

HONG KONG / JUDGMENT

LEE WING KAN v. HKSAR

COURT

Court of Final Appeal

DECIDED

18 September 2007

CASE / FILE NUMBER

FAMC28/2007

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bjbj FAMC No. 28 of 2007 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MISCELLANEOUS PROCEEDINGS NO. 28 OF 2007 (CRIMINAL) (ON APPLICATION FOR LEAVE TO APPEAL FROM CACC NO. 199 OF 2006)

Between: LEE WING KAN Applicant

- and - HONG KONG SPECIAL ADMINISTRATIVE REGION Respondent

Appeal Committee : Chief Justice Li, Mr Justice Chan PJ and Mr Justice Ribeiro PJ Date of Hearing: 18 September 2007 Date of Determination: 18 September 2007 D E T E R M I N A T I O N
Chief Justice Li :

1. On 16 May 2006, the applicant was convicted before the District Court (Deputy Judge Dufton) of three charges of conspiracy to defraud. Subsequently, he was sentenced to a term of 4 years and 6 months imprisonment.
2. The applicant was a director and shareholder of Yue Fung Development Company Limited (Yue Fung Development). On the prosecution s case, he conspired with others to defraud various banks. On the application of Yue Fung Development, the banks issued letters of credit in favour of various beneficiaries and granted loans. The letters of credit and loans in question were purportedly supported by genuine underlying commercial transactions. But in fact, there were no genuine transactions relating to the letters of credit and the loans. The banks were exposed to economic risk by reason of the absence of goods as security for the banks. The co-conspirators included staff and directors of Yue Fung Development and the beneficiaries. The total period covered by the three conspiracies was between 20 November 1998 and 28 January 2002.

3. The applicant's defence was that there were in fact genuine commercial transactions. But the transactions had to be structured in a complex manner. A main reason was because the processing work for the finished products was carried out by prisoners in the Mainland for Yue Fung Developments's factory there. This was in contravention of Chinese law and international trade law. This fact had to be concealed even from Yue Fung Development's own staff.
4. The crucial issue at the trial was whether there were genuine commercial transactions relating to the letters of credit and the loans. The Judge rejected the defence evidence, including the applicant's, and found the prosecution's case proved.
5. On 9 March 2007, the Court of Appeal (Stuart-Moore VP, McMahon and Reyes JJ) refused leave to appeal against conviction and sentence.
6. In seeking leave to appeal to the Court on the substantial and grave injustice limb, Mr Bruce SC for the applicant relies on two grounds. He properly no longer pursues a further ground relating to an absent witness for the defence which had been abandoned before the Court of Appeal.
7. The first ground is that the Reasons for Verdict (the Reasons) were deficient in that the Judge dismissed the body of documentary evidence of the defence without adequate reasons. The Court of Appeal was plainly right in dismissing this ground. As pointed out in its judgment, it is clear from his Reasons that the Judge had paid close and careful attention to the evidence called by both sides. In our view, the Reasons were not inadequate as alleged and there is no arguable case of substantial and grave injustice based on this ground.
8. The second ground is based on the manner in which the ICAC prepared two prosecution witnesses (PW10 and PW11) for giving evidence. These witnesses gave evidence under immunity and their evidence only related to the third charge. Before giving evidence, the ICAC went through a memory refreshing exercise with them. The Court of Appeal considered the exercise acceptable save in one respect, namely, the ICAC officer provided the witnesses with a summary of each paragraph in their statements. The Judge was concerned about this, saying it may have been better that such a summary was not provided. And he took into account the criticism of this practice by the defence in assessing the evidence. The Court of Appeal rightly condemned this practice, stating that it must stop. As it pointed out, this practice gave rise to the possible danger that : witnesses may feel compelled to agree with the summary given to them and to adopt it in their testimony later whether or not the phraseology used in the summary had been strictly accurate.
9. Before the Court of Appeal, the applicant had relied on the objectionable feature in the memory refreshing exercise referred to above as one of four matters which should have led the Judge to find that these two witnesses gave false evidence.

10. It is important to consider the evidence as a whole. On the evidence, including that of the ICAC officer concerned, the Judge accepted that the officer's concern was to ensure that the witnesses were intending to speak the truth. He had emphasised to them in the course of the exercise that they must tell the truth. Although the provision of a summary to the witnesses was rightly condemned by the Court of Appeal, it was plainly right in holding that this was not a material irregularity in the circumstances of this case. In our view, there is no reasonably arguable case of substantial and grave injustice on this ground.
11. Accordingly, the application for leave is dismissed. (Andrew Li) (Patrick Chan) (R.A.V. Ribeiro) Chief Justice Permanent Judge Permanent Judge Mr Andrew Bruce SC and Mr Felix C.Y. Hoe (instructed by Messrs Robertsons) for the applicant. Mr Kevin P. Zervos SC and Mr Martin Hui (of the Department of Justice) for the respondent. PAGE PAGE &`#\$ Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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