

CACC187/2008

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

**CRIMINAL APPEAL NO. 187 OF 2008
(ON APPEAL FROM DCCC 678 OF 2007)**

BETWEEN

HKSAR

Respondent

and

CHAN YUK-BUN

Applicant

Before : Yeung JA and Wright J in Court

Date of Hearing : 15 January 2009

Date of Judgment : 2 February 2009

JUDGMENT

Hon Wright J (giving the judgment of the Court):

1. On 24 April 2008 the applicant was convicted, after trial, by Deputy Judge Dufton of one count of conspiracy to live on the earnings of

prostitution, contrary to ss. 137(1), 159A and 159C of the Crimes Ordinance, Cap. 200. On 15 May 2008 he was sentenced to undergo imprisonment for 18 months. He sought leave to appeal the sentence. On 15 January 2009 we granted leave, allowed the appeal and ordered the applicant's immediate release. It is pertinent to note that this was the order sought on behalf of the applicant and was accepted, responsibly, by Mr David Leung, who appeared for the respondent, to be appropriate. We indicated that we would give our reasons for our decision and this now do.

2. The facts were straightforward. They were conveniently summarised on behalf of the respondent in this fashion:

"2. The applicant was the proprietor of a business running a website on the Internet which provided for advertisement of services rendered by prostitutes working in one-woman brothels and hotels. The website contained lewd photographs of the prostitutes, their names, services rendered and prices charged, their addresses and contact telephone numbers. The prostitutes have \$600 per month for the advertisement.

3. D2 to D7 were staff employed by the applicant. D2 was responsible for designing and managing the website and to provide technical support of the website. D3, D4 and D5 were photographers. Their responsibilities were to visit the addresses provided by the prostitutes, and take photographs of them. They took down personal details of the prostitutes and also collected the charges from them. When they returned to the office, the information and the photographs of the prostitutes would be passed to D6 for uploading to the website. As to the money received from the prostitutes, they would hand it over to the applicant.

4. D6 was a photograph editor where he was responsible to edit the photos of the prostitutes and upload them onto the website. D6 was also responsible for receiving calls from the prostitutes who placed job orders with the business. D6 would pass the addresses of the prostitutes to D3 to D5 for taking photographs. D7 worked as a computer programmer responsible for renewing the contents of the website.

...

6. The applicant was aged 50 and had no criminal convictions prior to the present case.

3. The judge called for background reports on all the convicted persons: in respect of D2 to D7, yet not the applicant, he also called for reports as to their suitability to perform Community Service. In the event, he ordered that each of those other convicted persons perform 180 hours of Community Service and pay a fine of \$20,000. None has made application for leave to appeal.

4. In the course of passing sentence the judge said the following:

"4. The roles of the defendants were different. [The applicant] operated the website and recruited the other defendants to assist in the operation. Throughout the period of the conspiracy in excess of \$6.5 million was deposited into the personal bank accounts of [the applicant]. [The applicant] admitted the approximate turnover the website of the website each month was around \$290,000-\$300,000 and that after deducting expenses the profit was around \$90,000-\$100,000.

5. [The applicant] was boss of the company. A clear distinction is therefore to be drawn between [the applicant] and the other defendants who he recruited to for the work website...

6. I accept that there is no evidence that any of the prostitutes were subject to any form of control, influence or direction and therefore the offence forms into a very different category to those offences involving pimps and vice establishments such as in *Secretary for Justice v LEE Cho-keung* CAAR2/2003.

7. Nevertheless I regard this as a serious offence committed over a period of 3 years between March 2003 and May 2006. Clearly this was a sophisticated operation, which encouraged prostitution on a large scale. The moneys deposited into [the applicant's] personal bank accounts and the exhibits produced at trial show many prostitutes took advantage of the services provided by the website. Whilst the website states only those over 18 can access the website there is nothing to stop minors accessing such a website.

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9. The soliciting and advertising of prostitution is illegal. A prostitute may not solicit in a public place... and a person may not publicly display a sign, which advertises the services of a prostitute... There can be no doubt that the Internet is a place to which the public or a section of the public are entitled or permitted to have access.

...

14. Whilst allowing sexual services to be advertised in this way may be safer for the prostitutes and prevent the trade going underground I recognize that Hong Kong society is more conservative than Western society with regard to issues relating to prostitution. There may well be a reluctance to amend the law as in the United Kingdom, the result of which would permit the advertising of sexual services thereby encouraging prostitution on a large scale, in particular considering that many of the prostitutes who work in Hong Kong are from the Mainland and from my experience hearing hundreds of immigration cases, more than often working illegally. Further, although there is no allegation in this case, the fact such web sites may enable crime syndicates to better hide their criminal activities is a strong argument against the amendment of the law and the need for deterrent sentences to prevent proliferation of such sites."

