

HONG KONG / JUDGMENT

HKSAR v. BUI VAN KHAI

COURT

Court of Appeal

DECIDED

27 February 2013

CASE / FILE NUMBER

CACC175/2012

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj CACC 175/2012 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO 175 OF 2012 (ON APPEAL FROM DCCC NO 216 OF 2012)

BETWEEN HKSAR Respondent and BUI VAN KHAI Applicant

Before: Hon Yeung VP and Barnes J in Court Date of Hearing: 22 February 2013 Date of Judgment: 22 February 2013 Date of Handing Down Reasons for Judgment: 27 February 2013 R E A S O N S F O R J U D G M E N T Hon Barnes J (giving the judgment of the court):

Introduction

AUTONUMOUT The applicant was convicted, on his own plea, before HH Judge Geiser in the District Court of the following two offences: remaining in Hong Kong without the authority of the Director of Immigration after having landed unlawfully in Hong Kong (unlawful remaining) contrary to section 38(1)(b) of the Immigration Ordinance, Cap 115 (Charge 1); and breach of deportation order, contrary to section 43(1)(a) of the said Immigration Ordinance (Charge 2). AUTONUMOUT By committing these offences, the applicant was also in breach of a suspended sentence of 18 months imposed on him in the case of TWCC 1850/2011. AUTONUMOUT The applicant was sentenced to a total of 3 years and 9 months imprisonment, which was arrived at in this manner: Charge months imprisonment; Charge years; 18 months of which to run consecutively to the 18 months imposed on the unlawfully remaining offence, totalling 3 years imprisonment; and 9 months of the suspended sentence of 18 months was activated and ordered to run consecutively to the 3 years imposed for the two offences, making a total of 3 years and 9 months imprisonment. AUTONUMOUT The applicant applied for leave to appeal against the total sentence. After hearing submissions we granted him leave to appeal and treated the leave application as the appeal proper. We allowed the appeal and reduced the total sentence to one of 2 years and months. We now give our reasons. The admitted facts AUTONUMOUT The admitted

facts relating to the two offences were fairly straight forward. On 5 February 2012, the applicant and another male (the other defendant in the case) were intercepted by the police in Sham Shui Po. Both admitted to the police that they had entered Hong Kong illegally the day before.

AUTONUMOUT Enquiries disclosed that the appellant was in breach of a deportation order made in January

2009. The applicant admitted, when interviewed under caution, that he was aware of the said deportation order made against him, prohibiting him from entering Hong Kong. The applicant said he had come to Hong Kong to seek medical treatment. The applicant's previous convictions AUTONUMOUT In 2006, the applicant was convicted of unlawfully remaining, robbery and possession of offensive weapon. He was sentenced to a total of 4 years and 3 months imprisonment. In 2011, the applicant was convicted of unlawfully remaining and in breach of a deportation order. He was given concurrent suspended sentences of 18 months. This is the third time the applicant was convicted of unlawfully remaining and the second time of being in breach of a deportation order. Reasons for sentence AUTONUMOUT After referring to the admitted facts, the applicant's previous convictions and the fact that the applicant was in breach of a suspended sentence, Judge Geiser said (at page 12, line A of the Appeal bundle): .. [nothing] of any moment has been put before me by way of mitigation, save for your respective pleas of guilty. And I will give you both due credit for that.
7. In HKSAR v Pham Van Tuan [2009] HKCU 776 and HCMA282/2009, the starting point of 36 months imprisonment in relation to breach of a deportation order was said to be in line with authorities . Accordingly, I sentence you both as follows:-
8. With regard to you, [the applicant], you are sentenced to 18 months imprisonment on Charge
1. This sentence already takes [into] account of your plea of guilty. On Charge 2 I adopt a starting point of 3 years imprisonment, but due to your plea of guilty I shall reduce that by one-third, coming to 2 years imprisonment on Charge
2. Due to the question of totality of sentence, I order 18 months of this sentence to run consecutively to the sentence on Charge 1, arriving at 3 years imprisonment. AUTONUMOUT Judge Geiser then activated 9 months of the 18 months suspended sentence to arrive at a total sentence of 3 years and 9 months imprisonment. Grounds of appeal AUTONUMOUT The main ground of appeal advanced by Mr Selwyn So, counsel for the applicant, was that the sentence was manifestly excessive in that Judge Geiser failed to take note that the two offences were not separate and distinct; and that their underlying criminality was the same: ie the unlawful presence of the applicant in Hong Kong. Mr So argued that the learned judge should have considered making a concurrent term for both sentences. AUTONUMOUT At the outset, Mr So made it clear that the applicant took no issue to the individual sentences imposed by the learned judge. The applicant also did not dispute the correctness or appropriateness of having 9 months of the suspended sentence activated. The only issue

