

HONG KONG / JUDGMENT

HKSAR v. WONG SUN SANG

COURT

Court of First Instance

DECIDED

11 May 1999

CASE / FILE NUMBER

HCMA189/1999

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bjbj 1999, No. MA 189 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 189 OF 1999

BETWEEN HKSAR Respondent and WONG SUN SANG Appellant

Coram: The Honourable Mrs Justice V. Bokhary in Court Date of Hearing: 11th May 1999 Date of Delivery of Judgment: 11th May 1999

J U D G M E N T

On 15th January 1999 this Appellant was convicted by Ernest Lin Esq. in the Magistrate s Court at Tuen Mun on one charge of procuring the making of an entry in a record of a bank by deception, contrary to section 18D of the Theft Ordinance, Cap. 210. He now appeals against conviction. The particulars of offence set out in the charge as re-amended read: Wong Sun-sang, you are charged that on the 3rd day of February, 1993 at a place outside Fountain Restaurant, No. 31-33, Hop Yick Road, Yuen Long, in Hong Kong, you did dishonestly with a view to gain for yourself or another or with intent to cause loss to another, procure the making of an entry in a record of the Ka Wah Bank Limited, namely, a deposit entry of HK\$15,183.00 to the account of WONG Sun-sang No. 709-2-10768-7-00 with the Ka Wah Bank Limited by deception, namely, by falsely representing, that by virtue of an agreement, you would use the said sum for the registration of a vehicle numbered FB5806 under the name of LAM Kai-kwong and for settling the insurance premium of the comprehensive insurance for the said vehicle under the name of LAM Kai-kwong. There was no dispute at the trial as to the background to the case. In his Statement of Findings, the Magistrate said: The background of this case was not in dispute. The victim of this case Mr. LAM Kai-kwong (hereinafter referred to as PW1) came to know the Defendant in 1992 through the

introduction of a friend. The Defendant was in the business of selling second hand vehicles. In early 1992 PW1 had acquired a second hand vehicle (Registration Number FB5806, hereinafter referred to as the said vehicle) through the Defendant who arranged to take out a comprehensive policy for the same. On the 3rd day of February 1993 PW1 handed a cheque drawn on his account with the Kwangtung Provincial Bank (Account No. 019-595-00075461) in the sum of HK\$15,183.00 to the Defendant at the abovenamed address. The cheque was subsequently deposited into the Defendant's own account with the Ka Wah Bank Limited (Account No. 709-2-10768-7-00). The said sum was transferred from the victim's account to that of the Defendant and an entry to this effect was made accordingly on the record of Ka Wah Bank Limited: see the Banker's Affirmation p.7. Having noted that, the Magistrate moved on to how the prosecution put its case, saying: Simply put, the prosecution contended that the Defendant had acquired the cheque by falsely representing to PW1 that he would use the sum stated thereon to arrange for payments of comprehensive insurance and the annual registration fee for the said vehicle. That by obtaining the cheque which was subsequently paid into his own account with Ka Wah Bank, the Defendant had procured an entry in the bank record to the effect the aforesaid sum had been transferred from the victim's account into that of the Defendant. As to the defence case, the Magistrate outlined it in this passage in his Statement of Findings: At the end of the prosecution case, I ruled that there was a case to answer. The Defendant elected to give evidence. In 1993 he had a standing arrangement with Insurloyal Consultants Limited in which he could take out vehicle insurance policies for and on behalf of his customers on a credit term of 60 days. After arranging for a Cover Note (i.e. A short term insurance as opposed to a standard one year term) and paying the registration fee for the said vehicle, the Defendant found himself in financial difficulty and was unable to settle the premium. In another word, the Defendant was saying that at the time of receiving the cheque and paying the same into his own account, he had not intention of deceiving PW1. But the Magistrate was satisfied beyond reasonable doubt to the contrary, and therefore convicted the Appellant. I turn now to the Perfected Grounds of Appeal against Conviction put in on the Appellant's behalf. Ground 1 reads: The Learned Trial Magistrate erred in convicting the Appellant of the offence of: Procuring the making of an entry in a record of a bank by deception, contrary to section 18D of the Theft Ordinance, Cap. 210, Laws of Hong Kong, because there was no or no sufficient evidence of:-

