

HONG KONG / JUDGMENT

HKSAR v. TSO MOON TONG

COURT

Court of Appeal

DECIDED

3 December 2007

CASE / FILE NUMBER

CACC17/2006

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REASONS FOR macrobutton nomacro JUDGMENT

macrobutton nomacro Hon Tang VP (giving the macrobutton nomacro reasons for macrobutton nomacro judgment of the Court): There were two defendants at trial. The appellant was the 1st defendant. In August 1993, the 1st defendant was appointed Works Supervisor I in the Electrical and Mechanical Service Department (EMSD). Since April 1999, he was responsible for the monitoring of performance of term contractors in air-conditioning maintenance and site inspection of air-conditioning and other general electrical and mechanical work at Kowloon Park. On 1 November 2002, he became Acting Assistant Air-conditioning Inspector. He remained at and responsible for Kowloon Park. In or about November 2003, the 1st defendant was about to be transferred from Kowloon Park to the head office. Thereafter, he was to be responsible for the whole of the work of the Kowloon area. The 2nd defendant was a friend of the 1st defendant. At the material time, he operated an air-conditioning maintenance company called ProSense. ProSense was a partnership with at least two partners namely the 2nd defendant and a Mr Lee Tak-wai who was PW3 at trial. Winston Air Conditioning & Engineering (Hong Kong) Company Limited (Winston) was awarded a term contract (the Maintenance Contract) for two years commencing on 1 November 2003 for maintenance of air-conditioning throughout Kowloon. The Maintenance Contract had a value of \$17 million. It seemed to have been Winston s expectation that there would also be extra orders worth a few million dollars. Winston took over from the previous term contractor, Ryoden as from 1 November 2003. The 1st defendant faced 6 charges at trial. He pleaded guilty to the first two which related to loans made to him by Mr Wong Tai-lap (PW7), who was first an employee of Ryoden and then an employee of Winston. The 1st defendant was convicted after trial by Deputy District Judge Casewell in relation to three of the four remaining charges. He was sentenced to a total of 36 months imprisonment, of which 32 months were attributable to charges 3 to 6. This is the 1st defendant s appeal against conviction and sentence in respect of those remaining charges. I granted leave to the 1st defendant to appeal

on 26 May 2006. The 2nd defendant was charged with the 3rd charge, jointly with the 1st defendant, and was charged with the 7th charge alone. He was also convicted after trial. He was sentenced to a total of 21 months imprisonment. He has not appealed. The 3rd charge was for: Misconduct in public office, contrary to Common Law and section 89 of the Criminal Procedure Ordinance, Cap. 221 and punishable under section 101I(1) of the Criminal Procedure Ordinance, Cap. 221. According to the Particulars of Offence, the 1st defendant, aided and abetted by the 2nd defendant:

- (i) showing improper partiality towards ProSense Company (ProSense) by:
 - (a) exerting pressure on LAM Hoi-fung and his employer Winston Air Conditioning & Engineering (Hong Kong) Company Limited (Winston) to subcontract to ProSense that part of the Maintenance Contract relating to the maintenance works at Kowloon Park;
 - (b) exerting pressure on Lam Hoi-fung and his employer Winston to subcontract to ProSense maintenance works under the Maintenance Contract; (ii) making arrangements for ProSense to further subcontract the maintenance works under the Maintenance Contract to Chun Hing Engineering Co. in which the said TSO Moon-tong had an interest. The prosecution case was that (and the learned judge so held) Chun Hing Engineering Co (Chun Hing) was a partnership. The 1st defendant was an undisclosed partner. ProSense was to sub-contract to Chun Hing the maintenance works under the maintenance contract. The 4th and 5th charges were for blackmail. They covered two occasions on 20 December 2003 at two different locations. The learned judge said: It was said, in relation to this charge, that the 1st defendant s misuse of his public office had gone beyond the pressure alleged in Charge 3 and had gone so far for the 1st defendant to issue threats of physical and economic harm to Winston, sufficient to constitute blackmail. However:

85. But I do find in relation to [the blackmail] charges that, on 20 December, the 1st defendant made an unwarranted demand in relation to the maintenance contract.

