

HONG KONG / JUDGMENT

HKSAR v. TSANG KA MING

COURT

Court of First Instance

DECIDED

27 August 2001

CASE / FILE NUMBER

HCMA307/2001

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bjbjU HCMA 307/2001 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 307 OF 2001 (ON APPEAL FROM ESCC 5040/2000)

BETWEEN HKSAR Respondent and TSANG KA MING Appellant

Before: Deputy High Court Judge Woolley in Court Date of Hearing: 21 August 2001 Date of
Handing Down Reasons for Judgment: 27 August 2001

REASONS FOR JUDGMENT

The appellant pleaded guilty in Eastern Magistracy to three charges: two of obtaining property by deception, and one of attempting to obtain property by deception. All three charges involved the fraudulent use of a credit card. He was sentenced on 19 February 2001 to 6 months imprisonment on each charge, to run concurrently. At the hearing I allowed the appeal and substituted a community service order of 120 hours, to be completed within 12 months, for the balance of his sentence, the appellant having been on bail since 4 April 2001. I now give my reasons for so doing. The credit card in question was stolen by the appellant's then girlfriend, a Miss Chan, from a neighbour's post box. Miss Chan then telephoned the owner of the card pretending to be calling from the bank and obtained the owner's personal particulars, which she then used to activate the card with the bank. I accept, as the magistrate accepted, that it was Miss Chan who was the instigator and driving force behind these activities, although the appellant was, it appears, a willing accomplice. The next day, at about 9.45 p.m., they made a purchase of a packet of tea in Sogo Supermarket, valued at about \$60.00, with the card. Within the next 48 minutes they purchased a gold bracelet and gold necklace worth \$13,668.00 at a jewellery shop, and then attempted to do the same in respect of other jewellery in another shop. The staff in the second

shop became suspicious and called the police and the appellant and Miss Chan were arrested there. Forms relating to the issue of the card were found on Miss Chan, who, however, for reasons which are not clear to me, nor to the magistrate, was not proceeded against. The magistrate initially imposed a sentence of 12 months imprisonment on the basis that the offences were prevalent in Hong Kong, and were of a serious nature, but recognizing otherwise that the appellant would be considered suitable for community service. On review, when the part played by the girlfriend was fully explained, and other mitigating factors put forward, the sentence was reduced to 6 months. On behalf of the appellant, Mr Grounds now submits that this is a case where a community service order should not only have been considered, but was the correct sentence in the circumstances. He points out that the magistrate found that he was of positive good character, that he has a good employment record, pleaded guilty at the first opportunity, and that all the property the subject of the charges was recovered. He also comes from a secure and stable home background with his family fully supporting him, the offences are completely out of character, and he is unlikely to re-offend. Indeed, the explanation for his participation in these offences appears to be solely the influence of Miss Chan, with whom he had a stormy relationship, which is now ended, with evidence that she was the dominant partner, and who was the prime mover in these events. Since his release on bail the appellant has taken up employment with American International Assurance, passed two examinations in insurance, and enrolled at the School of Professional and Continuing Education of the University of Hong Kong. I readily accept therefore that the offences with which he has been convicted were out of character, and that he is unlikely to be tempted into a similar course of action again. Mr Grounds submits that this is an eminently suitable case for a community service order, and takes as his starting point, as an authority to support this, the well known case of *R v. Brown* (1981) 3 Cr App R 294. There the court gave guidance as to the accused who would be most suitable for a community service order and who would:

- (1) be either a first offender, or one with a light criminal record;
- (2) come from a stable home background, perhaps with a family;
- (3) have a good work record orders not being designed to encourage the lazy, or to show the idle the error of their ways;
- (4) be in employment, or have a realistic prospect of such;
- (5) have shown genuine remorse; or
- (6) present no more than a slight risk of re-offending. This guidance was adopted in the Hong Kong case of *HKSAR v. Chow Chak-man* [1998] 2 HKC 659, and, Mr Grounds contends, perfectly describes the situation of the appellant here. However, he accepts that the magistrate took into account in sentencing both the prevalence and the seriousness of the offences. In respect of the former, while it is undoubtedly true that credit cards have, since their introduction, been a constant means of fraudulent crime being committed, I am not satisfied that this is any more prevalent than, say, simple theft. In any event, the magistrate seems, in his reasons for sentence, to have been influenced more by the seriousness of the

offences, rather than their prevalence, in deciding that pre-sentencing reports were not appropriate. I accept that, even in serious cases, one has to look at all the circumstances, not only of the offence itself, but of the accused. In HKSAR v. Lee Hon-yung HCMA 69 of 2000, in sentencing the appellant to a community service order for an offence of wounding, contrary to section 19 of the Offences Against the Persons Ordinance, Deputy Judge To said: Each case depends on its own facts and on the personal circumstances of the defendant. Community service orders have also been imposed on defendants committing far more serious and heinous offences than this. And he referred to the case of HKSAR v. Chow Chak Man and pointed out that there the offence was a serious pre-meditated burglary involving goods worth \$60,000.00. Seriousness alone is not therefore an overriding factor when considering a community service order, unless the offence falls within that group where public policy dictates that a custodial sentence must be given, such as those involving drugs or corruption. In this case I also take into account the fact that the appellant has spent some 44 days in prison prior to his release on bail pending this hearing. This must have a profound and disturbing effect on someone from the appellant's background, and I have no doubt that it has left a lasting impression on him. Taken with the other factors referred to above I consider it unlikely that he will offend again, and that in the circumstances of this case a community service order is an appropriate penalty. In saying this I intend no criticism of the learned magistrate, who applied the correct criteria to the offences themselves, and on that ground cannot be said to have given a sentence wrong in principle or manifestly excessive. However, when I now take into account not only the circumstances of the appellant, but what has happened since, in which I include his experience of prison, and hearing the clang of the prison gate, I am prepared to extend a degree of mercy in the knowledge that a lesson has been learned, and he should now be permitted to embark on what promises to be an industrious and productive life. For these reasons I allowed the appeal and substituted a community service order. (E T S Woolley) Deputy High Court Judge Mr Christopher Grounds, instructed by Messrs Littlewoods, for the Appellant Ms Irene Poon, of Director of Public Prosecution, for the Respondent - PAGE - & 6" HCPI No Alice LH Yu HCMA.dot Sharon LY Shum Microsoft Word 9.0 HCPI No Title Microsoft Word Document MSWordDoc Word.Document.8

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