- (i) any deception on the Appellant's part; (ii) any intention to deceive the victim; (iii) any dishonesty and that; (iv) the Appellant having the necessary mens rea at the time of the deception. Reading the Magistrate's Statement of Findings, one sees that after analysing and then rejecting the Appellant's evidence denying guilt, the Magistrate said: However, the duty to prove guilt still rests with the prosecution. By reasons of matters stated above, I am satisfied beyond all reasonable doubt that the Defendant did obtain the cheque in question by representing to PW1 that the amount stated thereon would be used to pay for the Insurance premium and Registration fee and that the Defendant did cause the cheque to be paid into his own account with the Ka Wah Bank, thereby procuring an entry to be made in the bank record. After the cheque had been cashed, I found that the Defendant had deliberately avoided PW1. His conduct before and after the incident was such that the only

possible inference I could draw was that he had acted dishonestly when he represented to PW1 the purposes of the funds. In other words, at the time of obtaining the cheque and depositing the same in his own account the Defendant knew that the money would not entirely be used for the purpose he promised. He had made the representation to PW1 in order to induce him to part with the cheque. That, as I see it, demonstrates that there was sufficient circumstantial evidence to support findings of deception, intention to deceive, dishonesty and mens rea at the time of deception. Ground 1 fails. I turn to Ground 2, which reads: The Learned Trial Magistrate failed to consider properly or at all in his Statement of Findings (see: Appeal bundle pages 79-83) the fact the Appellant;

- (a) registered the vehicle with the Government;
- (b) paid the vehicle registration licence which was about HK\$4,000;
- (c) subsequently met PW1 LAM Kai-kwong in fact less than 1 week after PW1 gave the cheque to the Appellant and at that meeting gave PW1 the new registration licence. (see: transcript of proceedings page 6 Appeal bundle page 19 lines R-T and page 7 Appeal bundle page 20 lines A-J);
- (d) at the aforesaid meeting when the Appellant gave the vehicle registration to PW1 the Appellant told PW1 there would be no problem for the insurance. (see: transcript page 7, Appeal bundle page 20 line J);
- (e) the fact that there was clear evidence that the vehicle was insured and was arranged insurance cover up to the 23rd April 1993. The Magistrate's Statement of Findings include the following paragraphs: To prove the case the Prosecution mainly relied on the testimony of PW1 who stated that his acquaintance with the Defendant was entirely business orientated. They did not socialize. When the insurance policy for the said vehicle was about to expire, the Defendant contacted PW1 offering to arrange for the renewal of insurance policy and the payment of the registration fee, the total sum for which being HK\$15,183.00. To which offer PW1 accepted. At the request of the Defendant PW1 made out a cheque; the payee of the cheque was not filled in; and handed it to the Defendant for paying the registration fee and insurance premium. A week later the Defendant met PW1 to give him the renewed Vehicle Licence Disk together with the verbal assurance that the new insurance policy would be in order. It was the last time PW1 met or spoke to the Defendant. Some time in mid April of the same year when PW1 received a letter dated 15th April 1993 from Insurloyal Consultants Limited to the effect that the insurance premium for the said vehicle in the sum of HK\$11,893.92 had remained outstanding. He was also warned that the policy would be cancelled if the premium had not been paid by 23rd April 1993: See P1. The Defendant could not be reached on telephone and even his office of Join Win Motors Company in Yuen Long was closed. Having exhausted all the means to reach the Defendant, PW1 finally settled the outstanding sum with his own funds and reported the matter to the police. Mr. TSANG Ka-keung (hereinafter referred to as) was the director of Insurloyal Consultants Limited in 1993 and the signatory of P1. He confirmed the content of the letter

