

HONG KONG / JUDGMENT

HKSAR v. A

[2021] HKCA 1789

COURT

Court of Appeal

DECIDED

3 December 2021

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[2021] HKCA 1789 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL

HKSAR Respondent v A Appellant

Before: Hon Macrae VP and Zervos JA in Court Date of Hearing: 25 November 2021 Date of
Judgment: 25 November 2021 Date of Reasons for Judgment: 3 December 2021

REASONS FOR JUDGMENT

Hon Zervos JA (giving the Reasons for Judgment of the Court): On 11 December 2019, the appellant was convicted after trial before Toh J (the judge) and a jury of a single count of trafficking in a dangerous drug, namely 258 grammes of a crystalline solid containing 255 grammes of methamphetamine hydrochloride (commonly known as Ice), contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134. On 16 March 2020, he was sentenced to 14 years imprisonment. The appellant was granted leave on 2 March 2021 by a Single Judge to appeal against his sentence, having had his leave application to appeal against his conviction refused. The appellant in his appeal against sentence essentially complained that he should have been given some discount from his sentence for assistance he had rendered to the authorities in the past. At the conclusion of the hearing, we dismissed the appeal and said we would hand down our reasons in due course, which we now do. The brief facts of the case were that on 24 May 2017, a woman (PW1) was stopped by police who found in a handbag she was carrying the quantity of drugs as particularised in the count in a transparent resealable plastic bag. She told the police the bag containing the drugs were given to her by the appellant in order to deliver them to a specified address for a reward of \$500. She pleaded guilty to trafficking in the drugs and thereafter gave

evidence for the prosecution in the trial against the appellant. It was not in dispute that the appellant's DNA was found on the flaps of the resealable plastic bag that contained the drugs. The defence case was that PW1 was not credible and had told lies in order to get a reduction in her sentence. The sentence In a closed court hearing on 16 March 2020, the judge was informed that the appellant had provided assistance on seven previous occasions as a registered informer and had received a reward on six of those occasions. It would appear the judge was of the view that if a defendant had provided assistance for which he had received a reward, then this did not constitute a mitigating factor that could be taken into account when determining the sentence to be imposed upon him. As a consequence, no reduction was given to the appellant for the assistance he had rendered to the authorities, nor was any issue taken by his counsel on the judge's approach to this matter. The judge noted the appellant had, amongst other convictions, a previous conviction for trafficking in dangerous drug in 2006, for which he was sentenced to 12 months imprisonment. She found there was no other meaningful mitigation that could be advanced on his behalf and in applying the relevant guidelines in *HKSAR v Tam Yi Chun* sentenced him to 14 years imprisonment. The affirmation of the appellant The appellant filed an affirmation in which he stated he had been giving assistance to the police for many years. He said that prior to 2006, he had been assisting the police by providing information to them about various criminal activities. He said when he was last released from prison towards the end of 2006 he was invited to become a registered informer. He was told he would only be remunerated for any information he provided on the basis he was a registered informer. The remuneration was determined on the basis that if the information could lead to a successful prosecution he would be paid a reward based on a certain percentage of the value of the dangerous drugs seized. He described how he assisted the police and what information he provided to them. He claimed in doing so he put himself at great personal risk and there were some people who were suspicious of him. He also claimed, in addition to assisting the police as a registered informer, he provided assistance to other units of the police for no reward. He said he had done this on numerous occasions but acknowledged he did not keep a record and the additional matters he listed were as best as he could recall. The fact is the additional matters the appellant mentioned were described in very general and imprecise terms. The affirmation of the inspector of police An inspector of police filed two affirmations in response to the appellant's affirmation. He described in detail the past assistance the appellant had rendered to the police, which he had extracted from police records. He confirmed the appellant had on seven occasions provided information to the police which was assessed to be of practical use. He noted, however, that the assistance did not involve any further action other than the provision of information and he was not aware of any risk to the appellant or his family as a consequence of his co-operation with the police. Except for the seven cases, he disputed the appellant's claim that he had assisted the police in respect of other cases. He noted there were no records of the appellant providing the additional information as he claimed. The appellant's submissions Mr H Y Wong, for the appellant, advanced two grounds of appeal. Ground 1 complained the judge failed to appropriately consider the past assistance the appellant gave to the authorities. Ground 2 stated the appellant had provided to the authorities, in a number of cases, additional assistance without any reward and he was therefore entitled to a substantial discount from his sentence. Mr Wong