5. In our view, the judge erred in principle and the sentence which was imposed was manifestly excessive.

6. We agree with the judge that this was a substantial operation which appears to have been returning a handsome profit for the applicant. If the figures are accurate they show, at a flat rate of \$600.00 per advertisement per month, patronage by some 500 users leaving aside the question of whether some advertisers ran more than one advertisement simultaneously.

7. The judge was correct, also, when he recognized that the circumstances of this offence placed it "... into a very different category to those offences involving & vice establishments...". His primary error,

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however, was that he failed to give proper recognition to that distinction. The authority to which the judge made reference, *LEE Cho-keung* (reported as [2004] 4 HKC 179, was so strikingly different factually and as to the personal circumstances of the applicants in that case as to be completely removed from the present matter: however, it eloquently illustrates why the present sentence is manifestly excessive.

8. Only a brief consideration of the judgment is necessary to demonstrate this to be so:

“13. The judge was right to say that the cases did not set a tariff. As Cross and Cheung 'Sentencing in Hong Kong' 4th edition, correctly remark at page 571, there is no customary sentence for this type of offence and 'everything depends on the particular facts of the case: whether the accused is the keeper, the manager or the assistant; the scale of the operation; the age of the prostitutes. Managers or keepers regularly receive terms of imprisonment; those who assist, less regularly. The maximum penalties for keeping a vice establishment under section 139 of the Crimes Ordinance, Cap 200, were increased from 2 years to 3 years on summary conviction and from 7 years to 10 years on conviction on indictment on 22 May 1998 (the maximum fine of \$20,000 was repealed). Cases decided before that day should be considered in the light of those increases.'

...

15. This was no ordinary or simple vice establishment. This was a large operation involving a significant number of prostitutes and a stream of customers; the use of several premises; four different floors, 22 rooms; and it was also a sophisticated operation involving the generation of substantial sums of money within a matter of weeks; an operation that ran promotional campaigns requiring the visits of photographers to take nude photographs of the women for the purpose of advertisement; and those who were actively involved in its functioning must self-evidently have been aware of the scale of the operation in which they were involved...

...

17. Some of the women engaged in this conveyor belt of prostitution were aged as young as 16 years and to say, as did the

judge, that they were willing is correct as far as it goes but, especially with the young and those in Hong Kong unlawfully or working here unlawfully, that is to ignore the exploitation and dangers to which a system such as this one subjects them. A reading of the full facts gives some flavour too of the demands made of them; of the monetary exploitation which required them to perform sexual services for many customers before they earned any money and even then only a fraction of what was paid by the customer. Each of these respondents, more so the first than the others of course, exercised an active role in controlling the daily activities of the women and in running this establishment. The operation continued after a closure order on one of the premises and, albeit at the direction of the boss, the first respondent tore down a closure order and carried on regardless. That, in his case, is an aggravating feature. ... The sophistication of the operation went so far as to detailed arrangements for lawyers and for substantial compensation in case of arrests. These women were all of them illegal immigrants or two-way permit holders who ought not to have been working. ..." [emphasis supplied]

9. From the judgment it appears that a starting point of two years imprisonment was considered appropriate in respect of each of the persons convicted of conspiring to live on the earnings of prostitution: only one of those so sentenced had no previous criminal convictions. It is apparent from the judgment that one of the particular factors which exercised the Court of Appeal on that occasion was the daily level of control exercised by each of the applicants.

10. Although the judge said "I accept that there is no evidence that any of the prostitutes was subject to any form of control, influence or direction..." he went on to take, for the applicant, the same starting point as that taken in *LEE Cho-keung* in respect of those convicted of conspiring to live on the earnings of prostitution.

11. It is clear from other cases that the element of control is arguably the single most significant feature in arriving at an appropriate

sentence: for example, in *LAM Hin-yar v HKSAR HCMA18/2003*, Beeson J observed:

“It is important to note that it is the individual who is sentenced in cases such as this, given that there are no tariff sentences, although some guidelines exist. That somebody is a keeper of a vice establishment, for instance, does not make that person necessarily more culpable than a person who manages the establishment; it depends on the specific facts of the case. Here, the Appellant was not simply a tenant, but was involved in the running of the vice establishments operating in the premises.”

that being a case in which there was evidence of direct control and direction of the prostitutes and sharing of the proceeds of each act of prostitution: a period of four months imprisonment for living on the earnings of prostitution was not disturbed on appeal. Similarly in *YU Kin-chiu v HKSAR HCMA869/1999* a sentence of three months imprisonment was upheld on appeal where there had been evidence of introduction of the prostitute to, and participation in the fee paid by, clients.

