

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

**MAGISTRACY APPEAL NO 385 OF 2000
(ON APPEAL FROM ESCC 1122 OF 2000)**

BETWEEN

HKSAR	Respondent
and	
TAM HEI LUN	1 st Appellant (D1)
PO YIU MING	2 nd Appellant (D2)
MAK KING LAM	3 rd Appellant (D3)

Before: Hon Stuart-Moore Ag CJHC, Rogers VP and Woo JA in Court

Date of Hearing: 9 October 2000

Date of Judgment: 9 October 2000

Date of Reasons for Judgment: 16 October 2000

REASONS FOR JUDGMENT

Hon Rogers VP (giving the judgment of the Court) :

At the conclusion of the hearing of these appeals, the appeals were dismissed and we said that we would hand down our reasons in writing later. This we now do.

On 21 March 2000, the appellants pleaded guilty before Mr. Ian Candy, Principal Magistrate in the Eastern Magistracy to various charges relating to misuse of computers and computer accounts and in the case of the 3rd appellant to charges under the Copyright Ordinance, Cap. 528 relating to infringement of copyright.

On 5 April 2000 the 1st and 3rd defendants were ordered to be detained in a Detention Centre and the 2nd defendant was sentenced to a period of 6 months imprisonment on all charges.

All three defendants appealed against sentence and on 30 May 2000, Pang J directed that the appeals be referred to the Court of Appeal, pursuant to section 118(1)(d) of the Magistrates Ordinance, Cap 227, for determination of whether there should be any sentencing guidelines for the type of offences with which these cases are concerned.

At the commencement of the hearing before the Court of Appeal the 2nd appellant abandoned his appeal and his appeal was accordingly dismissed.

Background Facts

The 2nd appellant was a user of the Internet. While his computer was connected to the Internet he used a program called Back Orific which enabled him to gain access to computers of other users whilst they were connected to the Internet. Those other users whose computers were accessed by the 2nd appellant would have been unaware at the time

that someone else was accessing their computers. By using the Back Orific program the 2nd appellant was able to find out the login names and passwords of those users. The 2nd appellant apparently obtained 127 login names and passwords by this method.

However the 2nd appellant did not use the information he gained for mere idle curiosity. He used the accounts to access the Internet between February to May 1999. The fees which the Internet Service Providers charged for such access were, in the ordinary way, charged to the accounts of the respective account holders.

The 2nd appellant also passed on to the 1st appellant details of some of the login names and passwords which he had obtained. The 1st appellant knew that the 2nd appellant had obtained the account details wrongfully and that he was not entitled to use them. He paid the 1st appellant a total of HK\$3,000 for this information. The 1st appellant used the account details to gain access to the Internet between February and May 1999. Naturally, again, the fees which the Internet Service Providers charged for this access were charged to the respective account holders.

The 1st appellant also sold details of some of the accounts, which he obtained from the 2nd appellant, to five other people. In respect of four of those, the 1st appellant concealed from them that the details of the accounts had been obtained illegally. In all the 1st appellant made a profit of HK\$1,500 by selling details of accounts which he had obtained from the 2nd appellant.

The 3rd appellant also obtained details of Internet Service Provider accounts from the 2nd appellant and used them to obtain access to the Internet without payment. That he did in May 1999.

In 1998, however, the 3rd appellant had set up a web page on the Internet. In that web page he invited members of the public to buy compact discs of songs in the MP3 format. There was a list of some 300 songs. The 3rd appellant charged HK\$88 for one disc, HK\$160 for two discs and HK\$210 for three discs. He would request the purchaser to deposit money into his personal bank account. After the 3rd appellant received the money he would download the relevant songs from the Internet and save them in the MP3 format on re-writable compact discs. Because of the use of the MP3 format many more tracks could be included on a compact disc produced by the 3rd appellant than on the normally commercially available CDs. The 3rd appellant would send the completed discs by post to the purchasers.

The Pleas of Guilty

The 1st appellant pleaded guilty to 14 charges of obtaining access to a computer with a view to dishonest gain, contrary to section 161(c) of the Crimes Ordinance, Cap 200 and 8 charges of dealing with proceeds, known or reasonably believed to represent proceeds of an indictable offence, contrary to section 25(1) of the Organized and Serious Crimes Ordinance, Cap 455.

The 2nd appellant pleaded guilty to three charges of criminal damage, contrary to section 60(1) of the Crimes Ordinance, Cap 200 and

12 charges of obtaining access to a computer with a view to dishonest gain, contrary to section 161(c) of the Crimes Ordinance, Cap 200.