submitted the judge was mistaken in taking the view that past assistance provided by a defendant for which he had received a reward was not a mitigating factor. He cited *Z v HKSAR* for the proposition that receiving payment for pre-arrest assistance does not act as an absolute bar to a reduction in sentence. Mr Wong confirmed on the previous occasion the appellant was convicted for drug trafficking in 2006, previous assistance he had rendered to the police had been taken into account when he was sentenced for that offence. He accepted that the additional cases described by the appellant were vague and general and he did not rely on them in support of his submission. By reference to the seven substantiated cases, he argued that since 2007 the appellant had provided useful information to the authorities, and in the course of doing so, had put himself at considerable personal risk. Whilst the appellant received a financial reward in six of the seven cases, he submitted the appellant was nonetheless entitled to further credit because of the nature of the assistance and the risk to his personal safety. He also submitted that the case for which the appellant had not received a reward, involved him providing information which led to the arrest of a defendant, who was found in possession of a dangerous drug, but later absconded while on bail. He argued in those circumstances the appellant was entitled to some discount from his sentence for the lengthy relationship he had with the police and the information he provided to them. The respondent's submissions Mr Raymond Cheng, for the respondent, noted, apart from the seven cases in which the appellant provided assistance as a registered informer, none of the other alleged instances of assistance could be verified by the police. He cited *HKSAR v Yeung Hoi-ting* where it was held that a defendant's unsupported assertion that he had rendered assistance to the authorities would not normally be a reliable basis for mitigation, and that such assistance would need to be confirmed by the relevant authority. Mr Cheng argued the appellant was not in the category of a supergrass, which was reserved for a truly exceptional level of cooperation: *HKSAR v Cheung Chi Yuen*. He pointed out that the appellant did not provide any statement or testify in any of the seven cases that had been verified. Nor were the police aware of the appellant or his family being put at risk of harm in any of the seven verified cases. He submitted there were no special features distinguishing the assistance offered by the appellant from the ordinary assistance rendered by informers who provide information only. He particularly noted that the appellant had received financial reward in respect of six of the seven cases and, in the circumstances, was not entitled to any further benefit for the assistance he had rendered to the police on those occasions. Mr Cheng further argued that the appellant had not been deterred from engaging in drug trafficking in that he committed the present offence only one month after having provided information to the police in relation to a drug trafficking case for which he was paid a substantial reward. Furthermore, he had been convicted for the present offence after trial despite cogent evidence from an accomplice and the presence of his DNA implicating him in the trafficking of the drugs.

Discussion The Court of Final Appeal in *Z v HKSAR*, held that credit for pre-arrest assistance could be given when sentencing a defendant, although the circumstances of such assistance should be closely examined by a court before deciding whether and if so, the extent to which it should be taken into account. The Court went on to explain that in deciding whether in such circumstances a reduction in sentence is merited will depend upon the particular facts and circumstances of the case and in this respect gave some guidance by reference to various case

