

HONG KONG / JUDGMENT

LAM SEE CHUNG, STEVEN

COURT

Court of First Instance

DECIDED

13 March 2013

CASE / FILE NUMBER

HCMA555/2012

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bjbj HCMA 552, 553, 554 and 555/2012 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. HCMA 552 OF 2012 (ON APPEAL FROM ESCC 5145/2011) MAGISTRACY APPEAL NO. HCMA 553 OF 2012 (ON APPEAL FROM ESCC 1967/2012) MAGISTRACY APPEAL NO. HCMA 554 OF 2012 (ON APPEAL FROM ESCC 1968/2012) MAGISTRACY APPEAL NO. HCMA 555 OF 2012 (ON APPEAL FROM ESCC 2064/2012)

BETWEEN HKSAR Respondent and LAM See Chung, Steven Appellant

Before: Deputy High Court Judge Wright in Court Date of Hearing and Judgment: 7 March 2013
Date of Handing down Reasons for Judgment: 13 March 2013

REASONS FOR JUDGMENT

The appellant appealed sentences imposed on him by David Dufton, Esq. in Eastern Magistracy on 4 July 2012. He pleaded guilty to 13 charges spread across four different charge sheets: 5 were charges of obtaining property by deception, 8 of fraud. At that stage he was already incarcerated, serving a period of 22 months imprisonment imposed earlier in other matters spread across 3 different charge sheets: those, similarly, were charges involving fiscal dishonesty. The magistrate performed a careful and detailed sentencing exercise to which I shall return. The appellant makes no complaint about the individual sentences imposed on the various charges, nor could he. At issue is whether the principle of totality was properly observed so as to reflect the appellant's criminality. The magistrate was aware that, the following day, the appellant was due to appear in the District Court for plea and sentencing on "charges relating to credit card fraud.". It seems that that sentencing exercise took place. The appellant was dissatisfied with the outcome and has also sought leave to appeal those sentences - again, apparently on the basis of totality.

Reference to the Court of Appeal Mr. Acton-Bond of counsel, who appeared for the appellant in these appeals but not below, applied for an order pursuant to s 118(d) of the Magistrates Ordinance, Cap 221, that these appeals be referred to the Court of Appeal in order that they may be determined along with the appeal against the sentences imposed by the District Court. It has been emphasised in many judgments, both of the Court of Appeal and of this court when dealing with magistracy appeals, that it is desirable, where possible, for a person convicted of a number of offences to be sentenced for all outstanding matters at the same time by one court. Whilst the desirability of, and the reasons for, that approach are self-evident I did not regard this as being an appropriate matter with which to burden the Court of Appeal. There was no novel point that needed deciding: the principles that are to be applied in sentencing of this nature are well established. The application of those principles in assessing the appropriate totality of sentences is a matter of judgment, sentencing, it is often said, being an art rather than a science. In any event, the Court of Appeal will have to decide whether to grant the appellant leave to appeal, as he has no right of appeal from the District Court: whether or not it does so it, effectively, will have the final word reflecting its view of totality. If it were disinclined to grant leave, the Court of Appeal would be placed in a difficult, if not invidious position, if these four appeals were also before it. These four appeals This being an appeal from a magistrate, it was a rehearing before this court based on the material before the magistrate together with such further evidence as this court may allow to be introduced. This court was required to arrive at its own decision. Obviously of importance in the present appeals was the appellant's history of criminal convictions: these may conveniently be dealt with in two tranches, those for which he had finished serving sentences by 4 July 2012 and those for which he was then serving sentences. On 20 March 2009 in E3109/2008 the appellant was sentenced to undergo imprisonment for 7 months on each of 7 charges, 1 of obtaining property by deception and 6 of fraud, with the sentences ordered to be served concurrently with one another. On 18 May 2010 in KC5988/2009 he was sentenced, surprisingly one may think, to serve 200 hours of community service in respect of 1 charge of fraud and 1 of attempting to obtain property by deception: he was also ordered to pay \$10,000 in compensation in respect of the latter offence. At the risk of pointing out the obvious, the sentences covered a total of 9 offences. Those sentences had been served by the time the appellant was sentenced for the offences which are the subject matter of this appeal. On 21 December 2011 in ESCC4848/2010 the appellant was sentenced to serve 8 and 10 months respectively on two charges of evasion of liability by deception with an order that resulted in an aggregate sentence of 16 months imprisonment - the reference to 18 months imprisonment in the magistrate's Reasons for Sentence was obviously a typographical error. On 8 February 2012 in ESCC2126/2011 the appellant was sentenced in respect of 5 charges of fraud each sentence being imprisonment for 3 months with an order that resulted in 2 months imprisonment being served consecutively to the earlier 16 months in ESCC4848/2010. On 25 May 2012 in TMCC1676/2012 the appellant was sentenced to serve 4 months imprisonment on each of 3 charges of fraud with an order that resulted in 3 months imprisonment being served consecutively to the earlier sentences. In summary, in respect of a further 10 offences involving fiscal dishonesty the appellant had been ordered to serve a total of 22 months imprisonment which he was serving as at the date of sentencing in the matters subject to this appeal. The magistrate noted that the first