raised is whether the learned judge was wrong to have ordered 18 months of the 2 years term imposed on Charge 2 to run consecutively to the 18 months imposed on the unlawfully remaining offence. AUTONUMOUT Mr So relied on the judgment of McMahon J in the case of HKSAR v Do Thi Hue, HCMA 873/2001, in which the learned judge had indicated that the nexus between the two offences should not be ignored, and that the proper approach was to consider the overall culpability in terms of determining to what extent the sentences should run concurrently. McMahon's views were adopted by the Court of Appeal in HKSAR v Pham Van Tuan, CACC 272/2010. AUTONUMOUT Mr So also referred to the previous convictions of the defendants in the above Pham Van Tuan case (3 previous of unlawfully remaining, 1 previous of breach of deportation order) and another case HKSAR v Pham Van Hung, CACC 14/2011 (5 previous unlawfully remaining and 4 previous breach of deportation order), in which the Court of Appeal ordered an overall sentence of 23 months and 28 months respectively for the two offences, to support his contention that the overall sentence for the present two offences should not be more than 23 months. AUTONUMOUT Mr So admitted during oral submission that he had overlooked the fact that the sentence imposed on Charge which the applicant did not take issue was one of 24 months, thereby making it impossible to have a total sentence of less than 24 months for these two offences. Mr So asked this court to impose a concurrent sentence for the two offences. Respondent's response

AUTONUMOUT Miss Lily Ho, Senior Public Prosecutor of the respondent did not agree with Mr's submission that the two sentences should run concurrently. She cited some 9 cases and submitted that the courts have always passed partially consecutive sentences for the two der was one of 7 years and opined that if that particular applicant (who had 3 previous of such an offence) should enter Hong Kong unlawfully again in defiance of the deportation order, a starting point well in excess of 3 years was likely to be adopted. Miss Ho submitted that the starting point of 3 years for the breach of deportation order offence imposed in this case could not be regarded as too high. AUTONUMOUT Miss Ho further submitted that in any event, the overall sentence of 3 years and 9 months, while on the high side, could not be said to be manifestly excessive. Our consideration AUTONUMOUT The question whether the sentences imposed on these two offences should run consecutively has been discussed in a number of cases. AUTONUMOUT In HKSAR v Pham Van Tuan (CACC 272/2010), Yeung VP, giving judgment of the court, said in para 17: The two immigration offences were not separate and distinct. The position was carefully analyzed in Do Thi Hue (supra) and we do not find it necessary to repeat the exercise. Because of the existence of the deportation order, when the appellant entered Hong Kong illegally, he would have committed both offences of unlawfully remaining and breach of a deportation order. The underlying criminality for the two immigration offences was the same, namely the appellant's unlawful presence in Hong Kong. AUTONUMOUT In Pham Van Tuan, the defendant has 3 previous conviction of unlawfully remaining and 1 previous of breach of deportation order. The trial judge imposed a sentence of 20 months for the unlawfully remaining offence and 21 months for the breach of deportation order offence. He ordered 10 months of the breach of deportation order offence to run consecutively to that of the unlawfully remaining offence. On appeal, this court recognised that the offence of unlawfully remaining would be made

more serious when there was a deportation order (para 18 of the judgment) and ordered 3 months of the 21 months to run consecutively to the 20 months imposed, making a total of 23 months for these two offences. AUTONUMOUT It should be noted that in the case of HKSAR v Nguyen Cong Su, CACC 286/2012, Yeung VP, giving judgment (in Chinese) of the court, further explained the rationale of ordering part of the sentence imposed on the breach of deportation order to run consecutively to the sentence imposed on the unlawfully remaining offence in Pham Van Tuan (at para 16): ^ (W N R-N3 lYu/n :y N4 R/fi 0 N4 f N4 N(W g^ lYu/n l g^ lYu/n 0 N4 lYu/n S f N 0 0 an order in Pham Van Tuan was to reflect the principle that the offence of unlawfully remaining would be made more serious when there was a deportation order . It did not mean that the court of appeal was of the view that ordering a partially consecutive sentence was the appropriate way to deal with the sentencing. AUTONUMOUT The court further said (in para

