

HONG KONG / JUDGMENT

HKSAR v. TSANG SHUI KWAN AND ANOTHER

COURT

Court of Appeal

DECIDED

18 January 2007

CASE / FILE NUMBER

CACC304/2006

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REASONS FOR JUDGMENT

Hon Burrell J (giving the reasons for judgment of the Court): AUTONUMOUT At the conclusion of the hearing we made the following decision. We granted leave to the 1st applicant and treated the hearing as the appeal. We allowed his appeal and reduced his sentence to 2 years in the manner indicated in paragraph 14 of these reasons. We found that the 2nd applicant's application was without merit and refused it. We indicated that we would hand down our reasons later, which we now do.

FACTS

On 20 July 2006 both applicants were sentenced by Judge Geiser in the District Court. They had pleaded guilty in September 2005 and thereafter remained on bail whilst they gave evidence for the prosecution in a related matter which resulted in further convictions. The 1st applicant, in September 2005, pleaded guilty to eight offences on a charge sheet containing 15 offences against him. The seven to which he pleaded not guilty were left on the court file. The 2nd applicant faced two charges of accepting an advantage contrary to S 9(1)(b) of Cap. 201. He pleaded guilty to charge 17 and charge 16 was left on the file. The facts of the case were succinctly set out by the judge at the time of sentencing. He said

4. The Summary of Facts with regard to the 1st defendant which he has admitted reveal that insofar as the 4th, 5th and 6th charges are concerned, he misrepresented to three painting workers employed by Shui On that he was a subcontractor of Shui On and that they were his employees. He demanded them to return part of their wages to him and he also misrepresented to the workers that Shui On had overpaid them and that the workers were

required to return the overpaid amount to him. The three workers returned to him a total of \$77,000 from August 2002 to May 2004.

5. With regard to the 10th and 11th charges, the facts reveal that in November of 2002, D1 approached a Fong Yick-wah who was a senior construction manager of Shui On and offered a total sum of \$150,000 to him in order that Fong would not criticise his work at Shui On projects at Pak Tin, Tai Wo Hau and Science Park. He made monthly payments of between 10 and \$20,000 when Fong was inspecting the workplaces of D1. In order to finance the bribes, D1 demanded his subordinates to return to him part of their remuneration.
6. Similarly, with regard to the 13th charge, the 1st defendant offered monthly bribes of \$10-11,000 to Lun Hing sang, who was a foreman of Shui On, so that he - that is Mr Lun - would not criticise the work carried out by D1 and his workers. Again, these bribes were financed by D1 demanding his subordinates to return part of their remunerations to him.
7. With regard to the 14th charge, the facts indicate that the 1st defendant offered bribes to D2 who was the assistant foreman responsible for checking and recording the work completed by D1 and the site workers as he wanted D2 to expedite the calculation of bonuses to his workers. These bribes of \$1,000 to \$1,500 were paid in cash to the 2nd defendant, commenced in October 2003 and continued up to May of 2004.
8. The 15th charge concerns D1 who, at the suggestion of Lun, demanding a 0.3 per cent rebate of total sales from Hop Hing, the company that D3 operated, back to Shui On. From January 2003 to May of 2004, D1 recovered a total of \$23,000 rebates from D3 by way of cash cheques. He cashed the cheques and gave \$15,000 to Lun.
9. As regards the 2nd defendant, the facts in relation to the 17th charge that he has admitted indicate that since late 2003 up to May of 2004, he accepted monthly bribes from a tile worker of \$1,000 to \$2,000 each month in his capacity as an assistant foreman and in his capacity of supervising the work done by site workers. The judge divided the offences to which the 1st applicant had pleaded guilty into two groups. The first group consisted of the fraud charges (charges 4, 5 and 6). For each case he took a starting point of 3 years imprisonment. He then reduced it to 2 years because of his pleas of guilty. He then discounted another 6 months to reflect the co-operation that he has given to the ICAC and the evidence that he has given against other defendants. Thus he passed a sentence of 18 months on Charges 4, 5 and 6 which he ordered to be served concurrently. Charges 10, 11, 13, 14 and 15 formed the second group. They were four offences of offering advantages and one of accepting an advantage. He adopted the same approach as with the first group, namely a starting point of 3 years, reduced to 2 years for the guilty plea and a further 6 months for giving evidence for the prosecution. Again he made all these sentences of 18 months concurrent with each other. However the two groups of sentences were ordered to be consecutive making 3 years in total. As for the 2nd applicant he selected a starting point of 2 years for charge 17, reduced it to 16 months for his plea of guilty and discounted another 6 months for his co-operation resulting in a final sentence of 10 months imprisonment. Both

