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CACC 269/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CRIMINAL APPEAL NO. 269 OF 2006
(ON APPEAL FROM DCCC NO. 426 of 2006)

BETWEEN

HKSAR — Respondent

and

LI SHOU WEN (李壽文) — Applicant

Before: Hon Stuart-Moore VP and Lunn J
Date of Hearing: 13 February 2007
Date of Judgment: 13 February 2007

J U D G M E N T

Stuart-Moore, VP (giving the judgment of the Court):

Background

1. This is an application of leave to appeal against sentence.

2. The four charges of obtaining property by deception admitted by the applicant, aged 40, when he appeared before Deputy District Judge A Tse each related to street scams of a kind similar in style to many others which have come before this court over the years. They were dependent for their success upon finding a naive, easily duped victim who was at the same time sufficiently avaricious that any reservations which might normally have been harboured about the plausibility of the scheme were either never considered or were ignored.

3. The four offences to which the applicant pleaded guilty on 20 June 2006 were committed on 13 November 2004, 8 October 2005, 8 December 2005 and 10 January 2006 respectively. The applicant was arrested on 24 February 2006 after the victim of the earliest of these offences recognised him in the street. He was later identified by three more victims of the same scam after which he made a confession to the three further offences.

4. In essence, the street scams, carried out by a three-member gang, were designed to persuade gullible members of the public to part with sums of money they could ill afford to lose by a pretence that a substantial profit was to be made from the resale of electronic components which were said to be computer products each worth $200. In truth, these were radio components valued at 3 renminbi each.

5. The Summary of Facts in respect of the 1st charge will suffice for present purposes to explain the gang's method of operation as the facts of the remaining charges were, for all practical purposes, much the same:

"Madam Yeung Chiu-ha ('PW1') was a 38 year-old-lady with little education. On 13 November 2004 in the morning, she was on her way home after shopping at market and was stopped by an unknown male ('A') who asked PW1 whether there was any computer company nearby. A repeated the same question to another unknown male (subsequently identified as the Accused, a Mainlander entering Hong Kong with 2-way permit). Later, A asked PW1 and the Accused to his truck which was parked nearby to help him unload certain computer products. A promised to pay them a few hundred dollars as reward. PW1 and [the Accused] waited at Sheung Shui Plaza for A.

2. A returned later and said that he no longer required the assistance of the Accused and PW1. The Accused, however, asked A what computer products he had. A took out a small circular electronic part and told the Accused that it was HK$200/piece. The Accused then paid HK$200 to A for 1 piece. A then left the scene. The Accused and A exchanged mobile phone numbers.

3. The third unknown male ('C') appeared and asked for direction for certain places. The Accused and C chatted and learned that C was in the computer field. He then took out the electronic part he 'bought' from A and showed it to C. C was interested and asked how much it was. The Accused said it was HK$300. C asked how many stocks the Accused had. The Accused then called A. PW1 learned that there were 3,000 pieces. PW1 and the Accused agreed to buy 3,000 from A at HK$200/ piece and sold them to C at HK$300/ piece. They went to look for A to buy the 'electronic parts'. They asked C to wait at a nearby McDonald Restaurant.

4. PW1 and the Accused met A at the vicinity of the McDonald Restaurant. The Accused said he would go home to get HK$300,000 and asked A to accompany PW1 to bank to get HK$30,000, which was the share PW1 could afford. They met again later. PW1 gave the money to A. The Accused then asked PW1 to hand the electronic parts to C and collect payment from C. However, PW1 could not find C. A and the Accused also disappeared. PW1 discarded the electronic parts and made a report to the police.

5. On 24 February 2006, PW1 met the Accused and [another] of the trio again. She followed them and made a report when she saw 2 uniform police officers, who arrested the Accused. Upon search, 2 name cards of a Singaporean computer company were found (which was used in other fraud summarised below). The other male left before the police arrived.

> 6. Under caution by PC33242, the Accused admitted that he had deceived HK$30,000 from PW1. During subsequent caution, the Accused admitted the sham as described above. A, C and the Accused himself were Mainlanders playing different roles in the sham. A was played by one Zheng-min ('Zheng'). C was played by one Zhou Ya-hong ('Zhou'). The 'electronic parts' were in fact radio component of RMB$3. They shared the money. The Accused had spent the money in the Mainland. The name card was used previously to deceive others." (Appeal bundle pp. 7-8)

6. The sums of money and a small number of other items of property obtained in the four offences admitted by the applicant amounted in value to about $200,000.

