

HONG KONG / JUDGMENT

HKSAR v. YICK TZE KAI

COURT

Court of Appeal

DECIDED

4 October 2007

CASE / FILE NUMBER

CACC485/2006

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bjbj fP[sO) n nomacro Applicant

Before: Hon Stuart-Moore VP and Lunn J Date of Hearing: 4 October 2007 Date of Judgment: 4 October 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court): On 4 September 2006, the applicant pleaded guilty to three charges each of which alleged that he, being an agent of the Hong Kong Government, namely, a Building Surveyor of the Buildings and Lands Department, with intent to deceive his principal, used a document, namely an Application for Private Tenancy Allowance () in relation to the leased property at Flat B, 3/F Winner Court, No. 18 Hospital Road, Hong Kong (the leased property) in respect of which the Hong Kong Government was interested and which contained a statement which was false or erroneous or defective in a material particular, namely, that he was eligible to claim and receive PTA in respect of the leased property which, to his knowledge, was intended to mislead the Hong Kong Government. The particulars of these offences, which were contrary to section 9(3) of the Prevention of Bribery Ordinance, Cap. 201, differed only as to date. The offences were committed on 7 August 1991, 4 May 1993 and 21 April 1995 respectively. Deputy Judge A Yim set out the relevant facts in her sentencing remarks to which we shall turn shortly. She also made reference to the applicant s wife (D3) who, in charge 4, was alleged to have dealt with property known or believed to represent the proceeds of an indictable offence, namely a sum of \$4,707,725.80 (the sale proceeds of the leased property) knowing or having reasonable grounds to believe that the said property, in whole or in part, directly or indirectly represented the proceeds of an indictable offence, contrary to section 25(1) and (3) of the Organized and Serious Crimes Ordinance, Cap. 455. D3 was convicted after trial. The applicant was sentenced on 27 November 2006 to concurrent terms of 8 months imprisonment on each charge against which he now seeks leave to appeal. D3 received a sentence of 6 months imprisonment suspended for 2 years. There is no application in D3 s case, the judge having found that her psychiatric condition and the fact that she had at one stage been given reasonable prospect that the prosecution would not offer evidence against her , amounted to exceptional circumstances for suspending her sentence. The judge s concise and accurate account of the facts included the following assertions: At the material time, D1 was last promoted to a Building Surveyor in the Buildings Department. D1 was

entitled to apply for Private Tenancy Allowance (PTA) from the Government of the HKSAR. According to Civil Service Regulations 852(5)(a), a Government officer shall not claim PTA in respect of accommodation in which the officer himself and/or any relatives of the officer has/have a financial interest. Some time in 1991, D1 arranged to purchase a property at flat B, 3/F Winner Court, 18 Hospital Road, Hong Kong (hereinafter referred as the Property) at 1.98 million. He approached his colleague Wong Pui Yee, requested Wong to act as the registered owner of the property. After giving some consideration to the matter, Wong agreed to assist. Wong went through the formalities of the purchase. All the deposits, legal costs and disbursements in relation to the purchase came from D1. Wong further provided D1 with her income proof for arranging mortgage with Po Sang Bank and signed the mortgaging document as instructed by D1. A saving account with Po Sang Bank was opened in the name of Wong to facilitate the auto pay of the monthly mortgage re-payment; the passbook of the saving account was handed to D1 for him to arrange for the payment of all the monthly instalments. Shortly thereafter, D1 approached Wong, requested Wong to sign on a tenancy agreement in respect of the Property. Wong did as requested. In about 1992, Wong was required by the Inland Revenue to declare rental income; she related the matter to D1. D1 instructed Wong to declare rental income in relation of the Property, and thereafter he reimbursed all the property tax for Wong. In 1993 and 1995, Wong signed 2 further tenancy agreements with D1 on his request. On or about 7 August 1991, 4 May 1993 and 21 April 1995, D1 submitted three application[s] for PTA based on the tenancy agreements purportedly signed by him as the tenant on one hand and Wong as the landlord on the other. D1 declared on his applications that he had read and fully understood CSRs 800-809 and 850-873, particularly CSR 852(5) which stipulates the types of accommodation in respect of which an officer may not claim PTA. The applications were approved by the Government. Between June 1991 and March 1997, D1 had obtained PTA in the total amount of \$1,495,852.13 (after deduction of 7.5% rental). The Property was sold in May 1997 for \$6.8 million. D1 gave instruction to Wong to instruct the solicitor [to] issue cheques representing the balance of the purchase price of the Property to D3[s] elder sister Leung, who later transferred the principal amount together with interest in the sum of \$4,707,725.80 to D3 on 16 October 1997. D3 had knowledge of the fraud and assisted in covering up the fraud. D3 received and dealt with the sum believing the sum in part, indirectly, represented the proceeds of an indictable offence. On 7 February 2005, D1 and D3 were arrested and they remained silent under caution. (Appeal bundle pp. 26-27) Bearing in mind these facts, the judge rightly observed that the applicant had utilised a plan which involved cheating the government for about 6 years so that in no sense could his behaviour be described as a single fall from grace . She went on to comment, again correctly, that the government was entitled to place trust in its staff and that the applicant had betrayed this general trust reposed in him . She added, however, that while the applicant had pleaded guilty, he gave untruthful evidence in court [on behalf of D3] and that this cast doubt on the genuineness of his remorse . We shall return to this comment, as an aspect of the sentencing procedure, in due course. As to mitigation and the starting point for sentence, the judge stated: ... since the sale of the premises, D1 has led an honest life and he returned the allowance obtained dishonestly in full together with interest to the Government. Because he has committed the present offence, he is liable to lose his job and pension. And I accept that it is unlikely that the defendant could

