

HONG KONG / JUDGMENT

HKSAR v. WAN KA LING

COURT

Court of Appeal

DECIDED

2 May 2013

CASE / FILE NUMBER

CACC318/2012

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Before: Hon Cheung JA and Barnes J in Court Dates of Hearing: 26 April 2013 Date of Judgment: 26 April 2013 Date of Handing Down Reasons for Judgment: 2 May 2013 R E A S O N S F O R J U D G M E N T Hon Barnes J (giving judgment of the court):

Introduction

AUTONUMOUT The applicant pleaded guilty before Deputy District Judge Tse (the judge) to one count of Obtaining Property by Deception, contrary to section 17(1) of the Theft Ordinance, Cap 210 (1st Count) and one count of Theft, contrary to section 9 of the same Ordinance (2nd Count). He was sentenced to 32 months imprisonment for the 1st Count and two months imprisonment for the 2nd Count. The judge ordered both sentences to run concurrently, resulting in a total sentence of 32 months. AUTONUMOUT The applicant applied for leave to appeal against the sentence of 32 months imposed on the 1st Count. AUTONUMOUT At the conclusion of the hearing, we granted leave to the applicant to appeal against sentence and, treating the application as the appeal proper, we allowed the appeal and ordered that the sentence of 32 months for the 1st Count be reduced to one of 26 months imprisonment. We did not disturb the judge's order that these two sentences were to run concurrently. We now give our reasons. Admitted facts AUTONUMOUT This is a credit card fraud case. The admitted facts disclosed that the applicant used an American Express credit card (AE card) in the name of Wong yung to purchase two jackets, five pairs of jeans and a bag valued at \$9,687 at a shop in Tsuen Wan. The transaction was successful. While the salesperson was preparing a receipt, the applicant suddenly retrieved the AE card and left the shop with the items he purchased without waiting for the receipt. AUTONUMOUT The applicant was intercepted by two security guards at the shop entrance and taken to a staircase for inquiry. The applicant threw two credit cards onto the ground. A report was made to the police. One of the two credit cards retrieved by the police was the AE card used by the applicant earlier. The other credit card was a GM Visa card also in the name of Wong yung . The applicant claimed that he picked up the two cards and admitted having used the AE

card to purchase items. Mitigation AUTONUMOUT The judge heard that the applicant was a 35 year old single man with four previous convictions, two of which related to dishonesty. The applicant's last conviction was for the use of a forged credit card and he was sentenced to two years imprisonment. Work wise, the applicant worked as a bartender and then as a waiter, later promoted to the post of a supervisor. His employer sang him praises. He lost his job as a result of the economic crisis towards the end of 2009. He was made a bankrupt in July

2010. He committed the present offences when he could only find casual work and he felt guilty for failing to support his parents. AUTONUMOUT The judge heard that the applicant picked up the two credit cards the day before he went and bought the items of clothing in order to get money by re selling them. He kept both cards as he did not know whether the shop would accept the AE card. AUTONUMOUT It was urged upon the judge that the applicant was remorseful and that he had started attending a church with his parents. There was no evidence to suggest the applicant was involved in a syndicate and there was no international element involved. Reasons for sentence AUTONUMOUT The judge referred to the applicant's background and the mitigation advanced on his behalf. The judge noted the applicant's previous conviction of credit card fraud involving a syndicate, and the applicant committed a similar offence shortly after he was released from prison. The judge commented that while there [was] nothing to suggest that [the applicant] was part of a larger syndicate in the present case, the facts of the previous case admitted by the applicant showed that what he did then was exactly in the same manner as he did in the present case. In view of the applicant's financial circumstances and his readiness of make quick money through illegal means, the judge was of the view that there [was] every reason to believe that he would continue to use those two credit cards in the same way if he had succeeded on this occasion. AUTONUMOUT The judge referred to HKSAR v Sun Chun Lei, CACC 476/2002 and HKSAR v Cheung Ka Wo Johnny [2002] 2 HKC 517 and adopted a starting point of four years. The judge gave the applicant the full discount of one third for his guilty plea. Grounds of appeal AUTONUMOUT Ms Terry Chan, counsel for the applicant, advanced a total of six grounds of appeal. In a nutshell, the applicant complained that the judge:

- (a) placed too much weight on the applicant's previous similar conviction;
- (b) wrongly inferred that the applicant was part of a syndicate when committing the present offence;
- (c) wrongly inferred that the applicant would continue to use the two credit cards had he not been caught on this occasion;
- (d) failed to give sufficient weight to various mitigating factors;
- (e) wrong interpreted the case of Cheung Ka Wo Johnny; and

- (f) adopting a starting point of four years imprisonment which was manifestly excessive. AUTONUMOUT The main crux of Ms Chan s submission was that there was no evidence to show that the applicant was part of a syndicate when he committed the credit card fraud on this occasion. The judge placed too much emphasis on the fact that the applicant was part of a syndicate when he committed a similar offence before and wrongly inferred that he was part of a syndicate on this occasion. AUTONUMOUT Ms Chan submitted that the judge wrongly interpreted the case of Cheung Ka Wo Johnny in coming to her views that [e]ven a small scale credit card fraud with small losses by an offender who is not alleged to be part of a larger syndicate can attract 3 years imprisonment on a guilty plea when the three years imprisonment was the overall starting point. AUTONUMOUT Ms Chan prays in aid what the Court of Appeal said in HKSAR v Tu I Lang, CACC 464/2006 to support her contention that the starting point here should be three years or less (at para 10 of the judgment): Where the facts of the offence point to a small unsophisticated operation, involving only one or a few forged cards uncomplicated by other evidence materially linking the offender to a larger operation, then a starting point of three years imprisonment or less would be appropriate. AUTONUMOUT Chan complained that this wrong approach of the judge, together with her failure to sufficiently take into account the applicant s mitigating circumstances, and her drawing of the wrong inference that the applicant would continue to commit further credit card fraud had he not been caught resulted in an excessively high starting point of four years. Our consideration of the submissions AUTONUMOUT Credit card frauds are considered serious offences and severe and deterrent sentences are meted out to offenders (see R v Chan Sui-to and Another [1996] 2 HKCLR 128). AUTONUMOUT There are no guidelines for credit cards frauds as the facts and the offender s degree of culpability vary to a large extent from case to case. The Court of Appeal in Chan Sui-to gave some criterion as guidance to the lower court after reviewing a number of authorities dealing with a range of sentences (at page 134): Allowing for the different facts and the varying degrees of culpability, it is impossible to formulate a set of principles of sentencing from those decisions. We think however it would be helpful to the courts if they were guided by some criterion. We would therefore suggest that an accused who plays an active but not necessarily a key role in a medium size operation involving between \$50,000 and \$150,000, with no elaborate planning and equipment, and without an international dimension, should receive a sentence of five to six years after trial. Sentences may be adjusted upwards or downwards according to circumstances. AUTONUMOUT The Court of Appeal also said that the sum of money involved was only one of the factors to be taken into account, and not even the most significant factor. AUTONUMOUT In this case, the judge said in her Reasons for Sentence: Even a small scale credit card fraud with small losses by an offender who is not alleged to be part of a larger syndicate can attract 3 years imprisonment on a guilty plea . (Emphasis applied.) AUTONUMOUT It is clear that the present case involved a small, unsophisticated operation involving one credit card (though the applicant admitted through his counsel that he was prepared to use the other credit card should the shop refuse to accept the AE card), and the amount involved was relative small (just under \$10,000). There was no evidence that the applicant was part of a syndicate. It is unfortunate that the judge