- 17) of Nguyen Cong Su that the underlying criminality of these two offences were the same and the sentences should run concurrently, citing another Court of Appeal case HKSAR v Pham Van Hung, CACC 14/2011. AUTONUMOUT There was in fact no issue taken in respect of the individual sentences. We did not find Miss s reference to the dicta of Macrae J of particular assistance in this case. The matrix of that case and the applicant s background were very different from the present case. AUTONUMOUT The learned judge did not refer to any common underlying culpability between the two offences when he gave his reasons for sentence. He simply referred to the totality of sentences when he ordered 18 months of Charge 2 to run consecutively to the 18 months imposed on Charge
1. Reading his reasons for sentence, it does appear that he was treating the two offences as separate and distinct. If he had indeed considered the said common underlying culpability between these two offences, it is hard to see why he would have ordered 18 months (75% of the sentence of 2 years) to run consecutively to the 18 months imposed on Charge AUTONUMOUT For the reasons we have already given, the sentences imposed on these two offences should have been ordered to run concurrently. AUTONUMOUT Further, looking at the matter from another angle, a total sentence of 3 years for these two offences would mean a notional starting point of 4 years, which, in our view, was manifestly excessive even when the applicant was a repeated offender. We were of the view that given the applicant s previous similar convictions, an overall sentence of 2 years for the two offences was a proper one after plea. AUTONUMOUT The applicant was in breach of a suspended sentence and as conceded by Mr quite properly the activation of 9 months could not be criticized. After considering the totality of the sentences, we did not find it necessary to adjust the activation of 9 months to run consecutively to the sentences imposed on the two offences.

Conclusion

AUTONUMOUT For these reasons we allowed the appeal against sentence to the extent that the individual sentences for Charge 1 and Charge 2 remained unchanged, ie months for Charge 1 and 2 years for Charge 2; we quashed Judge Geiser s order regarding the consecutive sentence.

Instead, we ordered that both sentences to run concurrently, therefore making a total sentence of 2 years for these two offences. AUTONUMOUT We further ordered that the 9-month activated suspended sentence was to run consecutively to the 2 years imprisonment for Charge 1 and Charge 2, making a total sentence of 2 years and 9 months. (Wally Yeung) Vice-President (Judianna Barnes) Judge of the Court of First Instance Miss Ho May Yu, Lily, SPP of Department of Justice, for the respondent Mr So Kai Ming, Selwyn, instructed by Director of Legal Aid, for the applicant HKSAR v Tran Viet Thanh & Ors [2012] 1 HKLRD 903 HKSAR v Pham Van Tuan, CACC 272/2010 HKSAR v Ghulam Fareed, HCMA 382/2010 HKSAR v Nguyen Thi Phin, HCMA 1189/2007 HKSAR v Mohammad Shehzad, HCMA 793/2007 HKSAR v Muhammad Kakeer, HCMA 843/2006 HKSAR v Pham Van Tuan, HCMA 221/2004 . HKSAR v Nguyen Tuan Anh, HCMA 1091/2003 HKSAR v Nguyen Chi Trung@Dong Van Thanh, HCMA 1095/2001 PAGE - 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 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 hgga gd;}} gd;}} gd;}} gd;}} gdJ| gdJ| gdl{ hgga gdJ| hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga hgga ht,~ hgga ht,~ ht,~ h;}} h,b~ ht^T hsC# hgga gd[o ytt,~ gdt,~ gd;}} gdQ(` ~wrw~ hQ(` hQ(` hQ(` ht,~ ht,~ &`#\$ gd\_n hgwU hgwU D E F G H I J K L M N O P Q R S T U V hQ(` hQ(` hgwU gd\_n :p;}} :p;}} ytt,~ [Content\_Types].xml Iw}, \$yi} \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v )I` n 3Vq%'#q x)r :TZaG I u3 L+M2 e\O* \$*c?)6-r IqbJ#x ,AGm T[XF64 E)` # R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> 6vG6 6vG6 CACV Jeannie MY MokSo ABC.dot NgonChow Lai Microsoft Office Word Judiciary CACV Title Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=85899

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-bui-van-khai-2013>

Prepared on 26 October 2026 · Esheria