88. As it is not possible to adequately distinguish the location, I bring in a conviction of one charge of blackmail against the 1st defendant at an unknown location on 20 December 2003. The 6th charge was straightforward, the 1st defendant was alleged to have solicited a loan of \$100,000 from Mr Lee Tak-wai (PW3). Mr Lee Tak-wai was the 2nd defendant s partner in ProSense. Lam Hoi-fung (PW1), was the principal prosecution witness. He was one of several witnesses who gave evidence under immunity. The learned judge said:

12. The first prosecution witness said Winston did subcontract Kowloon Park to the 2nd defendant. They did this because they considered that Kowloon Park was a small part of their overall contract, and if they did not do this then the 1st defendant might do something bad back against their company and it might affect their work. It is known that, eventually, in December or January, Winston paid an invoice for work done by ProSense, the 2nd defendant s company. The Kowloon Park sub-contract had a value of \$88,000. According to Lam Hoi-fung (PW1), in late November 2003, the 1st defendant told him that he was to be transferred to the head office and would then be responsible for the whole of the work in the

Kowloon area. At the suggestion of the 1st defendant, PW1 and the 1st defendant met. According to PW1, the 1st defendant wanted the whole of the Kowloon Project to be sub-contracted to ProSense. He said at a meeting in early December, the price of \$11,000,000 was mentioned. PW1 did not agree to this proposal. This is what the learned judge said in the Reasons for Verdict:

15. The first prosecution witness gave the following evidence. He said that from the first meeting with the 1st defendant to the middle of December he had met the 1st defendant about ten times. During these meetings the 1st defendant had told the first prosecution witness that if Winston subcontracted the work to the 2nd defendant then Winston would certainly make a profit. He said there would be extra orders, but if Winston did not subcontract and did not do the work well, then there would be an effect on the performance of Winston.
16. The first prosecution witness was asked if the value of the extra orders were ever mentioned and he replied Yes. For Kowloon Park there would be few millions . He was then asked What would happen if Winston did not subcontract? The first prosecution witness replied He had many things. If Winston didn t do it well he would write badly in his report and say that the work ability of Winston was poor, and there were things related to the contract that would cause a loss were done. In a worst case it could be so badly written about Winston that Winston s name was removed. Now the 1st defendant s conduct caused Winston to contact the EMSD. It was EMSD who then brought in the ICAC. The 1st and 2nd defendants were arrested on 24 February 2004. Since 18 December 2003, the ICAC had covertly monitored meetings between PW1, the 1st and 2nd defendants. The commission also recorded telephone conversations. Tapes and transcripts of the monitored meeting and conversations were produced at trial to prove the two allegations of blackmail to evidence the kinds of threats and pressure being made by the 1st defendant to attempt to secure for the 2nd defendant the Kowloon subcontract . Para. 17 of the Reasons for Verdict. So far as Chun Hing was concerned, the persons involved were Chan Man-fai (PW4), Ki Shek chun (PW6), and Wong Tai-lap (PW7). PW4 had known the 1st defendant for 8 years. According to him, in February 2004, the 1st defendant suggested that he and Ki Shek-chun formed a company to contract work in other companies. He was told by the 1st defendant that he wanted to join as a shareholder. This is what the learned judge said: 26. In a later conversation the 1st defendant said he wanted to join the company as a shareholder. The fourth prosecution witness said, specifically in respect to the work, the following. The 1st defendant said a company called ProSense would contract the work of Winston and then further subcontract the work to our new company. The fourth prosecution witness and the sixth prosecution witness asked the 1st defendant if this role would conflict with the 1st defendant s EMSD duties. The 1st defendant s response to this was to tell them he did not want his name or details to be shown in any of the company documents or business registration. The business registration was produced by the prosecution. It did not contain the name of the 1st defendant but it did contain the names of the three other men.