applicants applied for leave to appeal their sentences. The 1st applicant was unrepresented, the 2nd applicant was represented by Mr Benny Ho. The 1st Applicant The 1st applicant complained that his overall sentence was too long. He said that sentences in other similar cases were not as long. In answer to this we note that all cases depend on their own facts and in cases of fraud and bribery charges it is unusual to glean any benefit from other cases. So much depends on the interaction of various factors such as, the amount of money involved, the nature of the relationship between the maker and the taker of the bribe, the length of time the fraud had been continuing and the defendant's course of conduct which led to the offences being committed. In this case the applicant cheated fellow employees, who were one step below him in the company's hierarchy, out of their hard earned wages. In some cases he did so over a period of two years. But for being caught it would no doubt have continued. The bribery charges also involved fellow employees. They spanned approximately a six month period and involved about \$250,000. We bear in mind also that in each group of offences there was a breach of trust element in the sense that the applicant abused his position in the company to make his own position more secure. He was funding his bribes to senior employees by defrauding his junior employees. Having considered the submissions and having derived some assistance from R v Clark [1998] 2 Cr 137, HKSAR v Cheung Mee Kiu CACC99/2006 and AG v Leung Kin Wai [1996] 588 we take the view that the starting point of 3 years for each group of offences cannot be described as excessive. They are serious offences involving systematic corruption which, as the sentencing judge said, strike at the very heart of a civilized society. The applicant gave evidence against two other defendants in a separate trial concerned with similar acts of bribery in the same company. One defendant pleaded guilty at trial, the other was convicted after trial. The total discount given to the applicant was 50% namely, a reduction from a starting point of 6 years down to 3 years. Once caught, he was indeed co-operative and gave helpful evidence. The discount given was a proper one, but anything higher than 50% would have been over generous. All that remains is for us to consider whether it would have been more appropriate for the judge to have ordered the two sentences of 18 months to have been only part consecutive to each other. The judge did have totality in mind when he ordered the sentences within each group to run concurrently. However, we consider the resulting 6 year total as a starting point after trial was still too long and that 5 years on the facts of this case would have been appropriate. We think the judge should have ordered that 2 years of the 3 years sentence to run consecutively, making the starting point 5 years. A 50% discount would then have resulted in a final sentence of 2 years imprisonment and in order to achieve this we shall order that 12 months of the overall term imposed on the charges in the second group (10,11,13,14 and 15) should run consecutively to the first group. THE 2ND APPLICANT We turn now to the 2nd applicant. Two grounds of appeal are advanced. First, it is said that the 2nd applicant has a genuine and legitimate sense of grievance arising out of the fact that a fellow employee, one Shum Hing Kau, against whom he gave evidence at trial was the man who offered him a bribe which he accepted and who, on conviction was sentenced to only 4 months imprisonment. Secondly, it is submitted that the starting point of 2 years imprisonment for this applicant fails to take into account a number of factors. All but one of the five factors

referred to in the notice of appeal are matters which are relevant to mitigation and thus relate to the appropriate discount from the starting point and not to the correctness of the starting point itself. The 2nd applicant received a total discount from the selected starting point of 2 years of nearly 60%. This was contrary to the recognized practice of giving up to 50%, but no more, to those who have co-operated with the authorities to the extent of giving not only a statement but also evidence in court. The one factor which is relevant to the correctness of the starting point is paragraph (ii) of the notice of appeal which refers to the relatively small monetary gain, namely between \$12,000 and \$16,000. This, together with the first ground of appeal is relevant to our consideration on appeal. The 2nd applicant and Shum were sentenced by different judges. Whenever possible, in order to maintain consistency, it is preferable that one judge deals with all defendants. In this particular case the various defendants were split between the District Court and the Magistracy. There may have been good reason to do so. We simply emphasize that, absent a valid reason, every effort should be made to keep cases with multiple defendants in the same court. In this case we are concerned, not with the correctness of Shum's sentence but the correctness of this applicant

- s. Shum was lower in the company hierarchy. The 2nd applicant was a 26-year old assistant foreman who was accepting bribes on a regular basis. It was one piece in a jig-saw of corruption involving the 2nd applicant. He was undoubtedly the more culpable in a serious case of bribery and corruption in the Hong Kong construction industry, which is all too prevalent. He was also very fortunate to receive a significantly higher discount for his co-operation to the authorities than was granted to the 1st applicant. Thus, even if there may be some merit in the argument that the sentencing point of 2 years was on the high side, that must be balanced against the excessive discount which he was granted. The result is that the final sentence of 10 months cannot be criticized for being manifestly excessive. Finally, we note that the judge adjourned the sentencing of the 2nd applicant pending the preparation of a Community Service Report. In this case, there was no prospect of a Community Service Order being the proper sentence. In such circumstances delaying sentence for the preparation of such a report should be discouraged. (M. Stuart-Moore) (M. P. Burrell) (M. Lunn) Vice President Judge of the Court of First Instance Judge of the Court of First Instance Mr Gavin Shiu, Senior Assistant Director of Public Prosecutions of Department of Justice, for the Respondent Mr Tsang Shui-kwan, 1st Applicant, in person Mr Benny Ho, instructed by Messrs So, Lung and Associates, for the 2nd Applicant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$ z86 EQ%P }8&&V BK&rV N6(b o;)(o w\*/0 1~jB Nk7@ @b/8 q3Bz3 BFN,f 5vRJb.pM cYK\$U0L XmO` #BQR =28T !GdT lC=U6X4 Zk_U =Vu[d 0,]@ _J&df f&'RN /r|m" ~.*q ~.*q =28T 5vRJ /r|m /r|m w*/0 w*/0 =Vu[Zk_U !GdT }8&& lC=U _J&d T`Z_ |z*F fpNK & 6" HCA English.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 27 October 2026 · Esheria