said she accepted there was nothing to suggest that the applicant was part of a larger syndicate when there was no evidence that the applicant was part of any syndicate large or small on this occasion. The fact that he was part of a syndicate on the last occasion, and that he adopted the same modus operandi to obtain goods on this occasion, does not mean that he was part of a syndicate on this occasion. AUTONUMOUT It is also incorrect for the judge to say that such a fraud would attract three years imprisonment on a guilty plea when the Court of Appeal endorsed an overall starting point of three years. There is of course a possibility that it was just a slip on the part of the judge. AUTONUMOUT Although the Court of Appeal held in *Cheung Ka Wo Johnny* that an overall starting point of three years imprisonment for a small scale credit card fraud involving a sum of less than \$9,000 was not manifestly excessive, one has to bear in mind that that defendant in that case successfully used two credit cards to make three purchases amounting to just under \$9,000 and his further attempt to obtain goods valued at over \$3,000 failed, resulting in his arrest. The overall starting point of three years was for four offences. AUTONUMOUT In *Tu I Lang* (the authority relied upon by Ms Chan), the applicant pleaded guilty to one count of using a forged credit card and one count of possession of two forged credit cards. The facts disclosed that the applicant tried to buy a mobile phone with a forged credit card. When the shop assistant became suspicious and the police was called, two more forged credit cards were found on him. The trial judge adopted a starting point of four years imprisonment and the applicant was sentenced to concurrent 32 months imprisonment. On appeal, the Court of Appeal referred to, among others, *Chan Sui-to* and *Cheung Ka Wo Johnny* and reduced the starting point to one of three years imprisonment. AUTONUMOUT Similarly, in *HKSAR v Lau Pui Hang*, CACC 393/2003 and *HKSAR v Watt Siu Hung*, CACC 93/2001, a three years starting point was adopted for a relatively minor credit card fraud case. AUTONUMOUT The applicant was convicted of one count of credit card fraud and one count of theft involving two credit cards. The potential for loss was relatively limited. Leaving aside his previous convictions for the moment, in all the circumstances of this case, a starting point of three years would have been appropriate for the 1st count. AUTONUMOUT The applicant was not a first offender. He has previous conviction of offences involving dishonesty. He was sentenced to two years imprisonment in 2011 for having taken part in a syndicated credit card fraud and he committed the present offence four months after his release from prison. The judge was certainly entitled to take such into account when considering the appropriate starting point (see *HKSAR v Chan Pui Chi* [1999] 2 HKLRD 830). AUTONUMOUT As to the judge's view that the applicant would continue to commit credit card fraud had he not been caught on this occasion, such view amounts to a speculation on the part of the judge. There was no evidence before the judge to support such a view even though the applicant faced financial difficulty. If the judge had imposed a heavier sentence on account of some future, not committed offences, then it is wrong for her to do so. AUTONUMOUT Despite the able argument advanced by Ms Chan, we do not see anything in the applicant's background to mitigate what he had done except his guilty plea. Committing this serious crime because of financial strain is not a mitigating factor. AUTONUMOUT Even taking into account the applicant's previous convictions, including one similar to the present count, a starting point

of four years was, in our views, manifestly excessive. A starting point of three years and three months imprisonment would have been appropriate in this case. AUTONUMOUT The applicant is entitled to a full one third discount and the sentence should be one of two years and two months. We agree with the judge s approach in ordering the sentence imposed on 1st Count to run concurrently with the sentence imposed on the 2nd Count.

Conclusion

AUTONUMOUT For these reasons, we granted leave to the applicant to appeal against sentence and treated the application as the appeal proper. We allowed the appeal and ordered that the sentence of 32 months be reduced to one of 26 months imprisonment, to run concurrently with the sentence imposed on the 2nd Count. (Peter Cheung) Justice of Appeal (Judianna Barnes) Judge of the Court of First Instance Miss Chan Wing Han, Agnes, ADPP of Department of Justice, for HKSAR Ms S C Chan, Terry, instructed by Alfred Lam, Keung & Ko, assigned by Director of Legal Aid, for the 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 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 A B C D E gd(AZ gd1{ gd1{ gd2# h(AZ h(AZ h(AZ h(AZ gde@ gde@ yt(AZ h7bb hp_. hc]H hc]H hc]H gd(AZ h}a7 hU?I h}a7 h(AZ h(AZ gdM? gd_n yt(AZ &`#\$ F G H I J K L M N O P Q R S T U V yt(AZ yt(AZ [Content\_Types].xml Iw}, \$yi} \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/ theme1.xml w toc'v )I`n 3Vq%`#q x)r :TZaG I u3 L+M2 e\O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/ theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/ drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> 6vG6 6vG6 CACV Jeannie MY MokSo ABC.dot Ngong Chow Lai Microsoft Office Word Judiciary CACV Title Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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