B}bk T1\9e T*g5d -NKNMR `O1\ u1\sS vu6q g1X 0 0T pose of Exhibit P6 was to obtain the unfinished contract(s) of Wise for 2002. According to the evidence of PW1, he left Wise in May 2002, and joined HK-Asian in July 2002. He did not volunteer the information that Exhibit P6 was submitted for the purpose of obtaining the unfinished contract(s) of Wise. His evidence was that the idea of submitting a quotation to Shui On came from the 1st defendant. In para. 22 of the Reasons the Deputy Judge said: 0& l gI{ t^>\ Bf!k O,{mQI & 0T rmal time for transmission of tenders, but submitted a quotation to Shui On halfway through and obtained contracts. This suggested that it was on the initiative of HK-Asian that Exhibit P6 was submitted. It is not clear whether the judge had rejected the evidence of PW4 which as seen was different, and if so, why. Moreover, this is what PW1 said at transcript page 17T: T`OvuBf grU\N"V T#j@T OOUbO1X bOUbOsS 1XrU I{I{HQ gOUXoHQ

u1XrU T#jOUbO T"Vyr%R 6q`O TZPkU OUbObT Rf^t Y\$RIQ UbO- Rf@b g bOUbO gZP0R N0RIQ O gW OPNO OPNO T#j#j gOUbO 0 0T the details of all the quotations, so that the quotation should be neither too high nor too low. However, since PW1 was the general manager of Wise, he was aware of the prices quoted by Wise to Shui On in relation to the 2002 jobs: See the evidence of PW4 at transcript page 120T. It is not clear whether when the Deputy Judge came to consider the evidence of PW1 on the role allegedly played by the 1st defendant in the formulation of this quotation, he had this in mind. At trial, Exhibit P8 was a table of comparisons of quotations from three contractors, including Wise, for similar services. It was prepared by the 1st defendant after Exhibit P6 was submitted to Shui On, for use by the Procurement Committee to decide whether the Wise contract(s) should be awarded to HK-Asian. It was the evidence of PW4 that there was no tendering process in the middle of June 2002 for Wise s unfinished contract(s). The only company which was asked to provide a quotation was HK-Asian. So the quotations in Exhibit P8 were presumably the quotations supplied by those three companies at the end of 2001 when tendering for the 2002 jobs, most of which were eventually awarded to Wise and another company. When one compares the quotation in Exhibit P6 with the original tender of Wise shown in Exhibit P8, it seemed likely that the quotation in Exhibit P6 was designed to be competitive with Wise. The judge made no reference to this at all. This is relevant to the credibility of PW1 whose evidence suggested that he was wholly reliant on the 1st defendant in preparing Exhibit P6. As noted, the judge had warned himself that PW1 was an accomplice. But there was no indication that he had evaluated PW1 s evidence at all. According to PW1, he left HK-Asian on bad terms. He was dismissed (Transcript 49D). He alleged that HK-Asian would not pay him his wages unless he agreed to false accounting (Transcript 49G). He had sued HK-Asian in the Labour Tribunal (Transcript 49F), it seems the outcome was not entirely satisfactory to him. (The evidence on the outcome is to be found in the 2nd defendant s statement to the police, which was admitted by the Deputy Judge. However, it is strictly speaking not evidence except as against the 2nd defendant.) PW1 used someone else s name to write a complaint letter to Shui On in February 2004 (Transcript 50H). The letter was not produced. But according to PW1, in the letter, the 1st defendant was accused of receiving benefit from HK-Asian (Transcript 50H). The ICAC had a copy of the letter. It is not clear how the ICAC came to investigate into this matter, for example, whether as a result of a complaint by Shui On or whether it was as a result of any complaint by PW1 or PW3. So, PW1 was not just an accomplice. He was a person who obviously had a grudge against the 1st defendant. In such circumstances, we believe it was incumbent upon the Deputy Judge to demonstrate that he had properly considered and evaluated the evidence of PW1. Nor does the matter stop here. The evidence of PW3 was regarded by the Deputy Judge as supportive of the evidence of PW1, though it is not entirely clear what use the Deputy Judge made of the PW3 s evidence. PW3 was not an accomplice. The judge gave himself no reminder to be wary of PW3 s evidence. PW3 also left HK-Asian on two separate occasions in unhappy circumstances. The first time, following a complaint that he had permitted a person who was unlicensed to work as a watchman. The second occasion, he left after he was photographed sleeping whilst on duty. However, the jud Ts^o`Lrgq -N1\ TLrgq Os^o` 0 0 N!k4 OWe4 AS~^, TbTF{4 0 0T mon

