

HONG KONG / JUDGMENT

HKSAR v. YEUNG HON KEUNG, LARRY

COURT

Court of Appeal

DECIDED

6 September 2007

CASE / FILE NUMBER

CACC233/2006

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REASONS FOR JUDGMENT (RE: CONVICTION) AND JUDGMENT (RE: SENTENCE)

Burrell J (giving the reasons for judgment of the Court) : AUTONUMOUT On 5 June 2006, the applicant was convicted on Charges 1 and 4 after trial before Deputy District Judge Thomas. The judge had found that there was no case to answer in respect of the remaining three charges, Charges 2, 3 and

5. On Charges 1 and 4 the judge passed sentences of 12 months and 18 months imprisonment to be served concurrently. AUTONUMOUT The applicant applied for leave to appeal against both conviction and sentence on Charges 1 and
4. At the conclusion of the application this court refused leave to appeal against conviction and reserved its decision on the application to appeal against sentence. We now give reasons for our refusal in respect of conviction and our decision on sentence. The charges and background AUTONUMOUT At the material time the applicant was a civil servant. He was a teacher in the Education Department. At the time of his conviction he was 41 years old. Since a young age and throughout his career as a civil servant the applicant had been driven by a desire to better himself. He had taken and passed many examinations, he had amassed a number of qualifications and he had acquired membership of a variety of professional bodies. This case concerns his attempt to join the legal profession in Hong Kong by dishonest means. The judge found that whilst employed as a teacher in the Education Department he applied for no-pay study leave in order to study for a Postgraduate Certificate in Education (PCEd). In fact he did not intend to study for such a certificate because he applied to study for a qualification which was unrelated to his current employment namely a Postgraduate Certificate in Laws (PCLL) on a course run by the School of Continuing and Professional Education (SPACE) at the University of Hong Kong. The Education Department would not have granted him unpaid leave to engage in legal studies. AUTONUMOUT The

applicant wanted to join the PCLL course on a part-time basis. Part-time on this particular course simply meant that the course spanned two years instead of one. In all other respects it was the same course. However in order to be admitted on to the two-year part-time course the applicant had to satisfy the university that he fell into one of two categories. Either he was a civil servant who had the written support of his department to enter the course (which he did not) or he had been continuously employed in the private sector for at least five years, would suffer financial hardship if he had to cease working and had the written support of his employer who would grant the necessary time off to attend day time lectures.

AUTONUMOUT As the applicant's only route onto the course was via the second category he made a bogus application. He provided two letters of support claiming to be employed by the Tai Po Hotel as their Legal Manager. One of the letters had a signature of Carey, Managing Director. Carey Yeung, who did indeed work for the Tai Po Hotel, was his sister.

AUTONUMOUT His application was granted. He completed the course, passed the examination and joined the legal profession as a barrister. He did not inform the Education Department that his unpaid leave was being spent studying law. AUTONUMOUT The above is an outline of his criminality. Arising out of it, he faced five charges, as follows : 1st charge : Obtaining services by deception (section 18A Theft Ordinance, Cap. 210). We set out the particulars in full YEUNG Hon-keung, Larry (YEUNG), between the 1st day of May 2000 and the 4th day of September 2002, in Hong Kong, dishonestly obtained services from The University of Hong Kong, namely an education including lectures and tutorials provided to YEUNG for the part-time course of Postgraduate Certificate in Laws (the PCLL course), by deception, namely, by falsely representing that (1) his then employer was Tai Po Hotel; (2) he had been employed by Tai Po Hotel as Legal Manager since the 2nd day of January 1992; (3) his then employer had agreed to release him to attend the day-time classes for the PCLL course; and by dishonestly failing to disclose to The University of Hong Kong of his then genuine employment as a full-time teacher by the Education Department of the Government of the Hong Kong Special Administrative Region. 2nd charge : Using a false instrument (section 73 Crimes Ordinance, Cap. 200). This charge related to one of the bogus letters of support from the Tai Po Hotel. 3rd charge : Forgery (section 71 Crimes Ordinance, Cap. 200). This charge related to other bogus letter. 4th charge : Fraud (section 16A(1) Theft Ordinance, Cap. 210). We set out the particulars in full YEUNG Hon-keung, between the 25th day of February 2001 and the 11th day of July 2002, in Hong Kong, with intent to defraud, induced the Education Department of the Government of the Hong Kong Special Administrative Region (the Education Department) to commit an act or make an omission, namely to grant or continue to grant him no-pay study leave from the 10th day of September 2001 to the 30th day of June 2002, which resulted in a benefit to himself or a prejudice or a substantial risk of prejudice to the Education Department, by deceit, namely by falsely representing that he intended to apply for and use the no-pay study leave to attend a course which was related to education or was relevant to his duties as a teacher employed by the Education Department and by dishonestly omitting to disclose to the Education Department of the fact that he had already been admitted to a part-time course of Postgraduate Certificate in Laws with the University of Hong Kong. 5th charge : False accounting (section 19(1)(a) Theft Ordinance,

