

HONG KONG / JUDGMENT

HKSAR v. B

COURT

Court of Appeal

DECIDED

18 October 2007

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

BETWEEN HKSAR macrobutton nomacro Respondent macrobutton nomacro Applicant

Before: Hon macrobutton nomacro Tang VP , Cheung JA and Beeson J in Court Date of macrobutton nomacro Judgment : 18 October 2007

macrobutton nomacro JUDGMENT

macrobutton nomacro Hon Tang VP : The defendant pleaded guilty to trafficking dangerous drugs in September 2005. He was sentenced in April 2006 to imprisonment for 7 years by Deputy Judge E Toh. The learned deputy judge adopted a starting point of 12 years. The defendant was given the full one-third discount notwithstanding that his plea came after an unsuccessful voir dire and there was also a Newton enquiry after he pleaded guilty which was equally unsuccessful. He was given a further discount of 1 year for certain post-arrest assistance which he had given to the police. This is what the leaned judge said when she sentenced the defendant: Having considered the latest special circumstances disclosed by the prosecution in the special procedure, I am prepared, however, to adjust the sentence accordingly. This may be further adjusted pending the outcome. At page 3 she said that the reduction should be 1 year for the special circumstances and she added: also the fact that he would be kept in special conditions, perhaps solitary confinement, and therefore that would place an extra hardship on him than normal. We were told by Mr Haynes, who appeared for the defendant, that he has indeed been kept in solitary confinement although that was done at his request. At the time when he was sentenced, it was known that the assistance that he had given to the police had resulted in the arrest and the prosecution of 3 persons for dangerous drugs offences in 2 separate trials. However the result of the prosecution was not then known. The result of those trials is now known. The 3 defendants had been convicted and sentenced to imprisonment for 2 years, 6 years

and 8 months, and 7 years and 2 months respectively. We gave leave to the defendant to appeal out of time because of this development. Having regard to the post-arrest assistance, I believe some further allowance should be given. Mr Haynes submitted that the defendant could almost be regarded as a super-grass. I do not agree. Although he had given meaningful assistance to the police which, as I have said, have resulted in the arrest and conviction of 3 persons, he could not by any stretch of the imagination be regarded as a super-grass. So the question today is what, if any, further allowance should be given to the defendant for his post-arrest assistance. I would err on the side of leniency and give the defendant an extra 9-month reduction for his assistance. This would bring the discount to over 45%, which can be regarded, in the circumstances of this case, as being on the high side. Mr Haynes, however, also sought to rely on certain pre-arrest assistance given by the defendant, which had resulted in the conviction of several persons in 2 separate trials. Those trials resulted in heavy sentences for some of the persons involved. I think in the first trial of the 3 persons involved, and they were sentenced for terms of imprisonment ranging from 3 years and 4 months to 14 years. In the other case, a person was sentenced to 16 years on a plea of guilty. One could gather from those facts, the substantial amount of dangerous drugs involved. However, such pre-arrest assistance was given by the defendant as a paid informer, and he was paid substantial sums for such information. At trial, because *Z v HKSAR* [2007] 1 HKLRD 977 had not been decided by the Court of Final Appeal, the judge rightly disregarded such pre-arrest assistance when sentencing the defendant. However, in the judgment of Court of Final Appeal, the Chief Justice said at para. 20 in relation to a paid informer the following: 20. 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. In this case, the defendant was given reward of approximately of \$240,000 which was calculated with reference to the amount of drugs involved. In the circumstances of this case, I do not believe it is appropriate to give the defendant any further discount for his pre-arrest assistance. So I will reduce the sentence of the defendant by 9 months, so the sentence will be reduced to 6 years and 3 months instead of 7 years. Hon Cheung JA: I agree. Hon Beeson J: I agree. Hon Tang VP: Leave to appeal against sentence out of time is granted. Treating the hearing of the application for leave as the hearing of the appeal, we allow the appeal and reduce the sentence of the applicant to 6 years and 3 months. Addendum: For calculation purpose, the sentence for the first count is reduced from 3 years to 2 years and 9 months and the sentence for the second count from 4 years to 3 years and 6 months, making a total consecutive sentence of 6 years and 3 months. (macrobutton nomacro Robert Tang) Vice-President (Peter Cheung) Justice of Appeal (C-M Beeson) Judge of the Court of First Instance Mr. John Haynes, instructed by Messrs Ho & Ip, for the Applicant. Mr. Simon Tam, Ag. SADPP of the Department of Justice, for the Respondent. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk 1udk G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V (#p# "0 "0 "0 i\$&`G @\$ _Rs setup Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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