Enhancement of sentence

7. The prosecution applied for an enhancement of sentence under section 27 of the Organized and Serious Crimes Ordinance, Cap. 455 ("OSCO"), on the basis, which the defence opposed, that this was an organized offence involving substantial planning and organisation. The judge noted that no evidence had been put before her as to 'prevalence' but she was satisfied that enhancement was justified on the ground advanced by the prosecution. In such circumstances, the approach to sentencing set out in *HKSAR v Tam Wai-pio* [1998] 4 HKC 291 at 298 fell to be considered. This court said:

> "… we offer the following guidance in order to minimise the risk of confusion for cases where enhancement of sentence has to be dealt with under the procedure laid down in the Ordinance. This approach would, of course, have to be adapted as necessary where multiple offences are involved, some of which are not organised crimes. In such circumstances, a judge should consider, determine and set out in clear terms:
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> (1) (a) the appropriate starting point having regard to the part played by the defendant, and

(b) the sentence that the court would have imposed taking into account the defendant's mitigation and totality;

(2) whether the specified offence was an organised crime within the meaning of s 2 of the Ordinance;

(3) whether the crime calls for an enhancement of the sentence under the terms of s 27(11) having regard to the information supplied by the prosecution to the court under ss 27(2)(a) to (e) or s 27(8) or the general nature of the organised crime itself;

(4) if enhancement is called for, the percentage increase by way of enhancement of the sentence.

In the present case, if this simpler formula had been adopted, precisely the same result would have been achieved. Taking the facts and figures adopted by the trial judge, and using the four-stage process we have proposed, the rationale for the sentences imposed would have come to this:

(1) (a) the appropriate starting point after trial would have been two years on each charge, and

(b) taking into account the mitigation, a one-third discount would have left 16 months' imprisonment on each charge;

(c) taking into account totality, this 32 months could properly be reduced to 24 months;

(2) each offence constituted an organised crime within the meaning of the Ordinance;

(3) enhancement was called for having regard to the nature of the offences;

(4) a 50% increase in sentence would have raised the overall sentence to one of 36 months."

8. The judge, having been referred to *HKSAR v Tam Wai-pio*, took a starting point of 3 years' imprisonment on each charge which she then reduced to 2 years to reflect the guilty pleas having found that this was the only mitigation which could properly lead to a reduction in sentence. The judge then, instead of looking at totality, gave her reasons why enhancement, pursuant to section 27 of OSCO, was appropriate before observing that:

> "… the only issue to be considered is the general nature of the organised crime itself. The facts of the present case are almost identical to the facts in the case of *Ma Suet-chun* [*& Ors* [2001] 4 HKC 337], also identical to the case cited by the defence, *Ma Tin-on*. I understand that the case of *Ma Suet-chun* was decided on prevalence rather than organised crime. However, the Court of Appeal has already expressed the view that there should be an enhancement of 50 per cent for similar offences in the future.
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> ……
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> 11. Having regard to the general nature of the organised crimes in the present case, I will adopt the observation in *Ma Suet-chun*. This case obviously calls for an enhancement of sentence. I will also adopt the observation of the Court of Appeal in *Ma Suet-chun* on the percentage of enhancement. The sentence on each charge is enhanced by 50 per cent. That means it is increased to 3 years." (Appeal bundle p. 15)

9. It was only finally that the judge considered totality and ordered that 6 months of the sentences on charges 2, 3 and 4 should each run consecutively to the other sentences imposed, making a total of 4½ years' imprisonment.

Grounds of appeal

10. It is the failure to adhere strictly to the guidelines in *Tam Wai-pio's* case which has in part led to this application. The applicant sought leave to appeal against his sentence on four grounds which were advanced on his behalf by Mr Mughal.

11. In the first of his grounds, Mr Mughal submitted that an enhancement by 50 percent under section 27 of OSCO was "further increased on the basis of the totality principle". He argued that by giving "a 50 percent enhancement of 12 months based on OSCO and a further 50 percent increase of 18 months based on the principle of totality", the judge

had "effectively increased the sentence upon the applicant by 100 percent". A similar point was made in the 3rd ground of appeal wherein, it was suggested that the applicant "had been subject to more than a 'doubling' of his sentence".

