

HONG KONG / JUDGMENT

HKSAR v. YAU CHUN HUNG

COURT

Court of Appeal

DECIDED

25 July 2007

CASE / FILE NUMBER

CACC517/2006

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Before : Hon Stuart-Moore, VP, Stock JA and McMahon J in Court Date of Hearing : 25 July 2007
Date of Judgment : 25 July 2007

J U D G M E N T

Hon Stock JA (giving the judgment of the Court): AUTONUMOUT On 2 November 2006 this applicant was convicted by Deputy Judge Sham in the District Court of conspiring to traffic in dangerous drugs. He was sentenced to a term of six years imprisonment. He now seeks leave to appeal against conviction and sentence. AUTONUMOUT The charge alleged that the applicant, between 1 March 2005 and 30 June 2005 conspired with Ho Tsan Lam, Wong Nga Shun and Chan Pui Man to traffic in dangerous drugs, namely heroin and cocaine. AUTONUMOUT At the material time, the applicant was a Correctional Services Department officer posted to the Lai Chi Kok Reception Centre. Ho and Wong were detainees of that Centre. Chan was Ho s girlfriend. AUTONUMOUT The case disclosed by the prosecution evidence was that in March 2005 an inmate called Ah Hong approached Wong with a proposition. The proposition was that Ho should arrange for the delivery of drugs to the applicant who would bring the drugs into the Centre and deliver them to Wong. The applicant would require a payment of \$50,000; \$20,000 of which was to be paid in advance and \$30,000 once the drugs had been delivered to Wong. The idea was that the drugs would be put into condoms which in turn would be placed in a cigarette packet. AUTONUMOUT Wong put the proposal to Ho who agreed to arrange for the drugs to be delivered to his girlfriend, Chan. He saw his girlfriend in prison and instructed her to secure \$20,000 and a new SIM card. With the assistance of another inmate who made contact with Ho s drug partner outside prison, Ho arranged for the drugs to be delivered to her. She was to receive the drugs and to hand them to a person who would by then have contacted her and identified himself as Ah Dee . She was also to pay that person \$20,000 at the time the drugs were handed to him.

AUTONUMOUT Ho then provided Wong with the telephone number which Chan secured with her SIM card. There was then a meeting between Wong and the applicant during which Wong wrote the telephone number on a piece of paper and handed it to him. He told the applicant to refer to himself, when speaking to Ho's girlfriend, as Ah Dee. Some days later, at another meeting, the applicant told Wong that the drugs would be ready in a couple of days. Subsequently someone telephoned the girlfriend on the number provided (63735473), and provided her with a telephone number at which he could be contacted. An arrangement was made between them to meet and at that meeting she gave the person whom she met the drugs and \$20,000.

AUTONUMOUT One morning during the Easter holidays, the applicant went to Wong's cell and delivered to him the cigarette packet containing condoms with the heroin and cocaine. Wong gave half the drugs to Ho and kept half for himself, some for their own consumption, the rest for sale to other inmates. It was hoped that the \$30,000 balance would be met from the proceeds of sale. AUTONUMOUT In April 2005, some urine tests were conducted in the Centre. Wong's urine tested positive for drugs. AUTONUMOUT There then came a time when the applicant gave Wong a Hong Kong Jockey Club betting account number and asked for \$5,000 to be paid into it. That account number belonged to another prison officer to whom the applicant owed money. The prosecution evidence established that that money was, at that time, paid into that account and the officer himself gave evidence as to the money owing and paid. The evidence of the accomplices was that that money had been put into that account by Chan on Ho's instructions.

AUTONUMOUT After the urine tests, the drug dealers in the prison had to be careful and drugs were disposed of, so the balance of the amount owed to the applicant could not be paid, although he pressed Chan, Wong and Ho for it. AUTONUMOUT Whilst investigating the case, officers of the ICAC searched the applicant's locker at work and in his diary was discovered an entry of the telephone number 63735473, that is Chan's telephone number, as well as the name Fat Lam which happens to be Ho's nickname. AUTONUMOUT No evidence was called by the applicant at trial. AUTONUMOUT In his careful and extensive Reasons for Verdict, the trial judge reminded himself that the prosecution case rested heavily on the evidence of Ho, Wong and Chan who were each testifying under immunity from prosecution, had criminal records, and had reason to lie.

He was nonetheless satisfied that each had told the truth. He noted as well certain discrepancies in their testimony but concluded that none provided grounds for concern. AUTONUMOUT The applicant has submitted extensive and very detailed grounds of appeal and written argument.