was true. In my view, the matters set out in Ground 2 received proper consideration by the Magistrate. Ground 2 also fails. I turn to Ground 3, which reads: The Learned Trial Magistrate was wrong to state and conclude in his Statement of Findings (see: Appeal bundle page 82 line 2), ... the significance of such a cover note had never become apparent when, it was a fundamental part of the defence case that such a cover note had been issued to show the Appellant did intend to keep to the agreement and/or arrangement at the time PW1 handed over the cheque. That takes the Magistrate's words out of context. What the Magistrate actually said was this: Mr. Francis, solicitor acting for the Defendant during cross-examination suggested to PW1 that in addition to the Licence Disk, an Insurance Cover Note was also given to him by the Defendant. The significance of such a Cover Note had never been apparent. Even if it had been given (which, for reasons stated below, I did not accept was the position), it could not alter the fact that the premium had not been paid by the Defendant as he was supposed to do. It might, however, lend support to the Defence contention that the Defendant had honestly intended to carry out the agreement he promised at the time the cheque was handed over. In any event PW1 denied that such was the case. All in all, I noted that the substance of their testimonies had not been challenged; in particular, PW1's assertion that the cheque would not otherwise be given to the Defendant if it was not for the purposes stated by the Defendant had not been contradicted by either cross-examination or by the Defendant's testimony. Having the opportunity of observing them while they were giving evidence and after scrutinizing their evidence, I was satisfied that they were honest and true witnesses. I accept their evidence in its entirety. There is no substance in Ground 3, and it too fails. I turn to Ground 4, which reads: The Learned Trial Magistrate erred when he stated in his Statement of Findings (at Appeal bundle page 83 lines 11-14) at the time of obtaining the cheque and depositing the same in his own account the Defendant knew that the money would not entirely be used for the purpose he promised. He had made the representation to PW1 in order to induce him to part with the cheque. , when the actions of the Appellant shortly after receiving the cheque and up to the time PW1 and the Appellant last met tended to point the other way that is, the Appellant had every intention of carrying out his side of the agreement and/or arrangement. The Magistrate dealt with the Appellant's actions in this passage in his Statement of Findings: I was not impressed by the Defendant as a witness. His account of events leading to his failure to honour his obligation to settle the premium payment was, to put it at its highest, unlikely. While this court accepted that in the ordinary course of business, it was not unheard of companies would have cash flow problems; yet the course of action subsequent to the deposit of the cheque had rendered his contention of good faith suspect. If the cash flow difficulty had been unexpected, I found it extremely unlikely that he would behave as he did by not contacting PW1. That at the same time he could not be reached either by telephone or in his office was suspiciously convenient to him. His explanation why he was reluctant to contact PW1 was a prime example of twisted logic: because his girl friend was a relative of PW1, he did not want him to know about his own predicament. That was despite the fact that his girl friend had said to the Defendant that she would repay PW1 on the Defendant's behalf. I also noted that apart from his bare contention, there was not an iota of evidence to

support his account. PW3 was not even asked in cross-examination about the communication with the Defendant after the premium had been found outstanding. There was no Cover Note produced. In fact, PW3 was not asked to confirm the same had been issued. For the reasons above, I did not find the Defence contention reasonably credible. I rejected the Defendant's evidence. In my view, the Magistrate's approach is not open to the attack made by Ground 4, which ground also fails. Finally, Ground 5 reads: In all the circumstances of the case the conviction is unsafe and unsatisfactory. That is an assertion which cannot stand when the other grounds have failed. In the result, this appeal is dismissed. (V. Bokhary) Judge of the Court of First Instance, High Court Mr William Allan (instructed by Messrs. Paul Kwong & Co.) for the Appellant Mr Paul K. Madigan (of the Department of Justice) for the Respondent - PAGE - t"@@ f!@@ ~ytoje` [|wrmheb_Z @\ \SSLAI\HP LaserJet 4 Plus Ne02: winspool HP LaserJet 4 Plus \SSLAI\HP LaserJet 4 Plus \ \SSLAI\HP LaserJet 4 Plus 1999, No PoolA/Karen Normal Microsoft Word 8.0 Judiciary 1999, No Title _PID_GUID i!^ Microsoft Word Document MSWordDoc Word.Document.8

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