

HONG KONG / JUDGMENT

HKSAR v. YEE HING CHUNG

COURT

Court of Appeal

DECIDED

15 January 2007

CASE / FILE NUMBER

CACC287/2005

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Before : Hon Ma CJHC, Stock JA and McMahon J in Court Date of Hearing : 9 January 2007 Date of Judgment : 9 January 2007 Date of Reasons for Judgment : 15 January 2007

REASONS FOR JUDGMENT

McMahon J (giving the judgment of the Court) AUTONUMOUT The applicant was convicted after trial in the District Court before Deputy Judge Livesey of an offence of forgery, contrary to section 71 of the Crimes Ordinance (Charge

- 1) and, together with three co-defendants, of an offence of Conspiracy to defraud, contrary to Common Law (Charge 2). AUTONUMOUT The applicant was sentenced to two years imprisonment in respect of the 1st charged offence and to four years imprisonment in respect of the 2nd charged offence. The sentences were ordered to run concurrently. That resulted in a total sentence of four years imprisonment. The applicant seeks leave to appeal only his convictions, he having abandoned his application regarding sentence. We dismissed his application and reserved our reasons. We now give those reasons. AUTONUMOUT The prosecution case was that the applicant and his co accused conspired to set up and operate a sham silver investment company (New Profit). Various people were purportedly hired as employees of the company which operated from freshly leased premises in Connaught Road Central. Those individuals were then induced by various stratagems to invest in London silver by other staff of the company who were in fact members of the conspiracy. The employees paid large sums of money to New Profit believing that they were investing in the London silver market. In fact no such investments were made and the money was appropriated by unknown members of the conspiracy. AUTONUMOUT The applicants role in this centred on the setting up of New Profit and leasing its premises. He signed the provisional tenancy agreement in respect of the lease of the premises using the name of

Wong Chi Wai and provided a false identity card number. That was the factual basis of his conviction for the 1st charged offence. AUTONUMOUT His fingerprints were found on two of a number of application forms completed by persons seeking employment with New Profit. Those forms were found in the possession of a female co conspirator () during the police investigation of the case. The applicant had also been seen in the premises of New Profit by PW13, a police undercover officer posing as a job applicant. Those facts, together with his role in setting up the company and leasing its premises, were the basis of the applicants conviction of the 2nd charged offence. AUTONUMOUT McGowan for the applicant advanced a number of grounds. They can be re-numbered and summarised as follows : Charge

1. The judge was in error in finding that the applicant signed the provisional tenancy agreement the subject of charge 1.
2. The judge erred by not considering the fact that no fingerprints of the applicant were found on the provisional tenancy agreement.
3. The judge erred in accepting PW3 as a credible and reliable witness. Charge 2
4. The judge erred in inferring that the applicant was involved in the conspiracy. Generally
5. The applicant s counsel and solicitor failed to conduct his case properly.
6. The convictions were unsafe. AUTONUMOUT We will firstly deal with the grounds relating to Charge 1. Grounds 1, 2 and 3 AUTONUMOUT These grounds can be conveniently dealt with together. The judges finding that the applicant signed the provisional tenancy agreement was based on the evidence of the estate agent Mr Chan Wing Hong () who had negotiated with the person Wong who signed the provisional agreement. PW3 had identified the applicant as that Wong at an identification parade approximately two months after the signing of the provisional agreement. Once PW3 had been accepted by the judge as a reliable witness then it was inevitable that the applicant would be found to be the Wong who forged the provisional agreement. AUTONUMOUT PW3 had told the court that he had met Wong on three separate occasions in the course of the leasing of the premises to New Profit. The total time they had been together was about one hour. AUTONUMOUT There was one significant attack on his credibility at trial : During his evidence chief PW3 had said no one else was present when he had his dealings with the applicant. But in cross examination PW3 said that on the occasion the applicant had signed the provisional tenancy agreement on 9 March 2004, PW3 s superior, Kenny Kwok, had also been present. In that regard, his evidence was as follows Q. That s the provisional tenancy agreement. Now, does that document require the signature of Kenny Kwok or not? No need. Can you recall, please, Mr Chan, did you ever show that document to Mr Kenny Kwok? In fact, on the day when we signed this provisional tenancy agreement, Mr Kwok did go up there together with me, so after I had filled in this form and after he had checked it, finding that no problem, then it s me. Then he gave it back to me and then I handed this document myself to Mr Wong. So at the meeting at the 25th Floor of the Yue Tai Building, when that document RP3 was signed, Mr Kenny Kwok was present and taking a part in the discussion, would that be right? He was