scenarios, including where a defendant rendered assistance as a paid informer: 20. First, the defendant may have assisted the authorities out of good motives. He may have had a genuine wish to assist the authorities. His assistance in these circumstances would usually deserve full recognition in mitigation of sentence. Secondly, the defendant may have received payment or other consideration for his assistance. It has to be recognised that payments to police informers are a fact of life and the use of informers is necessary in society's fight against crime. Although assistance for which payment or other consideration was given may be recognised as a mitigating factor, the court should carefully consider all the circumstances in deciding whether the assistance in the case in question deserves any reduction and if so, the amount of reduction. The more substantial the payment or consideration, the less sympathetic should the court be in this regard. Thirdly, the courts should be wary of the situation in which a defendant who is engaging or is intending to engage in criminal activities gives assistance to the authorities in order to build up credit for himself to be used later if apprehended for the purpose of minimising the consequences of his crimes. Although there is no bar against the recognition of assistance given in such a situation, the courts should proceed with considerable circumspection in deciding whether, taking into account all the circumstances, the assistance merits any recognition and if so the degree of any discount. It is undesirable for the courts to take an approach which has the effect of fostering potential defendants trying to build up goodwill in this way. It is incumbent on a sentencing court to assess very carefully the circumstances behind the provision of assistance to the authorities by a defendant who has received payment or consideration for having done so, and to be particularly wary of a career criminal who is exploiting the vulnerabilities of the criminal justice system for his own interests. Unless it can be substantiated or supported by the relevant law enforcement agency, we are not prepared to act on the unsupported assertion of a defendant in respect of assistance he claims he has rendered. The other cases the appellant said he had provided assistance to the police are described in extremely vague and general terms, and as rightly conceded by Mr Wong, provided no proper basis to be taken into account. Accordingly, we were not prepared to act on them in such circumstances. We have carefully examined the seven cases in which the appellant has provided information as a registered informer and are satisfied that given the circumstances of the cases, including the receipt of substantial rewards in six of the cases, no further benefit should be given to the appellant by way of a reduction from his sentence. As for the case in which no reward was paid to him, it was accepted by the police that the information the appellant provided was of practical use. It led to the arrest of a person who was found in possession of a quantity of drugs but who later absconded. However, it was pointed out by Mr Cheng that a reward was not paid to him after an assessment of the case by the police. There may have been a reason for this by the police. Mr Cheng argued that even if some provision was made for a discount to the appellant's sentence for the assistance he rendered in that case, it would be offset by the fact that the starting point adopted by the judge was two months less than it should have been on a strict arithmetical calculation of the tariff, and that the starting point should be enhanced for his role as an organiser in the trafficking of the drugs and for his prior conviction for drug trafficking. There was considerable substance in this submission and we agreed with it. We were therefore of the view that no further reduction to the appellant's sentence was warranted for his pre-arrest assistance to the police. We accordingly dismissed the

appeal. The role of informers Mr Cheng in the course of his submissions made the observation that the appellant had not been deterred from trafficking in drugs himself and the present offence was no less serious than those he provided information about to the police. This observation brings into question the role of informers and their relationship with law enforcement officers, particularly when the informer provides information about the criminal activities of others but at same time is furthering his own criminal interests. We understand that the police require informers to be registered and assigned to a handling officer with appropriate records kept of their dealings with each other. It would appear the appellant had a long-term relationship with the police in providing information, initially on an informal basis, which was later formalised when he registered as an informer. As seen by his criminal record, while the appellant provided information in relation to the involvement of others in the drug trade, he was engaging in the same criminal activity himself. The inherent vulnerabilities to which a law enforcement agency is exposed when utilising informers has long been an issue of concern, particularly in respect of the supervision and handling of informers and the nature of the relationship between informers and those who utilise them. It is for this reason that there should be in place an effective accountability regime governing the use of informers by a law enforcement agency that is properly regulated with checks and balances in order to prevent any abuse or misuse. This is crucial in maintaining public confidence in the criminal justice system and in ensuring the integrity of the law enforcement agency in its dealings with members of the criminal fraternity. (Andrew Macrae) (Kevin Zervos) Vice President Justice of Appeal Mr Raymond Cheng, SADPP, of Department of Justice, for the respondent Mr H Y Wong, instructed by Cheung & Liu, assigned by the Director of Legal Aid, for the appellant Zervos JA. Appeal Bundle (AB), 72D-H. AB, 46. HKSAR v Tam Yi Chun

[2014] 3 HKLRD 691.

(2007) 10 HKCFAR 183, at [20C-D].

[2019] 3 HKLRD 516, 535.

[2018] 2 HKLRD 1396, at [26]. Z v HKSAR, at [19]. PAGE

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