

HONG KONG / JUDGMENT

HKSAR v. WONG CHI YU

COURT

Court of First Instance

DECIDED

23 October 2008

CASE / FILE NUMBER

HCMA367/2008

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Before: Deputy High Court Judge Mackintosh in Court Date of Hearing: 23 October 2008 Date of Judgment: 23 October 2008

J U D G M E N T

The appellant was convicted after trial in the magistracy of an offence of fraud contrary to section 16A of the Theft Ordinance, Cap. 210. He was sentenced on the 21st April 2008 to four months imprisonment and ordered to pay \$5,000 restitution. He has appealed against his conviction and sentence and was granted bail by a judge in the Court of First Instance after spending about two weeks in custody. Today, he abandons his appeal against conviction. That position was indicated by solicitors on his behalf before today, but no formal steps to abandon were taken. I dismiss his appeal against conviction accordingly. The facts can be found in the statement of findings of the magistrate. At the material time, the appellant worked with a company called AMTD Financial Planning Limited (AMTD) which provided a referral service to finance companies for clients seeking loans. Assistance in making applications would be made and if a referral was successful, AMTD would receive a referral fee from the finance company. Fees were not payable to AMTD by its clients. In March 2006, a client (PW1) sought a loan of \$320,000 through a company similar to AMTD called Excel Gain Consultants Ltd. This was handled by PW2. The loan application was not successful but PW2 promised to refer PW1 to someone else. A few days later, a man giving the name Chong, who was in fact the appellant, called PW1 and offered to assist him in obtaining a loan through a company called Super Star Consultants Ltd (Super Star). Super Star was a shell company set up in 2005 as a result of discussions between the appellant and some associates, one of whom (PW6) was the shareholder and director. PW1 was told by Chong that he had successfully made an application for a loan on his behalf with UA Finance Ltd and that he had to pay Super Star's fees. These were initially put at \$7,000 but were

reduced by negotiation to \$5,000. By the 16th March 2006, the loan with UA Finance was finalized and PW1 went to a particular bank branch to collect the money. It was in the form of cheques (to credit card companies to whom he owed money) and cash. At the bank, he was met by the appellant, who was wearing a mask to disguise his identity and who presented himself as Mr Chong of Super Star. The mask was only briefly removed during their contract, at the request of PW1. The loan was paid out to PW1 and Chong accompanied him to various banks to make payments. In due course, PW1 paid him the \$5,000 in cash as the agreed fee. In April 2006, staff at AMTD, which had in fact handled the loan application through the appellant as its employee, called PW1 to ask him if he was satisfied with the service provided by the company. PW1 was no doubt surprised at this because he did not realise that he had been dealing with AMTD and when he was told that AMTD charge no fees, he complained that he had paid Chong \$5,000. Later, Chong, that is, the appellant, in an attempt to deflect PW1 from his complaint, contacted PW1 and said that the fees were nothing to do with AMTD, they were the fees paid to Super Star. Of course, AMTD made enquiries with the appellant who had handled the application to UA Finance. The appellant lied by saying that PW1 had been referred to him by Chong of Super Star and he did not ask for the fees. The long story can be cut short by saying that the arrangements were then made to deceive the investigators of AMTD into believing that Chong was a staff member of Super Star. The appellant in fact brought in PW6, the associate who formally operated Super Star as its shareholder and director, to cover for him with AMTD's enquiries. The explanations were given to AMTD through PW6 at a meeting and were backed up by a written report by the appellant to AMTD which perpetuated the lie. The trial and reasons for sentence Eventually, the matter was reported to the ICAC who investigated and the appellant was interviewed and was charged in December 2007. He pleaded not guilty and a trial was then arranged. The matter was contested in full over 2 days and eventually the appellant was convicted. After conviction, the magistrate called for a probation and community service report. He left the appellant on bail whilst those were obtained. The report set out the background of the appellant and indicated that he was not in need of probation and but it recommended community service as being appropriate. However, the magistrate declined to follow that recommendation stressing that the offence involved the use by the appellant of his knowledge of PW1's details, obtained through his own employment, to cheat to PW1, a man apparently in dire need of money to pay off existing debts, out of \$5,000, which was a substantial sum to PW1. He also cited the appellant's lack of remorse. Expressions of remorse had been made to the probation officer by the appellant but these were regarded as lacking genuine regret for the offence: they were more an expression of regret at being caught and ultimately convicted. The appeal Today, Mr Parry argues three grounds of appeal. Firstly, it is submitted that the Magistrate was wrong to impose imprisonment having called for a community service report because the calling of a such a report had raised a legitimate hope in the mind of the appellant that such an order would be made. Today, there is before me an agreed translation of this very experienced magistrate's remarks upon adjourning sentence, where he said, expressly and emphatically, that the request for a probation/community service report was not to be taken as any indication whatsoever that such orders would be made, that their purpose was to obtain information. That was exactly the proper approach when the offender's bail was being renewed and it shows that