there. Yes, but do you remember being asked just about 5 minutes ago by the gentleman to my right, the prosecutor, whether at the meeting with Mr Wong it was just you and him and you said, Yes, it was Mr Wong me and him. ? A. To my understanding, the question earlier which was put to me was I thought that the question was asking whether Mr Wong signed, was there anybody else together with Mr Wong. AUTONUMOUT PW3 later also said he was unsure as to whether there may have been one other person present with Wong . He said I suggest to you, Mr Chan, that in fact that when you went there on 9 March you met two men there. There was you and Mr Kenny Kwok on one side and there were two men on the other side. I don t remember, as you put such a question to me. All right, well, perhaps if it s not clear I will put it again. I am suggesting that when you were having discussions at the meeting at the Yue Tai Building on 9 March, the same meeting at which that document, RP3 was signed, there was you and Kenny Kwok for the agents and there were two men for the prospective tenants. No, that should not be the case. Well, you say that should not be. Let s see, are you certain or you think that is not the case? Not sure. AUTONUMOUT PW3 s witness statement made no mention of any other person being present at his meetings with the applicant. In this regard, he said in evidence A. Concerning the statement, in fact all along the police officer, just put questions to me and then I gave him the answers, so maybe during the course of taking the statement no one told me that the importance of me mentioning my boss Kenny Kwok was there, so that s the reason why not a word concerning my boss was mentioned in the statement. AUTONUMOUT McGowan suggested that this area of inconsistency or uncertainty (however it is best described) in PW3 s evidence and witness statement necessarily meant that PW3 s fundamental evidence as to the applicant being the person who signed the provisional tenancy agreement was unreliable. AUTONUMOUT In her reasons for verdict, the judge set out her reasons for concluding otherwise as follows

156. Criticism was made on the evidence in that he made no reference in his witness statement to his boss being present when the provisional tenancy agreement was being signed. Also, he ultimately agreed that on the 9th there may have been a person with D1 but he felt that it was a decorator. It is of note that PW3 did not refer to the presence of his boss when giving his evidence-in-chief. In my judgment, this criticism in no way affects the required standard of proof. PW3 s boss was there to ensure that no mistakes were made; he was not there as a party to discussions. Similarly, the decorator, if present, was not a party to the discussions.
157. PW3 s witness statement was apparently set out in a narrative form, not in question-and-answer form. This is normal for witness statements. It does not mean that PW3 was never asked any questions, nor asked to give information in a particular order or about certain aspects of the case if he glossed over them or missed them. Such questions are not normally written down in written statements. In my judgment, this criticism was of no import at all. Witness statements are only to be used as an abide memoire. It is not unusual for additional information to come out to cross-examination, based upon defence constructions. Indeed, it would be unusual for additional information not to come out. These matters in no way affected the required standard of proof. AUTONUMOUT The judge was aware of the inconsistencies apparent in this aspect of PW3 s evidence and dealt with them. A court is not

obliged to reject all of the evidence of a witness simply because some inconsistency exists within it. In this case the judge gave sufficient and good reasons for concluding that PW3's inconsistent statements as to others being present at his meeting with the applicant at the time the provisional tenancy agreement was signed did not reduce his fundamental reliability as a witness on the crucial aspect of the identification of the applicant. Her conclusion in this regard was one which was open to her, and as the trial judge she was in the best position to assess the credibility of PW3. AUTONUMOUT We might add that in our view PW3's evidential inconsistency was not of a magnitude so as to necessarily undermine his general credibility. The issue as to whether other persons may have been present or nearby at the time the provisional tenancy agreement was signed was peripheral to the central issue as to whether PW3's identification of the applicant as the person Wong was reliable. Other inconsistencies were pointed out in the course of counsel's submissions but these were similarly of little or no consequence. AUTONUMOUT McGowan had a related complaint that the absence of the applicant's fingerprints on the provisional tenancy agreement was important evidence which the judge failed to consider before concluding on the basis of PW3's evidence that it was in fact the applicant who signed that document. AUTONUMOUT We do not think that evidence could be characterized as important. It is trite to say that fingerprints of evidential quality are not always left on an object when it is touched by a person. In the circumstances of this case, the lack of the applicant's fingerprints on the signed document was neither here nor there. AUTONUMOUT In any event, there is nothing to suggest that the judge did not consider it. It had been admitted in the signed admitted facts produced to the court that the provisional tenancy agreement did not have the applicant's fingerprints on it. The fact that the judge did not expressly refer to the absence of the applicant's fingerprints on the provisional tenancy agreement in her reasons for verdict does not mean she ignored or overlooked the evidence. A judge is not required to refer to every item of adduced evidence in giving reasons for verdict. In the present case, the probative value of the absence of the applicant's fingerprints was not such as to require the judge to expressly incorporate that fact into her stated reasons for verdict. AUTONUMOUT In our view, there was no merit in the first three grounds of appeal. CHARGE 2 Ground AUTONUMOUT Mr McGowan complained that the judge erred in inferring that the applicant was a member of the conspiracy to defraud the employees of New Profit. As a starting point he submitted that the judge was in error in finding that the applicant helped set up the company in addition to leasing its premises. He said that there was insufficient evidence for the judge to safely arrive at that finding. AUTONUMOUT The judge in her reasons for verdict had said of the applicant's role He was not only concerned in signing the tenancy agreement; I was also satisfied that he was concerned in the setting-up of the business New Profit. The setting-up of the company and the provision of premises is essential to the carrying out of the conspiracy. AUTONUMOUT The judge had apparently accepted that the applicant was the Wong referred to in the evidence of PW1 who was an employee of an accounting and secretarial services firm which had incorporated the company New Profit and provided its company chops and other documents. She said she had been asked to do so by a Wong who she had never met but had spoken to over the