27. Also the evidence showed that on 25 February there was a meeting that the persons involved were to be involved in Chun Hing Engineering. And it had been proposed that each prospective shareholder would bring along \$5,000 as contribution to the establishing of the company.
28. The sixth prosecution witness, Mr Ki Shek-chun, was also involved in Chun Hing. His job at Winston had been facilitated by the introduction of the 1st defendant. The sixth prosecution witness also said the 1st defendant suggested the formation of Chun Hing, and it was to subcontract work for ProSense, and the 1st defendant was to participate in the company through having shares.
29. The seventh prosecution witness had also been introduced to the 1st defendant. He was another shareholder in Chun Hing. He said that each shareholder would contribute \$5,000. His evidence was that each shareholder was allowed drawings. These are as follows: Ki Shek-chun, \$13,000; Chan Man-fai, \$7,000; \$4,000 for Wong Tai-lap and \$4,000 for the 1st defendant. Any profits were to be shared equally. He said the 1st defendant's name was not included in the business registration as he already had a job. In any event, the partners were to meet on 25 February at the Delicacy Seafood Restaurant for the purpose of establishing a company. The 1st defendant was arrested about that meeting on 25 February. Paras. 26-29 of the judgment. Apart from the evidence of the immunized witnesses, the prosecution relied, as we have said, on the tapes of the monitored meetings as well telephone conversations against the 1st defendant. There were also the records of the 1st defendant's video interviewed by the ICAC. There was a voir dire proceedings at the conclusion of which the learned judge admitted the video-interview records. On appeal the appellant again claimed that he had been abused with foul language and threatened by ICAC officers. But we have no reason to disagree with the learned judge's conclusion. The 1st defendant also gave evidence. He told the learned judge that so far as Chun Hing was concerned, he had intended to open a company with three friends but that he intended to join the company only after he had retired. Essentially, his defence was that: 36. what he had said was not said to influence the first prosecution witness; that what he said at the meetings was just joking and bluffing. He also said that all the things he had said were false. As for the 20 December meeting, he was not blackmailing anyone. He had drunk a lot of beer that day, he was very drunk. Although the learned judge admitted the record of interview he said they were: 48. generally exculpatory and set out, at an early stage, the defendant's contention, that this was a misunderstanding resulting from his drunken bragging and bluffing. As for the 1st defendant's evidence that he was not in a position to issue variation orders, the learned judge said: 50. The decision was made by a person called the engineer. He could write recommendations for the allocation of the extra works but the decision was not made by him. The learned judge went on to say:
52. The first prosecution witness has said that, firstly, the 1st defendant said that Winston may not get extra works - those are the VO's at Kowloon Park - that later on, that if Kowloon was subcontracted to the 2nd defendant, then there would be extra orders, and that if Winston

did not subcontract and did not do the work well then there would be an effect on the performance of works. And that meant, to quote the first prosecution witness he would write badly in his report to say the work ability of Winston was poor, and there were things relating to the contract that could cause a loss were done. In the worst case it could be so badly written about Winston that Winston's name was removed. One thing that the eighth prosecution witness did say in his evidence was that the supervisor was responsible for writing about the performance of the contracting party. Clearly, any adverse report may affect the ability of the contractor to either continue to perform the contract or, eventually, to renew it. It also appears that the 1st defendant was, as a supervisor, in a position to affect the allocation of small VO's and to bring pressure to bear on the contractor by writing adverse reports. So far as the blackmail charges are concerned, he found that in relation to the meeting of 20 December: 58. there was a clear threat. The parts that I have referred to are a small but, in my view, significant and overwhelming part of the threats that were issued. There is a clear threat to cause economic loss of \$1 million if Winston did not follow the path prepared. Then the learned judge concluded:

62. The 1st defendant was taxed extensively about these points in cross-examination. He repeated for almost two days the same answers, that he was bluffing or bragging, or speaking falsely. He was unable and unwilling to expand his answers to deal with the reality of the evidence, to deal with the reality of the content of the monitored conversations.
63. I found him to be untruthful and evasive. I found that I had to reject his evidence.
64. As I say, I also did not find that he was significantly affected by drink, although drink had been taken. That being the case, I must reject the evidence of the 1st defendant. We turn to the arguments raised by the 1st defendant in the appeal. One of the point raised by the plaintiff was that insofar as the respondent's case against him relied on secretly-taped conversations between him and Lam Hoi-fung (PW1), who was acting under the instruction of ICAC, that was in breach of article 30 of Basic Law and article 14 of the Hong Kong Bill of Rights. This was the point which initially persuaded Tang VP to grant leave to appeal. The circumstances of the covert surveillance by ICAC were set out in paras. 17 and 18 of the Reasons for Verdict. The respondent conceded that on the authority of HKSAR v Li Man-tat and Tan Chye-seng, Nicholas, CACC 303/2005, and Leung Kwok-hung and Anor v Chief Executive of The HKSAR [2006] 9 HKCFAR 441, the covert surveillance infringed the freedom and privacy of communication, as protected by the Basic Law and the Bill of Rights. However, Ms Louisa Lai, counsel for the respondent submitted, in the case of HKSAR v Lam Hon-kwok Popy and Ors, CACC 528/2004, this court by a majority, decided that evidence obtained in breach of the right in privacy would not per se lead to the inadmissibility of the evidence obtained as a result. The critical question is the fairness of the trial. Whether such evidence should be admitted must depend on all the circumstances of the particular case. Here as in Lam Hon-kwok, Popy, PW1 was entitled to give evidence. As Judge LJ said in R v Bailey and Ors [2001] EWCA Crim 733 at para. 6: An authentic recording, and an accurate transcription of it, provided the best possible evidence of exactly what was said during the

conversations. And that if the tape recordings were not admitted:

