

HONG KONG / JUDGMENT

HKSAR v. ATTER, ASHOK

[2022] HKCFI 3049

COURT

Court of First Instance

DECIDED

21 October 2022

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HCMA 242/2022

[2022] HKCFI 3049 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE (Appeal against Sentence) MAGISTRACY APPEAL NO
242 OF 2022 (ON APPEAL FROM STCC 1061 OF 2022)

BETWEEN HKSAR Respondent and ATTER, ASHOK Appellant

Before: Hon Anna Lai J in Court Date of Hearing and Judgment: 31 August 2022 Date of Reasons for Judgment: 21 October 2022 R E A S O N S F O R J U D G M E N T The appellant was convicted by the Magistrate on his own plea of one charge of breach of condition of stay . He appealed against the sentence of 6 months' imprisonment. I dismissed the appeal at the conclusion of the hearing. I now provide the reasons for my judgment. Admitted facts The appellant arrived Hong Kong as a visitor on 22 September 2013 and was permitted to remain until 2 October 2013. The appellant was aware of his condition of stay in Hong Kong. However, he did not leave on or before this date as required and had since overstayed for 8 years and 3.5 months. On 26 January 2022, the appellant surrendered to the Immigration Department for having overstayed . Reasons for sentence The appellant was 27 years of age at the time of sentence with a clear record in Hong Kong. He came from India to Hong Kong in 2013. In mitigation, defence counsel stated that the appellant surrendered to the Immigration Department because he wanted to go back to India as soon as possible to see his father who was very sick in hospital . In sentencing, the Magistrate pointed out that there was no tariff for the offence of overstaying. The principal considerations were the length of the period of overstaying and whether any employment has been undertaken during such period. Having considered the decisions of HKSAR v Tagulao Marcelita A HCMA 528/2022 and HKSAR v Ping-Ay, Josie Eblogen HCMA 634/2011, as well as the period of overstaying being 8 years and 3.5 months, the Magistrate took the view that the appropriate starting point should be 12 months' imprisonment. The Magistrate gave the appellant a one-third

discount for his guilty plea and further reduced the sentence by 2 months to give him credit for surrendering himself to the authorities, bringing the final sentence to one of 6 months' imprisonment. Review of sentence The appellant applied for a review of sentence on the ground that his father was in serious condition in hospital. The appellant said he was told by his mother on 30 and 31 May 2022 that his father was in serious condition but she refused to disclose the details to him, fearing that he would be more depressed. She just told the appellant to go back as soon as possible if he wanted to see his father. After he was sentenced, the appellant did not make enquiry of his father's updated condition because he did not think his mother would tell the actual situation. The Magistrate refused the review of sentence application and confirmed the sentence for the following reasons: It was incredible that the Appellant's mother did not tell the Appellant about the actual condition of his father; The Appellant was unable to provide sufficient details of his father's condition. His mere statement that his father was in serious condition did not amount to exceptional circumstances; and There were no humanitarian grounds which warrant a reduction in sentence. Ground of appeal The only ground advanced by Mr Richard Donald, counsel for the appellant, was that when sentencing the appellant, the magistrate was not fully informed of the serious medical condition of the appellant's father and was thus not in a position to fully appreciate and consider the humanitarian situation that existed in respect of the appellant's father imminent death. Consideration The appellant accepted that the sentence of 6 months' imprisonment was within the normal guidelines, the only issue being whether there was humanitarian ground which justify a reduction of sentence. The appellant produced a medical report purportedly issued by "Sandhu Cancer Centre" on 13 June 2022. On its face, the report certified that one "Mr. Vijay Atter" was suffering from "stage 4 Burkitt lymphoma", which was clarified to be a "serious type of blood cancer". The report also stated that "the disease is not controllable and beyond treatment", the patient's health was "deteriorating day by day", and that he "[may] have limited days left". A photo of a patient claimed to be the appellant's father was also provided. The respondent did not dispute the authenticity or accuracy of the medical report produced by the appellant. The respondent accepted that the report provided details as to the father's medical condition which were not before the Magistrate at the time of sentence. However, the respondent submitted that even taking into account the details as disclosed by the report, the circumstances in the present case did not fall within the "exceptional" category so as to justify this Court interfering with the appellant's sentence on humanitarian grounds. As rightly pointed out by the respondent, the fact that the appellant's father was in serious condition had already been considered by the Magistrate before sentence was imposed and at the review of sentence. There had been no significant change of circumstances except that the appellant now provided some supporting documentation which was not available in the previous proceedings. During the hearing of the appeal, counsel confirmed that the appellant came to Hong Kong in 2013 after he had an argument with his father. He had not undertaken any employment in Hong Kong during the period of overstaying as his livelihood was sponsored by friends and relatives in India. The appellant was first informed of his father's illness in January 2021 but he did not surrender to the Immigration Department until January 2022 because he thought his father's condition was not so serious at that time. Now he asked to be released earlier so that he could return to India to see his father as soon as possible. The authorities reveal that family

circumstances (in particular, illness of family members) generally do not amount to humanitarian grounds on which sentence may be reduced, save where they are exceptional and particularly tragic. In *HKSAR v Tarafder MD Abdul Jalil*, the appellant was sentenced to 6 months' imprisonment upon conviction on his own plea to the offence of using a forged travel document and making a false representation to an Immigration Assistant. On appeal, he put forward his father's worsening cardiac condition, his own mental illness and the passing away of his mother before he came to Hong Kong as humanitarian grounds to plead for an early release. In dismissing the appeal, Deputy Judge McMahon (as he then was) observed at paragraph 9 of the judgment, "As Leonard J said in *R v Lam Sai Ying*, MA 811 of 1991, there are a very large number of occasions when a person serving a sentence in Hong Kong has a seriously ill close relative in his homeland. That, by itself, is not normally regarded as a sufficient humanitarian basis for the reduction of sentence." I respectfully agree. The appellant in the present case had overstayed in Hong Kong for over 8 years. He was not worried about the health condition of his father despite being told of the father's illness in January 2021. In my view, the Magistrate was entitled not to place any weight on his father's illness which could not said to be so exceptional that would warrant a reduction in sentence. There was no merit in the humanitarian ground advanced by the appellant.

Conclusion

For the above reasons, the appeal against sentence was dismissed. (Anna Lai) Judge of the Court of First Instance High Court Mr Donald, Richard D., instructed by Jal N. Karbhari & Co., for the appellant Mr Cheng Hoi Fai, Herbert, PP of the Department of Justice, for the respondent

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