telephone. The chops and documents of New Profit were collected by persons who came to her firm on behalf of Wong . She had a telephone contact number for the person Wong . That telephone number was the same number PW3 used to contact the Wong who signed the provisional tenancy agreement. AUTONUMOUT PW1 said in evidence that she had first been contacted by Wong in the afternoon of 8 March 2004. This therefore was during the period when PW3 was in contact with Wong using the same telephone number.

AUTONUMOUT In our view given the evidence of PW1 and PW3 as to both contemporaneously dealing with a Wong who used the same mobile telephone number, the judge was entitled, in the context of the evidence as a whole, to conclude that the applicant, whom PW3 had identified as the Wong who had signed the provisional tenancy agreement on 9 March 2004 was also the Wong PW1 had been contacted by on the 8 March.

AUTONUMOUT McGowan goes on to further complain that in any event, even if the applicant was involved in the setting up of New Profit and the leasing of its premises there was still an insufficient factual basis for the judge to infer that the applicant was a member of the broader conspiracy to defraud. AUTONUMOUT In drawing that inference the judge relied upon four factual findings. Firstly, that the applicant had signed the provisional tenancy agreement using a false Hong Kong identification card number and by falsely using the name of Wong Wai. Secondly, that the applicant was the person Wong who had contacted PW1 for the purpose of setting up the company New Profit. Thirdly, that the applicant's fingerprints were found on two potential employees job application forms directed to New Profit found in the possession of D3 who had adopted the role of a staff member of New Profit to encourage the victimized employees to provide money for the purported purpose of investing in the London silver market, and finally that the applicant had been in the premises of New Profit at the time job applicants were being interviewed.

AUTONUMOUT It is difficult to understand why, if the applicant was simply setting up the company New Profit and leasing its premises, he found it necessary to use a false name and identification card number if he knew nothing of the conspiracy to defraud. That evidence by itself was compelling so far as his overall involvement in the fraud was concerned. But the additional evidence of his fingerprints being found on two separate completed employment application forms found at the home of D3, and PW13 having seen the applicant present at the premises of New Profit when PW13 (an undercover police officer) was posing as a job applicant, in our view places the matter beyond doubt. AUTONUMOUT As the judge said after referring to the applicant's role in the setting up of New Profit and his signing of the provisional tenancy agreement I accepted the evidence of PW13 that D1 was seen at the said premises during his observations. I noted that no other witness identified him as being at the said premises. However, his fingerprint was found on two of the application forms found at D3's premises. I noted their positions as set out in the Admitted Facts. However, in my judgment the only inference which can be drawn from the presence of his fingerprint on any of the application forms is that he was also involved in the business after it was set up and whilst it was the operation.