Cap. 210). This also related to his application for no-pay study leave. AUTONUMOUT Before turning to the grounds of appeal the following further background facts should be mentioned :

- (1) Prior to the events which form the subject matter of these charges the applicant had, between 1997 and 1999, successfully completed the Common Professional Examination of England and Wales () and been awarded a Postgraduate Certificate in Law by SPACE/HKU. According to the SPACE literature this guaranteed him a place on the PCLL course at SPACE in the academic year immediately following completion of the CPE . The literature did not mention the additional requirements which applied if the two year course was being applied for, namely that it was only open to civil servants or private sector employees of five years standing who had the necessary written letters of support. Thus, passing the CPE meant that a candidate could automatically move on to the one year PCLL course in the year after the CPE. If, however, he wanted to defer his PCLL studies he could apply to do so. Also, if he wanted to spread his PCLL studies over two years he could apply under one of the two categories referred to. (There was a third category which has no relevance to this case.) The judge found, as was obvious and not challenged, that the applicant was aware of these requirements and that his only chance of getting on to the PCLL course was by false pretences on to the two year course.
- (3) The background to the requirements for the two year course was summarised by the judge when he referred to the evidence of Ms Amanda Whitford, a director of the SPACE programme : Whitford made it clear that the basis upon which applicants were accepted for the part-time course might well cause injustice and exclude otherwise qualified applicants. If career civil servants and five-year employees of private sector employers were not supported by their respective department or employer and were not allowed to take time off during the working day, they would not be allowed to take the PCLL course on a part-time basis. The only way in which such applicants could join the course would be to resign respectively from the civil service or from the particular private sector employment and to take the course as an unemployed, full-time student. This would be the case even if the applicant had a guarantee of entry onto the PCLL course, as described above. Ms. Whitford made it clear, however, that the restrictions that had been imposed on entry to the part-time course were not mere products of academic whim. As the course is a pre-requisite for entry into the legal profession in Hong Kong, both professional bodies had been involved in the architecture of the course. It appears that the Law Society of Hong Kong had been insistent on the restrictions concerning part-time study.
- (4) The judge also found, as was again obvious, that the applicant knew he would not be granted no-pay study leave from the Education Department to study on the PCLL course. He would only been granted such leave so as to embark on the PCEd course. The evidence showed that it was a disciplinary offence to change courses without approval. In some circumstances, such an act could merit police investigation. The judge found that the applicant demonstrated a detailed knowledge of the Education Department Administration Circular

relevant to his application .

- (5) The main thrust of the defence at trial was that the applicant's conduct fell short of criminal dishonesty. The judge summarised the defence as follows The defendant has made no admissions as to whether the various representations were false. However, he has not seriously challenged the evidence supporting the prosecution case in that regard. However, through counsel, he invites me to take the view that his actions were those of someone who was desperate to take and complete the various courses for which he had signed up. He merely did what he did in order to complete those courses. He invites me to the view that, even if his actions are morally indefensible, and even if his own professional disciplinary body or bodies were properly to take an interest in his behaviour, what he did is not sufficient to make him dishonest as understood by the criminal law in Hong Kong. Grounds of appeal Charge AUTONOMOUT In respect of the 1st charge Mr Gary Plowman SC on the applicant's behalf makes two complaints. First, that when considering whether the applicant's conduct amounted to dishonesty the judge failed to take account of the fact that, having passed the CPE examination the SPACE literature guaranteed him a place on the PCLL course. The applicant was therefore doing no more than claiming his contractual right albeit by means of false pretences. Also, that he failed to consider Ms Whitford's evidence that those who applied for the two year (part-time) course were treated unfairly because they had to satisfy additional requirements (letters of support from their government departments or employers). AUTONOMOUT The main focus on appeal was that the applicant had a claim of right to his place on the course. If so it was not dishonest for the purposes of section 18A of Cap. 210 to claim that right albeit by employing a deliberate deception. AUTONOMOUT At trial the focus had been less specific. At trial counsel had submitted that the conduct, although morally blameworthy, fell short of dishonesty. Counsel's final submission contained the following remarks He acknowledges that those actions are culpable. But what he says and maintains through his plea of not guilty to these two remaining charges, is that the standard of culpability falls well below that which is required to found criminal charges in a court in Hong Kong. Yes, there is culpability. Yes, there are matters which may, or perhaps should, be referred to the disciplinary body of the Bar Association. These are matters that perhaps could [h]e ceased to be a civil servant, as we know have been referred to the Civil Service Branch of the Hong Kong government. But on his case these are matters which should not have formed the basis for criminal proceedings. AUTONOMOUT Counsel for the respondent, Mr William Tam, complains that the claim of right argument was never raised at trial and should not be entertained by this court. Whilst we accept that the specific submission that the applicant was exercising a right in contract was not spelt out at trial we are prepared to entertain this ground as being a more specifically defined consequence of the words that appeared in the SPACE brochure, namely that successful candidates in the CPE course earned a guaranteed place on the PCLL course. AUTONOMOUT In any event, this ground fails. It is unnecessary to consider whether or not the SPACE brochure created a contractual relationship between the university and a student because, even if it did, the known facts were that it was not a blanket guarantee in relation to the part-time course. In