commit further crime, I consider the appropriate starting point for charge[s] 1 to 3 to be 18 months, I reduce it by 1/3 for the defendant s plea to 12 months. I noted and considered the mitigation submitted by the defence. D1 and D3 are husband and wife. They are highly regarded by their friends, colleagues, and family members. Both participated in community volunteer works. They have a daughter aged 19 and a son aged 15; both are studying. Tak[ing] into account s clear record, good background and that the matter had been a hang-up to him since 1999, I reduced it further by 4 months to 8 months. (Appeal bundle pp. 28-29) In arriving at a global starting point for these offences, the judge referred to the judgment of this court in *Secretary for Justice v Pao Wai-hong* CAAR 3/2004 (unreported) stating: the Court of Appeal after referring a number of similar cases (convicted after trial) held at para. 19 that It was plainly the intention of this court to state that a custodial sentence should normally be imposed. In all cases of this kind, it is to be expected that such offenders, who are invariably to be regarded as having exemplary character by virtue of their position as senior Government servants, will normally go to prison for fraudulent behaviour on this scale. They are people who will have had every advantage in life and who, motivated by reasons of sheer greed, have acted not only in breach of the general trust reposed in them to act honestly towards the Government which has employed them but also fraudulently towards the public whose taxes are utilized in the payment of such benefits as these. (Appeal bundle p. 28) This court, in that review of sentence, had considered two other cases in one of which suspended sentences were imposed and in the other community service was ordered after contested trials as the judge in the present case had noted. However, as my judgment went on to state (in paragraph 20): We can accept, however, the criticism which can be made of the judgment in *Secretary for Justice v Leung Yat-ming and Anor* [(1999) 2 HKLRD 402], to which I was myself a party, that the message may not sufficiently have been conveyed that a prison sentence, following a conviction after trial, will normally be the inevitable result. (Emphasis added.) This passage may be taken to be an indication to those who plead guilty in similar circumstances to the applicant in the present case, where the offences are stale, timely pleas of guilty have been entered and compensation to the government has been made, that an immediate term of imprisonment will not necessarily be imposed. Here, all the criteria for imposing a sentence which might avoid an immediate term of imprisonment were met. A suspended sentence is usually, although not necessarily, imposed where there are exceptional reasons. There were, in our opinion, circumstances in the applicant s case which could properly be described as exceptional. The applicant had, by May 1997, desisted in any criminal conduct related to the leased property which by then he had sold. Secondly, the applicant was aware since 1999 that a criminal investigation into this matter had been instituted as the judge rightly acknowledged. Added to these circumstances, the applicant s mitigation was powerful. Not only had he pleaded guilty, the applicant had, before trial, compensated the government to the tune of more than \$3 million (which included the interest on the PTA). There is one other factor which we consider may have influenced the judge to order an immediate sentence of imprisonment rather than finding that the balance was tipped in favour of suspending the sentence. This is reflected in her comment that the applicant had given untruthful evidence on behalf of D3 during D3 s trial which cast doubt on the genuineness of his remorse . This was not a factor which could be held against the applicant and, as Mr Marco Li for the respondent pointed out, it may very well

not have been treated as something to the applicant s disadvantage as the discount he was given was not reduced. Nevertheless, when all of these matters are considered in the round, we are satisfied, without making any criticism of the judge s decision to do otherwise, that the sentence imposed on the applicant could properly have been suspended. Accordingly, we shall grant leave. Treating the hearing as the appeal, we shall quash the order that the sentence of imprisonment should be served immediately and substitute sentences of 7 months imprisonment on each charge which will be suspended for a period of 2 years. The reduced term of imprisonment is to reflect the fact that when I gave bail to the applicant in December 2006, he had by that stage served some weeks of his sentence in prison. The effect of this order is that the applicant will not be liable to serve the term we have imposed unless, within a period of two years, he commits a further offence punishable with imprisonment. (M. Stuart-Moore) macrobutton nomacro Vice-President (Michael Lunn) Judge of the Court of First Instance Mr Marco Li, SGC, of the Department of Justice, for the Respondent. Mr Cheng Huan, SC, and Mr Bernard Chow, instructed by Messrs Yaddy Cheung & Co. for the macrobutton nomacro Applicant PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk 1udk G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V "0 "0 i\$&`G Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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