171. Again, the only inferences which can be drawn, in my judgment, are that he was fully involved in the conspiracy to defraud and I convict him accordingly. AUTONUMOUT It may be that both the presence of the applicant's fingerprints on the job application forms and his presence in the office at the time of PW13's interview are facts which taken individually are capable of innocent explanation. But when considered in the context of the applicant's role in the leasing of the premises and the evidence as a whole they were matters which the judge was entitled to rely upon in arriving at her conclusion that the applicant's role extended into the more general conspiracy to defraud. AUTONUMOUT There is no merit in this ground of appeal. Ground 5 AUTONUMOUT McGowan argues that the applicant's case was not put properly at trial. The applicant did not give evidence, and his case could be put only through his counsel's cross-examination of prosecution witnesses. AUTONUMOUT In his affirmation provided to this court for the purposes of his appeal, the applicant says his case was that he was a decorator who was hired by the person Wong to refurbish the Connaught Road premises leased on behalf of New Profit. He says he was present when the provisional tenancy agreement was signed by Wong and that it must have been that PW3 confused him with Wong when PW3 identified him at the identification parade in May 2004. AUTONUMOUT The applicant provided written instructions to those representing him at trial. Those instructions were to the effect that the applicant had met PW3 and inspected the premises in Connaught Road early in March 2004 but had done so on behalf of Wong and that he had told PW3 this. AUTONUMOUT Subsequently on 9 March Wong asked the applicant to go with him to meet PW3 at the premises where they met both PW3 and Kenny Kwok. He saw Wong sign the provisional tenancy agreement and they then left. AUTONUMOUT The applicant by his affirmation says it was implicit in those instructions that PW3, because he had met him together with Wong on 9 March, had mistakenly identified him as Wong at the identification parade held two months later. AUTONUMOUT In the course of cross-examination of PW3 counsel for the applicant approached matters in this way Q. You see, I suggest that when you met a man outside that building on the afternoon of 4 March in the street he said that he was there on behalf or for Mr Wong and he was called Ah Yiu. Disagree. ... what I am suggesting the situation is, is that he identifies you and you assume him to be Mr Wong rather than him actually saying so. No. And I suggest to you that the person who signed that document which you still have in front of you, RP3, was not the same person as you had met on 4 March. Disagree. And so let me just finally I think put the case in this way that I suggest that the person you picked out at the police station was not the person who had signed that document which is in front of you. Disagree. I suggest the person you picked out at the identification parade was the one that you had met on 4 March. I saw him on the 4th and also on the 9th and on the 10th. All right, but I suggest that well, let me just put the 4th and the 9th at the moment, please and I suggest that on the 9th he was present but he was not signing the document. Disagree. AUTONUMOUT It is plain that counsel put the applicant's case that PW3 had mis-identified the person he had met on 4 March as the person Wong who had signed the provisional tenancy agreement on 9 March. It is plain also that the judge was aware that this allegation formed part of the applicant's case. In her reasons for verdict she said It is not denied that D1 did meet PW3 at the said

premises. It is submitted that D1 was not the person who signed the provisional tenancy agreement but a person who accompanied him to the said premises on 9 March.

AUTONUMOUT In short, there was cross-examination by trial counsel concerning the circumstances which may have given rise to PW3 mistakenly identifying the person with Wong on 9 March as the person who signed the provisional tenancy agreement. The groundwork was plainly established by counsel in support of the proposition that the applicant was the person or decoration worker who met PW3 on 4 March and who was, because he was present with Wong when the provisional tenancy agreement was signed on 9 March, misidentified by PW3 as the person who signed that agreement. It is plain also that the judge understood that to be the applicant's case. AUTONUMOUT There was no need for trial counsel to go further and specifically put to PW3 in cross-examination that the applicant was the person who had met PW3 on 4 March and was erroneously identified by him on 9 March. Sufficient of the groundwork had been laid. There can be no suggestion that trial counsel's omission (perhaps for good tactical reasons given PW3's denials as to the basic premise of the applicant's case) expressly to put to PW3 that the applicant was the decoration worker in question amounted to fault, let alone the high or flagrant level of fault required for this ground to succeed : see HKSAR v. Chong Ching Yuen [2004] 7 HKCFAR 126.

AUTONUMOUT In the event, the applicant elected not to give evidence. There was no further advance made on the groundwork established by counsel in cross-examination and there was therefore no evidence before the judge that the applicant was the workman or decorator who was alleged to have met PW3 on 4 March and who was with Wong on 9 March 2004. It was the applicant's own choice not to give evidence and no complaint was made before us about the advice he was given in that regard. In the above circumstances, it cannot be said he did not receive a fair trial and this ground failed also. AUTONUMOUT That being so, there was nothing unsafe or unsatisfactory concerning the applicant's convictions and his application was dismissed. (G. Ma) Chief Judge of the High Court (F. Stock) Justice of Appeal (M.A. McMahon) Judge of the Court of First Instance Miss Mary Sin, SADPP of Department of Justice, for the Respondent Mr James H.M. McGowan, instructed by Messrs Francis Kong & Co., for the Applicant PAGE - PAGE A 1udk 1udk &`#\$ 4or~ Rs~/ (Q\*<< ,DGpH ~ B; <(z&; NFaF4\ B[UN` (BQ VhrLO ,7)a~D ^|r ~ B; ,7)a NFaF (BQ B[UN D\$ti \TvV UH2 & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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