The 3rd appellant pleaded guilty to two charges of obtaining access to a computer with a view to dishonest gain, contrary to section 161(c) of the Crimes Ordinance, Cap 200 and ten charges of making for sale or hire infringing copies of copyright works without the licence of the copyright owner, contrary to section 118(1)(a) and 119(1) of the Copyright Ordinance, Cap 528.

The appropriateness of guidelines

Despite the fact that these appeals have been reserved for the consideration of the Court of Appeal with a view to consideration as to whether guidelines should be given in respect of the computer related offences, specifically section 161 of the Crimes Ordinance, we decline to do so on this occasion.

We have been informed that there have been less than ten prosecutions in relation to offences under section 161 and in those circumstances it is most unlikely that the full range of crimes which would fall within section 161 would now be known or appreciated. The present cases comprised gaining details of the Internet Service Provider accounts and misusing those to avoid account charges. To this extent only small sums of money were involved.

If bank accounts were accessed electronically large amounts could be involved. It is conceivable that skilled computer operators could

arrange that that could be done secretly and in an almost undetectable manner. In other instances computers may be accessed in secret and confidential business information may be obtained. The pernicious effect of the use of such a device as the Back Orific program cannot be over emphasised. If login names and passwords can be obtained from someone else's computer without their knowing about it, it is a very short step to other information also being extracted.

There are undoubtedly many considerations which a court would have to take into account in arriving at an appropriate sentence in respect of offences under sections 60 and 161 of the Crimes Ordinance. First and foremost would be the loss and damage which was caused to the victims. The gravity of the offence to the victim would be another matter. The purpose of the access would also be relevant as would be any gain financial or otherwise to the person perpetrating the access.

In the present circumstances we consider it sufficient to say that where access has been obtained to someone else's computer whether for gain or for some other reason, the act can in many respects be likened to burglary. What has happened is that there has been access to the computer of another, much in the same way as a person who enters a house or an office and goes through a drawer or filing cabinet. Some of the aspects of the offence of burglary are undoubtedly not present in relation to unauthorised computer access. The analogy is by no means perfect. Whilst indicating that we feel it inappropriate to lay down guidelines now we would indicate that unless there are most unusual circumstances a non-custodial sentence would be inappropriate for offences against section 161.

Present Appeals

1st appellant

It was argued that the Detention Centre sentence in respect of the 1st appellant was manifestly excessive. Strong reliance was placed on the fact that the 1st appellant pleaded guilty at the first opportunity and that previously he had a clear record. Undoubtedly he was of a young age. He was 19 at the time of sentence. He came from a stable home background. He had a good work and study record. It was argued that a community service order would benefit the 1st appellant : he had shown genuine remorse and was unlikely to re-offend. Furthermore the offences which he committed were at the lower end of the scale since the gain which he made was relatively small and indeed his offence was significantly less serious than that of the 2nd appellant. Any custodial sentence would be likely to disrupt the 1st appellant's course of study which he was undertaking in his spare time.

Particular point was made that it was not an appropriate case for a deterrent sentence since there was no evidence to show that the offences were prevalent in Hong Kong.

Whilst it is true that the number of prosecutions in respect of section 161 offences is at present small, the damage which such offences can cause should not be underestimated. As has been said above, unless there are unusual circumstances, a non-custodial sentence would be inappropriate for offences contrary to section 161. In our view, given the

age of the 1st appellant, a Detention Centre sentence was appropriate.

3rd appellant

Of particular significance in relation to the 3rd appellant is that he was 16 at the time when the majority of the offences were committed, specifically those relating to making unauthorised copies of copyright works. Again, the 3rd appellant had strong family support and was considered in the probation officers report as being suitable for community service order. He has been studying at the Open University and a custodial sentence would undoubtedly disrupt that. Nevertheless his offences also included, importantly, the copying of copyright works and selling them to members of the public commercially, even if the scale of the operation was small and in the nature of a part-time and almost amateur, cottage industry rather than a factory type operation. Even on this basis alone, we do not see that the custodial sentence, namely that of a Detention Centre, was wrong or manifestly excessive.

(M. Stuart-Moore)
Chief Judge, High Court (Ag.)

(Anthony Rogers)
Vice-President

(K.H. Woo)
Justice of Appeal

Mr I. Grenville Cross, SC Director of Public Prosecutions
and Mr David Leung, SGC for the Respondent

Mr Thomas Chan instructed by Messrs Peter W.K. Lo & Co for
1st Appellant

Mr Philip Ross instructed by Director of Legal Aid for 3rd Appellant