12. Both of these grounds, as framed, were a little difficult to understand. If the judge had adopted the procedure in *Tam Wai-pio's* case, the result would have been a starting point of 3 years' imprisonment on each charge reduced to 2 years' imprisonment to reflect the pleas of guilty. Considering totality next, with three of the sentences to be served consecutively to the extent of 6 months, this would have left an overall term of 3½ years which, with a 50 percent enhancement, would have left a total sentence of 5 years and 3 months. Indeed, Ms Anna Lai, in these proceedings, suggested that this is the sentence which this court should consider in substitution of the existing term. We think, however, that perhaps seeing that this was a higher sentence than she thought appropriate, the judge adopted a different route to achieve the sentence she intended. Whatever may have been the case, Mr Mughal's grounds in this respect are shown to have been misconceived.

13. In his second ground, Mr Mughal submitted that the judge had relied upon "the reasoning of cases concerning enhancement of sentencing on the ground of prevalence, which reasoning was not appropriate when considering enhancement on the basis of organized crime".

14. It is important that we should once again emphasise that the judge had twice made reference to the distinction between an 'organized crime' and a crime which is 'prevalent' so that it is apparent that she was

well aware of the difference in the present context. Whilst it is true that enhancement by 50 percent was recommended by this court in *HKSAR v Ma Suet-chun & Ors* [2001] 4 HKC 337 where the ground of 'prevalence' was relied upon by the prosecution, we have to say that we were not impressed by the argument that the judge's reliance on that case as the basis of enhancement for this kind of offence was inappropriate. Whilst the offences in the present case were put forward as organized crimes for the purpose of justifying enhancement rather than because of their prevalence, it is important to read in its full context what it was that Cheung JA, giving the judgment of the court in *Ma Suet-chun's* case, (at page 343) said:

> "The evidence shows there is obviously an upward trend for this kind of deception. The court should impose a deterrent sentence to stop the growth of such cases. In *HKSAR v Lee Sai Wing* [1998] 4 HKC 280, *HKSAR v Tam Wai Pio* [1998] 4 HKC 291 and *HKSAR v Cheung Wai Man* [1998] 4 HKC 284, the Court of Appeal took the view that it would be appropriate to enhance the sentence of specified offences that involved triad background or organized crimes by 50%. In *Cheung Wai Man* it was further decided that for organized crimes involving vehicle smuggling, trafficking in women for the purpose of prostitution in Hong Kong, and the use of force to recover money lent at usurious rate to gamblers, it would even be appropriate to impose an enhanced sentence of more than 50%."

15. The applicant was a persistent member of a well-planned and highly organized gang of tricksters who preyed on those who could least afford to lose their savings. The offences were committed over fourteen months and involved deliberately coming from the Mainland to target Hong Kong victims. In our opinion, enhancement by 50 percent was fully justified in the present case.

16. The 4th and last ground amounted to a submission that the judge was wrong to have enhanced the sentence at all.

17. An organized crime so far as it is relevant to this case is defined in section 2 of OSCO as a Schedule 1 offence (which includes obtaining property by deception) that:

> "(a) …
>
> (b) is related to the activities of 2 or more persons associated together solely or partly for the purpose of committing 2 or more acts, each of which is a Schedule 1 offence and involves substantial planning and organization; or
>
> (c) …"

18. The judge's assessment in her Reasons for Sentence, with this definition in mind, was as follows:

> "… The defendant and his accomplices were all mainlanders. They devised a premeditated scheme before they came to Hong Kong to commit the offences. Each offence involved more than two persons. The defendant and his accomplices played a different role in each scam. There was not only role play. The defendant and his accomplices had actually bought electronic components and brought them to Hong Kong to be used as props. I find that the prosecution has proved beyond all reasonable doubt that the four offences were organised crimes within the definition of section 2 of the ordinance." (Appeal bundle p. 14)

19. We are in full agreement with the judge's assessment that this was an organized crime which called for enhancement of sentence.

Conclusion

20. We have concluded that this is another of those applications where, regrettably, a failure to adopt a strictly correct approach to sentence

has been picked upon as a ground for asking for a reduction in sentence without a great deal of thought having gone into whether the sentence as it stands can properly be described as manifestly excessive or wrong in principle. It seems perfectly clear to us that the 4½-year sentence imposed by the judge was entirely appropriate. As such, there was no merit whatsoever in the application. We shall not, however, accede to the respondent's suggestion (at para. 12 above) to increase the sentence.

21. The application is dismissed.

(M. Stuart-Moore)
Vice-President

(Michael Lunn)
Judge of the Court of First Instance

Ms Anna Y K Lai, SGC, of the Department of Justice, for the Respondent.

Mr Hanif Mohamed Mughal, instructed by Messrs Tung, Ng, Tse & Heung, assigned by Director of Legal Aid, for the Applicant.