

HONG KONG / JUDGMENT

HKSAR v. WONG SIU MAN

COURT

Court of First Instance

DECIDED

19 December 2007

CASE / FILE NUMBER

HCMA955/2007

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bjbj

Before: Hon Beeson J in Court Date of Hearing: 11 December 2007 Date of Judgment: 19 December 2007

J U D G M E N T

The Appellant was tried in the Magistracy, by Mr Stephen Smout, on one charge of Dealing with Property known or believed to Represent the Proceeds of an indictable offence, contrary to sections 25(1) and (3) of the Organised and Serious Crimes Ordinance, Cap.

455. She was acquitted after trial and applied for the costs of the trial. Her application was refused by the Magistrate. The Appellant appealed against that order. Judgment was reserved at the conclusion of the appeal hearing on 11 December 2007 and is now given. The facts which emerged from the evidence showed that the Appellant had borrowed \$5,000.00 from a man called Chan, who lent money at excessive interest rates. Chan told her to open a bank account, into which the interest on her loan (\$750.00 every 10 days) was to be deposited. The Appellant was required to hand over to Chan the cash withdrawal card and PIN before she received the loan monies. The Appellant repaid her loan between 30 August 2006 and 31 October 2006. She did not close the account, because the bank statements sent to her showed there was money in the account from transactions about which she knew nothing. She feared trouble from Chan if she closed the account, as she believed he used the account himself. The Appellant gave evidence that she did not know that the money passing through the account was from transactions connected to loan-sharking; she believed Chan was engaged by a bona fide finance company. In March 2007 she closed the account which had a credit balance of \$110.62 at that time. Between 1 September 2006 and 9 March 2007, a total sum of \$162,090.00 had passed through her bank account transactions were recorded in the statements. In his Statement of Findings, the Magistrate accepted [B51] that the

Appellant was truthful in saying she did not know the monies paid into the account represented the proceeds of an indictable offence; that she had not operated the account; that she had no knowledge of payments other than her own, and although she believed that Chan was probably using the account, she did not know, or have reasonable grounds to believe, that payments into the account were the proceeds of indictable offences. On this basis the Appellant was acquitted of the charge. The Magistrate refused to grant costs as, in his view, the Appellant had brought suspicion on herself:

- (a) by surrendering control of her cash withdrawal card and PIN to Chan; and
- (b) by failing to take any action between October 2006 and March 2007, despite knowing from her bank statements that monies, other than her own, were passing through the account. Counsel for the Appellant submitted that the Magistrate's refusal to award costs was contrary to well-established legal principles and that his stating that she had brought suspicion on herself was wrong in fact and not supported by the evidence. In support, counsel for the Appellant relied on *Tong Cun-lin v HKSAR* [2000] 1 HKLRD 113 which sets out the principles applicable to the awarding of costs, and noted that the court had to look at the conduct of the Appellant during the investigation and trial and should consider the strength of the case and the circumstances under which she was acquitted. Counsel argued that the Magistrate's reasons for refusing costs were not compatible with his finding in favour of the Appellant that her evidence was truthful. He pointed out that the Appellant had handed the bank card and PIN to Chan before she received her own loan and before she made her first deposit of interest. She had no obligation to take any action between the end of October 2006 and March 2007, her explanations had been accepted by the Magistrate and she could not be said to have brought suspicion on herself. Counsel for the Appellant referred to *The Queen and Tse Sun-wah Cr. 489/1996*, an appeal against a conviction on a similar charge, based on a scheme for repayment of monies like that in the present case. Counsel in *Tse Sun Wah*, argued that the conclusion the judge drew from the facts against Tse, was neither irresistible, nor the only reasonable one which could be drawn. There was no evidence that Tse had exercised personal control over the account, nor evidence that he had knowledge of the loan-sharking operation. The opening of the account, of itself, did not amount to dealing with property representing the proceeds of an indictable offence, because when it was opened, there were no transactions connected to such property. Further, without evidence of Tse's involvement in the management of the account, it could not be established that he knew, or had reasonable grounds to believe, the transactions represented loan-sharking transactions. Although the facts collectively were suspicious, they did not admit of an irresistible inference of guilt. The Court of Appeal held that the prosecution had failed to show that Tse was aware of the alleged purpose for which the account was to be used, and thus there was insufficient evidence to support the irresistible inference the judge had purported to draw. Mr Polson, who appeared for this Appellant, relied on similar arguments to those advanced in *Tse*. It is difficult to see the logic of the Magistrate's position on costs, given that he accepted the Appellant gave truthful evidence. He did not clarify the basis for his refusal of costs by saying what, if anything, the Appellant

was obliged to do, or what action she should have taken. Mr Cheng, who appeared for the Respondent, submitted that the Appellant must have known that Chan was a loan shark, so she had reasonable grounds to suspect the money was tainted and that she could have asked questions of Chan, or reported the matter to the police, or the bank. Mr Cheng contended that her inactivity made the Appellant's conduct suspicious, so as to justify the refusal of costs. However, as the Appellant was a 21 years old female of limited education, had a clear record and was working as a care assistant in a rest home at the time, the suggestions as to what she should have done seem entirely unrealistic, particularly in the light of her evidence that she feared Chan. I accept that the discretion to award costs lies with the Magistrate and am aware of the strictures against an appellate court interfering lightly with the exercise of such a discretion. With the principles of *The Queen v Kwok Moon-yan* [1989] 2 HKLR 396 and *Tong Cun Lin v HKSAR* [2000] 1 HKLRD 113 in mind, I have endeavoured to look at the circumstances objectively in a broad sense. Having done so, I consider that there was not enough evidence to justify the Magistrate's deciding that the Appellant had brought suspicion on herself. Accordingly, I allow the appeal and rescind the order refusing the Appellant her costs. I make a fresh order granting the Appellant her costs of the trial in the Magistracy and the costs of this appeal; such costs to be taxed if not agreed. (C-M Beeson) Judge of the Court of First Instance Mr Raymond Cheng, SGC of the Department of Justice, for the Respondent Mr Ian Polson, instructed by Messrs Simon C W Yung & Co, for the Appellant

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Prepared on 27 October 2026 · Esheria