there is no substance whatsoever to this complaint. In the other grounds of appeal, it is submitted that in fact this case was suitable for community service and that the accused himself fell within the generally laid down criteria for such orders as set out in the case of *R v Brown* [1981] 3 Cr. App. R. (S) 294, where the well-known six factors are set out. Various authorities have been cited which expand on these factors. Generally speaking, they should all be present before an order is made. They require, as was said in one of the cases, *HKSAR v Wong Yiu-kuen* [2001] 1HKC 486, cumulative consideration. Here there is an issue about one of the factors, that is, whether the appellant held any genuine remorse. Mr Parry argues that he was remorseful, even though that remorse manifested itself after conviction following a trial. It was apparent, it is submitted, from expressions of remorse in the probation officer's report and in the appellant putting together the funds to repay the victim. I have considered this aspect. I am in no doubt that whilst remorse was expressed, it was not genuine. After sentence, the appellant signed a notice of appeal against conviction, which, whilst it was withdrawn two weeks later when he made his bail application, is a clear indication that there was no real regret at what he had done. Thus that factor, normally required before a community service order can be considered, was absent at the time of sentencing and it is difficult to generate it now, for an appeal, with any real force. This is of course a re-hearing of the matter, at which I am required to determine what was the right sentence, always bearing in mind that the magistrate heard the trial, saw the witnesses (including the victim), saw the defendant give evidence on the special issue and was therefore in a prime position to decide what was the right sentence. This was, as the magistrate said, a case of someone using his employment to obtain details of the victim which were used to perpetrate fraud; and when the threat of discovery arose, elaborate steps to cover up the offence and to deflect the enquiries were taken. That cover-up did not go directly to the quality (that is to say, the seriousness) of the offence which had already been committed; but it is relevant to the gravity of the appellant's dishonest conduct overall and some regard must be taken of it. This was not, as the probation officer said in his report, and offence of momentary greed. It was carefully planned and executed using a shelf company, available to the appellant through his associate PW6; and PW6 was used as part of the cover-up. It was a mean offence against a vulnerable victim, for reasons which I have earlier expressed, and the magistrate's characterisation of it as quite serious was, if anything, an understatement. I am in no doubt that community service was not appropriate in this case given the lack of remorse shown by the accused and the gravity of the offence itself. It was an offence which called for a sentence of imprisonment to be imposed despite the fact that the accused had no previous convictions. If he had shown remorse, and had pleaded guilty, community service might have been available: but it was not and is not now in my judgment. The only thing that has changed from the date of sentence is that the accused has spent two weeks in custody. That, for a young man of clear record, must have been a considerable shock to the system. To an extent, it balances the absence of real remorse, not so that the court could consider community service; but to the extent that the court should consider whether the sentence of imprisonment could be suspended. I do not criticise the magistrate's sentence: at the time and in the circumstances before him, it was proper; but given the time spent in custody since sentence, I am of the view that the sentence of imprisonment can be suspended. The fact of imprisonment marks the gravity of the offence; the suspension marks the

mitigation of the clear record and time already served. I therefore allow this appeal against sentence to the extent that I suspend term for a period of two years. I shall now explain to the appellant the effect of that order. (Colin Mackintosh) Deputy High Court Judge Ms Vivien Chan, Senior Public Prosecutor, of the Department of Justice, for the Respondent Mr Leslie Parry, instructed by Messrs John M Pickavant & Co, for the Appellant (re Sentence) Appellant, in person, present (re Conviction) 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 1udk 1udk HCMA.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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