order to apply for the part-time course, a candidate was required to apply for the full-time course and, at the same time, fill in a supplementary application form to do the two-year course instead of the one year course. The supplementary application included the letters of support from the government department or employer. The fact that these additional requirements were not identified in the brochure does not mean that the applicant is entitled to regard his right to a place as unqualified and therefore employ a deliberate deception to circumvent valid conditions simply because they had not been in print in the brochure. As already stated, the conditions were in place for good reason. Ms Whitford's opinion that they could lead to unfairness is an opinion, which although no doubt genuinely held, must be considered in the wider context which the judge clearly did (paragraph 8(3) herein). AUTONUMOUT It is fundamental to Mr Plowman's argument that SPACE had no right to impose conditions on the part-time course. This submission we consider to be untenable. The only basis for the submission is that the brochure or leaflet did not refer to them and, as a consequence, the university has entered a narrowly defined and restrictive contract with a student. The only additional words which actually appear in the brochure are offered by SPACE in the academic year immediately following completion of the CPE. The applicant's application was (a) not in the following year and (b) was not for the full-time course. AUTONUMOUT The judge was fully alive to this issue. He said I am entirely satisfied so that I am sure, beyond a reasonable doubt that the defendant fully realized that the demands of the course conflicted with his full time employment as a teacher with the Education Department. It is clear that the architects of the PCLL course intended that the course was to be a demanding and intensive course. It is clear that those architects expected the course to be regarded as a full time course. It is also clear that those architects expected students on the course to have given up, or not to have taken up, employment in order to devote themselves entirely to the course. It appears that the Law Society of Hong Kong wished to protect the interests of those less able to support themselves whilst following the course. Accordingly, conditions were put in place to decide eligibility for part time study. It is clear beyond doubt that the defendant had planned for some time the misrepresentations to allow him to apply for the part time course. AUTONUMOUT Later, having correctly directed himself on the principles laid down in *R. v. Ghosh* [1982] 1053, he said In the present case, I have no doubt whatsoever, that reasonable and honest people would regard the defendant's actions in adopting deception to enter a course that he would not otherwise be eligible to enter as entirely dishonest. Having decided that, I am also in no doubt that the defendant himself realized that reasonable and honest people would consider what he had done was dishonest. In my judgment, the continued deception of the defendant in pretending that his duties in his supposed private sector employment clashed with tutorials that were not scheduled sufficiently late to allow him to go straight to them from his teaching job, is a clear indication that the defendant himself knew that what he was doing was dishonest by the standards of reasonable and honest people. AUTONUMOUT It is true that these extracts do not refer to the claim of right issue in terms. This is simply because, it was not specifically canvassed at trial. It is nonetheless clear that the judge addressed and properly evaluated the evidence in relation to each ingredient of the offence.

AUTONUMOUT Plowman s second complaint with regard to the 1st charge is that the benefit of being able to undertake the PCLL course part time was not a benefit that was to be paid for and therefore was not a service within the meaning of section 18A of Cap.

210. Section 18A(2) of the Ordinance provides that It is an obtaining of services where the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for. [emphasis added] It is argued that the only benefit flowing from the deception was in being granted a place on the two-year course rather than the one year course. AUTONUMOUT This ground fails for two reasons. First, we have already decided that the university was not contractually bound to provide the applicant a place on the two year course unconditionally. It cannot be argued therefore that the deception only led to a place on the two year course and not the education provided thereby. Secondly, the inescapable reality is that the only avenue open to the applicant, to fulfil his ambitions, was to apply for the two-year course and he would not have received the education had he not deceived the authorities in the way he did.

