

HONG KONG / JUDGMENT

HKSAR v. SZE KAM LUNG

COURT

Court of Appeal

DECIDED

15 June 2007

CASE / FILE NUMBER

CACC289/2006

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bjbj button nomacro Applicant

Before: Hon Stuart-Moore VP and Beeson J Date of Hearing: 15 June 2007 Date of Judgment: 15 June 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court): This is an application for leave to appeal against a sentence, which in total amounted to 34 months imprisonment, imposed on 29 June 2006 by Deputy District Judge S M Sham in respect of three charges of theft to which the applicant had pleaded guilty. The 1st charge involved two notebook computers valued at \$28,980, the 2nd charge related to an amplifier worth \$19,800 and the third offence admitted by the applicant (charge 5) was in relation to two camera recorders together valued at \$82,500. These offences were committed, respectively, on 7 May 2005, 13 June 2005 and 16 January 2006. The thefts were committed by means of shoplifting. Six defendants including the applicant (D1 at trial) were charged. The charge sheet contained a total of 8 charges. Eventually, those responsible were arrested as the result of a police surveillance exercise carried out on 17 February 2006 when four of the defendants were followed in Mongkok. The applicant was seen to board a taxi which took him and D4 to an address in Chai Wan. When D1 was arrested, he was holding an amplifier which he admitted having stolen on 13 June 2005 (charge 2). The applicant was interviewed and he then admitted that he was the person to be seen in a CCTV film taken in the shop from which two computers were stolen on 7 May 2005 (charge 1). The film captured the applicant in the act of stealing this property. The computers were subsequently sold in Shenzhen. The theft which was the subject of the 5th charge was similarly established by CCTV film which showed the applicant and three others stealing the camera recorders in question. The applicant forced open a display cabinet in the shop and handed the items to two of his accomplices. Again, the applicant confessed this offence when confronted with the evidence of his wrongdoing. The applicant, aged 31, is no stranger to the courts. He has on 5 previous occasions been sentenced for theft. There were seven offences of theft covered by those appearances and each offence, we were informed, was by means of shoplifting. The last four appearances in court all resulted in prison sentences of between 3 and 6 months imprisonment. The latter sentence was in respect of three theft offences and was imposed on 26 November 2004. The applicant, we were told, was released from this sentence in February 2005

just three months before the first theft in the present series with which we are concerned. In passing sentence on the applicant, the judge said:

20. Charge 1. I take 15 months as a starting point, increased to 18 months for his repeat offending and reduced to 12 to reflect his plea. I see no reason to further reduce his sentence. For Charge 1 he is sentenced to 12 months imprisonment. Charge 2, the same: 15 months as a starting point, increased to 18 months, reduced to 12 for his plea. For Charge 2 he is sentenced to 12 months imprisonment. For Charge 5, I take 30 months as a starting point, increased to 33 for his repeat offending and reduced to 22 months for his plea. I take a higher starting point because the facts show this is an organised stealing and the value involved was high, amounting to \$82,500.
21. Now I come to the totality principle. Having considered it I make the following order. 6 months of Charge 1 and 6 months of Charge 2, consecutive to each other and consecutive to the 22 month term of Charge 5. The rest are concurrent. Total term is one of 34 months imprisonment. (Appeal bundle p. 19) It is apparent that the judge had enhanced the starting points for sentence based upon the principles stated in HKSAR v Chan Pui-chi [1999] 2 HKLRD 830. Plainly, as the sentencing judge stated, the facts on the 5th charge demonstrated that the applicant was involved in organized stealing of high-value goods. In this sense, the case represented a very considerable departure from what may be termed an ordinary shoplifting offence where items of low value are stolen, often to provide day-to-day sustenance. By contrast, this was, at least so far as the 5th charge is concerned, a crime committed by a well-drilled gang stealing in a remarkably brazen fashion. Mr Wong Po-wing, for the applicant, submitted in his 1st ground of appeal that the starting point of 33 months imprisonment on the 5th charge was, having regard to all the circumstances, manifestly excessive. His 2nd ground made the complaint that an overall sentence of 34 months imprisonment, following pleas of guilty, in respect of three theft offences revealed a failure to take the totality principle sufficiently into effect, added to which he argued that the 3-month enhancement on each of these charges was too high. He pointed out also that in carrying out the thefts covered by charges 1 and 2, there was no evidence that the applicant had been acting with others. There are no guidelines for offences of this kind. Each case will depend on its own facts. As if to emphasise this, Mr Wong produced a number of judgments dealing with facts which have little bearing on the present case as, consistent with the vast majority of shoplifting offences, the goods stolen were of small value albeit many of the offenders involved in those earlier decisions had longer criminal records than the applicant. It is impossible to consider professional theft on the level demonstrated by the facts on the 5th charge without drawing some comparisons with professional gangs of pickpockets who have made it their business to steal other people's property. Here, there were three offences spread over about eight months. The applicant has shown that he has not in the least been deterred by the comparatively lenient sentences he has received in the past. We consider that the 3-month enhancement in respect of the sentences imposed on all the charges was fully justified on this account. We can find no merit in this application and it is dismissed. (M. Stuart-Moore) macrobutton nomacro Vice-President (C-M Beeson) Judge of the Court of

First Instance Ms Grace Chan, SGC, of the Department of Justice, for the Respondent. Mr Wong Po Wing, instructed by Director of Legal Aid, for the macrobutton nomacro Applicant
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