7 offences had been committed between 2007 and 2009. The 13 offences in respect of which the magistrate sentenced were committed in the six-month period from June to December 2011. The magistrate identified two factors as being features which aggravated the starting point: first, that the appellant was a persistent offender, having committed 19 offences which had a common theme of fiscal dishonesty - to use the vernacular, he was a con artist who, as can be seen from the facts, was indiscriminate in selecting his victims; second, each of the 13 offences in respect of which the magistrate was to sentence had been committed whilst he was on court bail in respect of two pending cases involving 7 offences. The magistrate was fully justified in taking that view, as Mr Acton-Bond realistically accepted. Assessment of sentences in these appeals The overall picture became more clear by setting out the various offences in chronological order rather than the way they appear in the various charge sheets: June 2011 [ESC1967/2012]: 3 charges involving false representations made to one WANG Jian-she who was deceived of \$27,000: starting point of 6 months reduced to 4 months for the plea, with all sentences to be served concurrently with one another as they involved the same victim, but consecutively to the sentences imposed in ESCC 5145/2011; August 2011 [ESC5145/2011]: 3 charges involving the purchase, using valueless cheques, of motor vehicles from NG Ka-lun to a value of \$184,341: starting point of 12 months reduced to 8 months for plea, with all sentences to be served concurrently with one another; October 2011 [ESC1967/2012]: 3 charges involving false representations made to CHEUNG Hing-fung who was deceived of \$23,500: starting point of 6 months reduced to 4 months for the plea, with all sentences to be served concurrently with one another as they involved the same victim, but consecutively to the sentences imposed in ESCC 5145/2011; November 2011 [ESC2064/2012]: 1 charge involving false representations made to LEE Chiu-wing who was deceived of \$5900: starting point of 6 months reduced to 4 months for the plea, to be served consecutively to the sentences in the ESCC 5145/2011 and 1967/2012; November 2011 [ESC1968/2012]: 1 charge involving false representations made to NG Chi-wing who was deceived of \$1000: starting point of 3 months reduced to 2 months for the plea, to be served concurrently with all of the other sentences to take account of totality; December 2011 [ESC5145/2011]: 2 charges involving the purchase, using valueless cheques, of a motor vehicle from each of two different persons, the vehicles being valued at \$48,000 and \$45,000: starting point of 9 months reduced to 6 months for the plea, to be served concurrently with one another to take account of totality, but consecutive to the other charges on this charge sheet. Clearly, the magistrate was fully alive to the need to take account of totality. He then addressed it further in specific terms after completing the calculation of the individual sentences and the manner in which they should be served as between one another, saying: This makes a total of 26 months imprisonment to be served by the defendant, which I am satisfied properly reflects the defendant's criminality in all four cases. I am further satisfied that this is a meaningful discount from the maximum jurisdiction of the court [Emphasis supplied] Consideration of sentences then being served The magistrate went on to note that the appellant then was serving 22 months imprisonment. He went carefully through the sentences which he had passed, considering them in the light of the sentences being served. He provided cogent and compelling reasons as to why the sentences in ESCC1968/2012 and ESCC2064/2012 should be served concurrently with the sentences already being served and why the remaining sentences should be served consecutively to those sentences. He concluded his

reasons for sentence as follows:

32. This means therefore of the 26 months imprisonment imposed today the defendant will serve 22 months consecutive to the sentence he is now serving and 4 months concurrent. The total sentence the defendant now serves is one of 44 months imprisonment, which I am satisfied properly reflects his criminality in all seven cases. [Emphasis supplied] Reference was made to the decision of the Court of Appeal in *R v TSANG Chiu-man* CACC757/1995 in which the court regarded it as "unfortunate" that the judge had not indicated a starting point for offences then being served as well as then being imposed, saying: The principle that the judge should identify his starting point applies not merely to the offences for which a judge is sentencing defendant, but also to those cases in which the judge is approaching the question of sentence as if the current offences and the previous offences had been heard together. The magistrate was well aware that the appellant had pleaded guilty to all matters for which he was sentenced and, therefore, would have received a discount of one third on those sentences. His identification of the aggregate sentence which he would be serving as a consequence of the sentences imposed and orders made by him, namely 44 months imprisonment, indicates that he was aware of the fact that the aggregate starting point would have been 66 months imprisonment. Other than for the purpose of extracting principle, it is generally a fruitless exercise to be referred to sentences imposed in cases where the offences, and the circumstances of their commission, are entirely dissimilar to those under consideration. It was clear that the magistrate correctly applied the well-known principles applicable when approaching sentencing in a matter of this nature. He took into account all matters which it was proper for him to consider.

Conclusion

The resulting sentence was a robust one but fully merited: the appellant's course of conduct, which extended over a number of years, at times whilst on bail for pre-existing offences, was callous, calculated and cynical. I could not have improved on the approach and reasoning of the magistrate and respectfully adopted it as my own for these appeals. Each appeal was dismissed and sentence confirmed. (A R Wright) Deputy High Court Judge Ms WONG Kam Hing, SADPP, Department of Justice, for the Respondent Mr J Acton-Bond instructed by Department of Legal Aid, for the appellant 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 h'tF h'tF h'tF h'tF h'tF h'tF h nI hj@q h'tF h'tF h nI h'tF h'tF h'tF hj@q hak) hak) h'tF hj@q hak) h'tF h'tF h6kp h6kp h6kp h6kp h6kp qmqmqmqm hak) hl\$H hak) h6kp 1udk 1udk [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%`#q x)r :TZaG I u3 L+M2 e\O* \$*c?)6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6"

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