12. In *PANG For-cheuk v HKSAR CACC623/1998*, a case which, on its facts was at the opposite end of the scale to those referred to in the preceding paragraph, Leong JA, giving the judgment of the Court, said:

“2. ... In February, 1997, PW1 a 17 year-old girl was taken there by her boy friend to work as a prostitute to pay off a debt which her boy friend had incurred and in respect of which she acted as guarantor. The arrangement was that customers would pay the applicant for the girl's service and the applicant after deducting his share, would give the balance of the fees to the girl to pay off the debt of her boyfriend. A week after the girl started work, instead of receiving customers at the applicant's place, she was sent to such places as the applicant directed to provide service to the customers there. On her return, she would have to account to the applicant her intake and the applicant would then give her her share. This went on until March or April the following year when the girl indicated to the applicant she did not want to work as a

prostitute any more. In the meantime, the applicant told the girl that he had taken over the debt of her boy friend and she had to repay him. In addition during this period the girl occasionally borrowed money from the applicant. All these loans accumulated to over \$100,000 by March 1998. The girl discussed repayment with the applicant. The applicant agreed to the girl repaying these loans by monthly instalments and he also discounted the total owed to him by her to \$900,000.

3. The applicant had previous convictions of gambling, managing a vice establishment and living on earnings of prostitution.

...

8. In our view, 18 months in the circumstances of the present case may be on the high side but is not manifestly excessive or wrong in principle.”

13. As we understand the position in this application, there was no evidence of any form of control whatsoever by the applicant or any of the persons employed by him. In this sense, it was apparently a straightforward commercial operation with no threatening or other sinister undertones attached to it. The applicant merely offered an advertising facility to the prostitutes who, if they chose to do so, could take up the offer. There is no suggestion at all that the prostitutes were told that there would be any physical or personal consequences if they did not advertise on the website, that they would be harassed or in any way compromised. The fact that they were photographed with the intention that their appearance, as well as the details of the services offered by them, would be available to anyone minded to visit the website and that they were prepared to pay a modest fee for the advertising suggests to us that they were willing participants.

14. The judge failed to give sufficient weight to this particularly significant factor.

15. The judge erred also in finding that the operation "... encouraged prostitution on a large scale." It is not entirely clear to us just what he meant by this phrase. We accept that having an avenue open for prostitutes to advertise their services may facilitate the prostitution of those who utilise the resource but we can see no basis for a finding that providing an advertising service would in any way "encourage" prostitution on any scale. The availability of an advertising opportunity is, with respect, hardly likely to be the catalyst which results in a person deciding to prostitute herself.

16. The judge pointed out that there was nothing to stop minors accessing this website: Mr Leung made the same point during his submissions. That is true but, with respect, it is true of any site on the Internet unless access is controlled by subscription, password, membership or other means. Moreover, access to salacious or titillating advertisements is, of course, not confined to the Internet but is equally available from other media. We do not regard this as a proper consideration for the judge in the context of this offence.

17. The judge erred in two further areas: first, by apparently taking into account the fact that "many" of the prostitutes operating in Hong Kong are from the Mainland and "more than often working illegally". There does not appear to have been any evidence before the judge, or if there was he made no specific reference to it, either that persons working illegally were advertising on the website or, more importantly, that the applicant knew advertisers to be working illegally. Nor, may we add, was there evidence that any of the advertisers was particularly young.

18. The second area was that, having recognized that there was "no allegation" (or, insofar as we are aware, evidence) that a crime syndicate was involved in this operation, he went on to identify the need for deterrent sentences to "... prevent proliferation of such sites" which would "... enable crime syndicates the better to hide their criminal activities...". With respect, the judge allowed himself to speculate concerning matters which had no relevance to the question of sentence on this applicant.

19. The judge made reference to the one other Hong Kong case, similarly a decision of the District Court, involving a person running a website on which prostitutes advertised their services: a suspended sentence was imposed in that matter, the judge asserting that this was because "... that was the first prosecution.". Mr Leung suggested that there was a further reason, namely that that convicted person had been remanded in custody for three weeks pending reports.

20. Whatever the reasons for sentence may have been in that other matter, the fact that there has only been one such prosecution suggests that offences of this nature are, as yet, uncommon. There was no evidence, and Mr Leung did not seek to contend, to the contrary. Deterrence had but a minor role to play in this particular sentencing process.

21. In our judgment, the circumstances of this offence and this offender, bearing in mind that he was 50 years old and of clear criminal record, would have been met by a Community Service Order and the imposition of a substantial fine. An immediate term of imprisonment,

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apparently without the suspension of such term being considered, was not justified.

22. As the applicant had already spent nine months in custody we ordered his immediate release without imposing any further penalty on him.

(Wally Yeung)
Justice of Appeal

(Alan Wright)
Judge of the Court of
First Instance

Mr David Leung, SPP, Department of Justice, for Respondent.

Mr Francis Yip, instructed by M/s Ma, Tang & Co (DLA) for the Applicant.

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