ground that at the negotiation, both PW1 and PW3 were present although according to PW3 by that time PW1's shares had already been sold to him. Also, in about July 2003, PW3 made a complaint of false accounting to the police against the 1st defendant (but was told that it was a civil matter) (Transcript 97H). It is quite clear that PW3 was not a disinterested witness. However, the judge made no reference to any of these at all. His assessment of PW3 is contained essentially in para. 20 of the Reasons which has been quoted in para. REF _Ref157825932 \r \h above. We do not doubt that a judge who had properly evaluated the evidence might nevertheless accept the evidence of PW1 and PW3 and on the basis of such evidence convict the defendants. But, unfortunately, the Deputy Judge's findings are little better than conclusionary remarks. On the facts of this case, they are woefully inadequate. For that reason the conviction is unsafe and unsatisfactory and could not be supported, and we allowed the appeal. Mr Alex Lee, relying on *R v K and Others* [2005] 1 Cr App R 408, submitted that the particulars did not define the conspiratorial agreement. He submitted that the conspiracy was the agreement to abuse the tendering system of Shui On and to take unfair advantage of the 1st defendant's position in Shui On to the prejudice of Shui On and the other bidders. He submitted that the particulars were merely reasonable information given to the court and the defendants as to the nature of the allegation and overt acts upon which the prosecution asked the court to draw the inference that there was such a conspiracy and that the defendants were party to that conspiracy. There are two answers to this submission. First, that was not how the case was presented to or understood by the court below. *R v Chan Kong-to* [1997] HKLRD 412 is clear authority that it is the prosecution's duty to provide a precise statement of the conspiracy. The case presented at trial was that the particulars of the offence given in the charge defined the agreement. In other words, that was what the alleged conspirators had agreed to do. We do not lose sight of the fact that the offence is the agreement. Even so, as *R v K and Others* made clear, there is an important difference between particulars which defined the agreement, and particulars which are provided to give reasonable information in respect of the agreement. We also accept that the fact that particulars were given does not mean that they were essential ingredients of the offence. Thus, a distinction must be drawn between the particulars given as part of the charge and the particulars given in paragraph 4 of the Summary of Facts. However, the conspiracy, as explained by Mr Lee was never relied on at trial. Nor was that the basis upon which the judge convicted by the defendants. Mr Lee submitted that if necessary he would seek leave to amend the charge. We did not regard an amendment to be appropriate. It would not be fair to the defendants if they have to deal with a new case on appeal. Secondly, even if the particulars (whether in the charge or in the Summary of Facts) were no more than overt acts, such overt acts depended on the credibility of PW1 and PW3, and as the judge relied on such overt acts to find the conspiracy, our comments on his failure to properly evaluate the evidence are equally applicable. Mr Lee had also submitted that there was in any event evidence showing that the 1st defendant had disclosed information to HK-Asian in relation to the tender process in December 2002. The Summary of Facts made no reference to this particular matter and the judge did not make any finding on it. We are not prepared to hold that such evidence would support the charge without a proper evaluation

by the judge. (Robert Tang) Vice-President (Peter Cheung) Justice of Appeal (Carlye Chu) Judge of the Court of First Instance Mr Alex Lee, SADPP & Mr Beney Wong, GC, of the Department of Justice, for the Respondent. Mr Ching Y. Wong, SC & Mr. Peter Chow, instructed by Messrs David Hui & Co., for the 1st Defendant. Mr Philip Wong, instructed by Messrs Lau, Chan & Ko., for the 2nd Defendant. PAGE - 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 1udk (#p# "0 "0 "0 "0 "0! "0" "0# "0\$ "0% "0& "0' "0("0) "0* "0+ "0, "0- "0. "0/ "00 "01 "02 "03 "04 "05 "06 "07 "08 "09 "0: "0; i\$&`G @\$ _Rs Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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