AUTONUMOUT Amongst the many matters canvassed by the applicant are the following: The fact that the officer Ho to whom money was lent had himself borrowed money from others on more occasions than had the applicant. This is a matter that is of no relevance whatsoever to this case; He suggests that it makes no sense for him to have asked Chan for only \$5,000 to be paid into the betting account when he was allegedly owed \$30,000 by the co-conspirators. This complaint makes no sense: the evidence was that he owed a specific amount to the fellow officer and pressed the co-conspirators separately for the balance; He has taken us to entries in the diary kept by Chan which contained figures suggesting the receipt of a sum, over the period in question, substantially in excess of the likely proceeds of sale within the prison of the imported drugs. This point is a bad one because it assumes that all the figures found in that diary related to this conspiracy. He contends that the earliest possible time at which Wong could have received

the drugs from the applicant was the morning of 26 March 2005 and that the diary of Chan produced at trial shows her in receipt of money on 28 March 2005. He contends that this was far too short a time during which to arrange for making available the bank account which was in fact made available for the receipt of proceeds of sale of the drugs from prisoners, and for those prisoners to get information to their outside contacts to make payments into that account. The fallacy in this submission is that it assumes that the money to which the diary refers as having been received on 28 March was money from the proceeds of the drugs imported into the prison by the applicant. Then he queries and speculates as to the source of the money to pay for the drugs that were ultimately imported into the prison. This speculation cannot advance his application. He says that the telephone calls made to the mobile telephone of Chan from within the Centre were made at a time when he, the applicant, was on duty and that, therefore, it was impossible for him to be the caller. This is not logical since there was no evidence as to the ease with which those on duty could or could not make calls. There is also a suggestion by him that officers in the CSD were not allowed to carry mobile telephones and had to be screened for metal detection. This is evidence from the applicant to us. He did not give this evidence at trial. This does not appear to have been put at trial but, be that as it may, there may be many circumstances in which these calls could nonetheless have been made. Mr Hui counsel for the respondent has pointed out it is only an example that this applicant's service record shows a lapse in reporting for duty on time. In the same vein, the applicant also says that he could not have met Chan in the small hours of 25 March 2005 because he was on duty that night. The fact is that he was only on duty until 1:45 a.m. on 25th and could easily have met her thereafter. He points to inconsistencies in the evidence. The judge was aware of these and we do not think that they are such as to cut across the rationale for the core findings of fact. He argues that there was an absence of evidence corroborating the prosecution case, for example, that no CCTV recording of him passing the drugs at Wong's cell was shown. This, in the event, is neither here nor there. There was in fact corroborating evidence, notably, the entries in the applicant's diary and the payment into the account of the fellow officer. AUTONUMOUT There is nothing in these or any of the other grounds of appeal and the application for leave to appeal against conviction is dismissed. Sentence AUTONUMOUT The applicant was aged 33 years at the time of sentencing and there was a previous conviction for possession of a Part I poison but that was an offence committed after the commission of the present offence. AUTONUMOUT The judge approached the question of sentence as follows. The evidence was that the conspirators agreed to traffic in one ounce of No. 4 heroin, equivalent to about 28.35

9. The court adjourned in order to obtain expert evidence about the average purity of such heroin available in the drugs market at the time of the offence and the result was an estimate of 61.5% purity. The judge therefore took the purity of the drugs smuggled by the applicant to be somewhere near 17.43 g; and from that he took a starting point, in accordance with the guidelines in *R v Lau Tak Ming and others* [1990] 2 HKLR 370, of five years imprisonment. However, given that this applicant was a prison officer and abused his position in order to smuggle drugs into a prison, the judge increased that point to one of six years and, in the absence of mitigation, sentenced the applicant to that term.

AUTONUMOUT The applicant says that the judge ought not to have taken that amount to gauge the starting point. We do not see why not. The approach of the judge to the question of sentence was as conscientious as was his approach to the question whether the prosecution had proved its case. The sentence was appropriate and there is nothing in the application for leave to appeal against sentence. Accordingly that application is also dismissed.

[Submissions] AUTONUMOUT We have heard the applicant as to why we should not exercise our power under section 83W of the Criminal Procedure Ordinance, Cap. 221, to order that the period between the making of this application and its determination shall not count towards his sentence. AUTONUMOUT The grounds of appeal run to something in the order of 53 pages when translated; and this is without counting the bundle of annexures. The written submissions in support run, when translated, to about 37 pages. The submissions are highly detailed including frequent references to diary entries, and telephone records. In response to this we have 24 pages of written argument from the respondent. All of this the court has had to read. If there were anything of merit in these grounds and in the submissions, their length would not be to the point. But this applicant must well know that there is no merit whatsoever in these applications and the fact of the matter is that this Court s time and that of counsel for the respondent and of those who had to translate the documents have been entirely wasted, and wasted at public expense, and delaying the hearing of other cases, cases that may be arguable. This is precisely the sort of situation at which the statutory provision is directed. This is an applicant who gave no evidence at his trial and against whom the evidence, corroborated at it was, was overwhelming. We order that three months of the period between the filing of the application and its determination shall not count towards the applicant s sentence. (M. Stuart-Moore) Vice-President (Frank Stock) Justice of Appeal (M.A. McMahon) Judge of the Court of First Instance Applicant in person Mr Martin Hui, SGC of the Department of Justice for the Respondent PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V & `#\$ % ^,X v?\_ . J[ 6 vx@n .1^L k1B[p "E)` r c@sH <~j6 f8&s J[6 .1^L k1B[v?_ . "E)` f8&s & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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