AUTONUMOUT On any sensible view there is a direct causal link between the deception he practised and the education he received as a result. That the education is a benefit is not an issue. If he had been offered a place on the two-year course but decided not to take it up he would not have been guilty of the 1st charge. Charge 4 AUTONUMOUT Under Charge 4, grounds 3 and 4 can be dealt with together. Ground 3 complains that Charge 4 is bad for duplicity, in that it alleges two distinct offences and ground 4 complains that the judge s reasons for verdict relies on a third, further alternative basis. AUTONUMOUT Three parts of the particulars of the charge are relevant to these submissions : (a) Yeung Hon Keung, Larry, between the 25th day of February 2001 and the 11th day of July 2002 (b) by deceit namely by falsely representing that he intended to apply for and use the no pay study leave to attend a course which was related to education (c) and by dishonestly omitting to disclose to the Education Department of the fact that he had already been admitted to a part time (PCLL) course. AUTONUMOUT Prior to the trial there was a preliminary argument as to whether Charges 1 and 4 were duplicitous. This was in part, the same issue that is now being advanced on appeal. Submissions were made and the judge (not the trial judge) ruled that they were not duplicitous. On appeal, Mr Plowman places reliance on an exchange which took place between prosecuting counsel and the court in the course of that preliminary argument. The court asked when does the prosecution say that the act of fraud took place? The prosecutor answered On the date of the approval he was granted the no pay leave AUTONUMOUT Plowman submits therefore that one offence was complete on the day of the approval. Whereas, inducing the Education Department to continue to grant no pay leave by later concealing the fact that he was attending the PCLL course is a second offence. He complains that in spite of Mr s answer in the preliminary argument the prosecution in fact ran the case on the continuing deception basis and therefore alleged two offences within one charge. AUTONUMOUT We agree with the judge that Charge 4 is not duplicitous and we reject this ground for the following reasons. AUTONUMOUT Taken in context the prosecution did not commit itself to a single act of fraud on a single day during the

preliminary submissions. We see no point in reciting the entire exchange in this judgment, however the context in which Mr Tam gave his answer (as relied on by Mr Plowman) is important Prosecutor: the 4th charge is also not duplicitous. According to the 4th charge, as pleaded, the offence is between the 25th day of February because the form applying for no pay leave was dated 26 February 2001. So if you made the application on the 26th, we say, in that application there were false representations. The department or a relevant staff of the Education Department if that needs to be amended that can be done easily approved that application for no pay leave . And according to the Summary of Facts, he was granted no pay leave between the 1st day of September 2001 and 30 June 2002. But that no pay leave was subsequently extended further, I think until the 10th day of July 2002. So, again [emphasis added], there was a deception of misrepresentation, first, on or about 26 February, which led to the approval for the no pay leave which lasted for about 9 month, I think. Court: Yes. But when does the prosecution say the act of fraud took place? Prosecutor: On the date of the approval he was granted the no pay leave. However, an element of the offence is that there would have to be an act or an omission on the part of the department which resulted in a benefit or a prejudice. And that s why we have to look at what resulted. We say the benefit was that he was able to retain his salary package, etc. as set out in the Summary of Facts at paragraph 10 [should be paragraph 14] or a prejudice or a substantial risk of prejudice to the Education Department. So we say, as in the case of the 1st charge [emphasis added], we are in a similar situation; the deception proceeded first, followed by the act or omission which led to the benefit and prejudice, etc. And that benefit or that prejudice lasted during the no pay leave period. We say it is, again, not a duplicitous situation. These are my submissions. AUTONUMOUT Put simply, the fact that fraud (the charge alleged) can be a continuing offence and is invariably commenced by an act of deception is not a difficult concept. The prosecution was plainly not saying that the fraud ended on the day of the approval of the grant, it was saying that the deception which started the fraud occurred on that day. AUTONUMOUT In further support of his argument, Mr Plowman contends that there was an evidential basis for finding that the applicant may have originally intended to study for the PCed course but later changed his mind and changed to the PCLL idea and only then did he fail to inform his employer. That evidential basis concerned a letter found at the applicant s home, which suggested that in August 2001 the applicant had in mind the possibility of registering for both courses, the PCed on a full time basis and the PCLL on a part time basis. Whether or not this letter was ever sent was unclear because HKU had no record of it. AUTONUMOUT Plowman complains that, as a result of this evidence, the prosecution invited the judge and convict on an alternative basis. In his final submission Mr Tam had said But if your Honour takes the view that it s possible reasonably possible at that time, there was an intention to study both courses, then the prosecution will invite your Honour to convict on the alternative basis, that is maybe at that time he really intended to study PCed but later on he certainly didn