12. In effect therefore the judge was being asked to exclude the most reliable and undisputed evidence of what had happened when less certain evidence would have been admissible. His ruling did not make the process unfair. To the contrary, it contributed to the greater certainty that a true verdict would be reached if the evidence were placed before the jury. So we have no doubt in this case that the tape recordings were rightly admitted. It is also clear that on the authority of Leung Kwok-hung, the question of right of silence cannot arise. There was no functional equivalent of interrogation, or persons in position of authority here. The appellant also relied on other grounds of appeal. First, that the learned judge had failed to properly analyse the evidence from the immunized witnesses. The Reasons for Verdict shows quite clearly not only was the learned judge aware of the need to scrutinize the evidence of the immunized witnesses carefully, he had actually done so. The appellant also complained of misconduct on the part of the ICAC. He told us that after he was convicted he was told by the 2nd defendant that the 2nd defendant and Lee Tak-wai were asked to give evidence against him. The 2nd defendant refused and the ICAC chose Lee Tak-wai who became PW3. Without deciding on the reliability of what the appellant has told us, the learned judge was fully aware that Lee Tak-wai gave evidence under immunity. It is also well recognised that law enforcement agencies sometimes have to offer immunity in order to obtain evidence. There is nothing improper about that. The appellant also alleged that Mr Tong Yiu-sun, a shareholder and director of Winston, fabricated the case against him. Mr Tong gave evidence at trial at the request of the appellant. He had not been included in the prosecution's witness list. We have called for the transcript of Mr Tong's evidence. It is clear from his evidence that he had denied the allegations made against him. There was nothing in his evidence which helped the 1st defendant at all. We have also called for the transcript of the closing submission of Mr Surman, counsel then acting for the 1st defendant. Mr Surman made no reference to Mr Tong at all in his final submission. Not surprisingly so, because there was nothing in the evidence of Mr Tong, which could possibly help the 1st defendant's case. Allegations were made against Mr Tong in the cross-examination which he had denied. Allegations put to a witness is not evidence. The evidence of the appellant was disbelieved by the learned judge. So there was no evidence before the learned judge in support of the 1st defendant's allegation that it was Mr Tong who fabricated a case against him. Nor, having regard to the evidence of PW1, and the transcript of the taped conversations, were we left in any doubt that there has been no fabrication of any case against the 1st defendant at all. As will be recalled and as the learned judge has explained, the 1st defendant's defence was that he was joking or bluffing or that he did not mean what he was saying, or that he was too drunk. Such defence having been rightly rejected by the learned judge, the prosecution's case was clearly made out. There was no need for anyone to fabricate a case against him. Out of his own mouth, the 1st defendant was condemned. Another ground was that he was not in a position to influence the bidding system or to decide on the variation orders. The evidence was that he was in a position to actually decide on small variation orders. But as the learned judge found, the 1st defendant could have

made averse reports which might affect the assessment of Winston s performance. The quotation from para. 52 of the Reasons for Verdict has dealt fully with this argument. With respect, we agree. Lastly, the appellant submitted that the learned judge was not in a position to assess how the consumption of alcohol might have affected him. The learned judge has come to the clear conclusion that the defendant was not so befuddled by drink that he did not know what he was saying. He held that although the 1st defendant had been drinking, he knew what he was doing. There is nothing in this point. It is unnecessary for us to consider whether in any event self-induced drunkenness could have provided a defence. We turn to the appeal against sentence. On the 1st two charges, he was given concurrent terms of 4 months. That was to run consecutively to the other sentences. On the 3rd charge (misconduct in public office), a sentence of 30 months. In respect of blackmail, imprisonment for 15 months. Then on the 6th charges, 6 months imprisonment. The learned judge then decided that the overall proper totality should be 36 months. He arrived at 36 months by making the 15 months of the blackmail charge concurrently with the misconduct in public office charge. He then ordered that 2 months of the 6th charge should run consecutively to the 30 months as well as the 4 moths for the 1st two charges. The 1st defendant was in a position of trust which he tried to exploit for his own benefit. The overall sentence of 36 months imprisonment was not manifestly excessive. For the above reasons, we dismissed the appeal against conviction and sentence. (macrobutton nomacro Robert Tang) Vice-President (Peter Cheung) Justice of Appeal (B. Fung) Judge of the Court of First Instance Ms Louisa Lai, SADPP macrobutton nomacro , of the Department of Justice, for the Respondent. The Appellant, in person, macrobutton nomacro present 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 1udk 1udk 1udk 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 (#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 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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