- t. So there came a stage he knew he was no longer studying PCed yet he omitted to disclose that to the department. [emphasis added] AUTONUMOUT Convicting on an alternative basis does not make the charge duplicitous. In our case the judge did not convict on an alternative basis in any event. Given that as a matter of construction we find the charge, as drafted, not to be duplicitous, the judge was entitled to convict if he found one or both of the alleged deceptions proved within the time frame, which is what he did. In his reasons for verdict he made no reference to the alternative basis referred to above, he merely made a passing reference to the letter itself. AUTONUMOUT However, the fact that the judge did make a reference to what Mr Plowman described as a third alternative basis forms the foundation of the final complaint under the general heading of duplicity. That part of the written reasons which is relied on is as follows The prosecution says that the defendant either had no intention of studying for the PCed course because he was already studying in the PCLL course or, that, even if he did have such intention, he did not inform the Education Department that he was using his unpaid study leave to study in the PCLL course and not the PCed course. I have no doubt whatsoever that reasonable and honest people would consider that the defendant was certainly dishonest in using study leave granted for one purpose for another to be dishonest. (emphasis added) AUTONUMOUT We are invited to interpret this as meaning that the judge convicted on the basis that the applicant might have had a genuine intention of studying for the PCed at the time he applied for the leave and therefore he had no intent to defraud at the material time. The argument continues that using the leave to study law was not part of the charge. AUTONUMOUT There is no merit in this ground. The judge did not convict on this basis. The passage is no more than a description of the continuing dishonesty which flowed from his dishonest acts and intentions at the outset. There is no substance in the argument that this passage represents a third or different basis upon which the applicant was convicted and a basis upon which he had not been charged. Charge 4 (Ground 5) AUTONUMOUT By this ground, it is argued that the applicant's deception did not cause a benefit to the applicant, neither did it cause a prejudice to the Education Department which are necessary ingredients of the offence of fraud under section 16A(3). AUTONUMOUT The benefit was described by the judge as follows It is clear that the defendant was receiving a benefit as the result of the grant of unpaid study leave. He remained in employment and did not have to resign. His accrued pension rights were preserved and his place on the master pay scale was maintained. AUTONUMOUT We are satisfied that having one's employment, pension rights and pay level preserved is a clear benefit and an attempt to argue to the contrary cannot be seriously made. AUTONUMOUT Likewise, the prejudice to the Education Department was clearly and correctly stated. The judge said In addition there was clear prejudice to the Education Department by the deceit. The department had to hire a substitute teacher and caused the Treasury to pay her. The fact that her salary may have been less than the amount saved by not having to pay the defendant is irrelevant. A deceitful person cannot hijack the discretion of another and then claim that there is no prejudice because there is a saving to the other. That would be to reward deceit. AUTONUMOUT There is no merit in this ground. AUTONUMOUT The application in regard to conviction is dismissed. APPLICATION FOR LEAVE TO APPEAL

AGAINST SENTENCE AUTONUMOUT Plowman urges the court to conclude that 12 months imprisonment on Charge 1 and 18 months imprisonment on Charges 4 to be served concurrently is manifestly excessive. He reminds us of the following factors : the applicant was entitled to do the PCLL course; the deception was to circumvent restrictions which Ms Whitford described as unfair ; the applicant did not prevent a genuine candidate from getting on the course as it was undersubscribed; the applicant s fees increased the university s income; the government had no direct financial loss; the applicant s good character and impressive record of taking and passing examinations and acquiring qualifications to improve his circumstances; the drastic consequences of this conviction. AUTONUMOUT He referred us also to the case of AG v. Tai Chin Wah [1994] 2 HKCLR 81 in which the court stated that a starting point of 18 months to 2 years was proper in case where an unqualified man forged academic qualifications which resulted in him being admitted as a solicitor. It was submitted that such a case was far more serious than the present case. AUTONUMOUT On the other hand, a carefully planned fraud on a government department involving deceit and forgery for entirely selfish ends must be viewed seriously. As a result of the deception, the legal profession of Hong Kong admitted a fraudster. In all the circumstances whilst we accept that he was afforded no leniency, we do not consider the overall sentence is manifestly excessive. AUTONUMOUT Accordingly, leave to appeal against sentence is refused and this application is dismissed. (M. Stuart-Moore) (M.P. Burrell) (J. Barnes) Vice-President Judge of the Court of First Instance Judge of the Court of First Instance Mr William Tam, Ag SADPP of the Department of Justice, for the Respondent Mr Gary Plowman, SC and Mr Derek Chan, instructed by Messrs Fung & Fung, for the Applicant PAGE - 1udk 1udk &`#\$ &`#\$ <(z&; & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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