

HONG KONG / JUDGMENT

HKSAR v. CAMARA ABOUBACAR

[2019] HKCA 148

COURT

Court of Appeal

DECIDED

20 March 2019

CASE / FILE NUMBER

CACC353/2017

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bjbj CACC 353/2017

[2019] HKCA 148 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CRIMINAL APPEAL NO 353 OF 2017 (ON APPEAL FROM
HCCC NO 268 OF 2017)

BETWEEN HKSAR Respondent and CAMARA Aboubacar Applicant

Before: Hon Macrae VP and Zervos JA in Court Date of Hearing: 30 January 2019 Date of
Judgment: 20 March 2019

J U D G M E N T

Hon Zervos JA (giving the Judgment of the Court): The applicant applies for leave to appeal against his sentence of 14 years imprisonment imposed on him by M Poon J following his plea of guilty to trafficking in a dangerous drug, namely 761 grammes of a solid containing 618 grammes of cocaine, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134, and the forfeiture order of US\$1,500 made pursuant to section 56 of the same Ordinance. The brief facts On 31 December 2016, the applicant arrived at the Hong Kong International Airport on a flight from Conakry, Guinea, via Dubai, United Arab Emirates. He was intercepted by Customs officers and taken to hospital for a medical examination where it was discovered that he had foreign objects inside his body cavity. He eventually discharged a total of 60 pellets, containing the drugs in question. He also had in his possession US\$1,500 and some Guinean francs. The street value of the cocaine at the time of the offence was \$690,988. The applicant at first denied knowing what was inside his body. However, later when he pleaded guilty to the drug trafficking

offence, he accepted and admitted that he was in possession of the drugs for the purpose of importing them into Hong Kong. The sentence and forfeiture In mitigation, it was submitted that the applicant was a French Guinean national who was married with a young son. Prior to the offence, he was a singer at a club, earning around US\$120 per week, and because he was unable to financially support his family he was lured by customers at the club to bring the cocaine to Hong Kong. On his arrival in Hong Kong, he was to contact a person on a telephone number that was provided to him. It was said that he gave the telephone number to the Customs officers after he was arrested, but it turned out to be a facsimile number and no one could be contacted. The judge applied the correct sentencing guidelines for trafficking in cocaine and adopted a starting point of 20 years imprisonment, which she enhanced by one year for the international element to 21 years imprisonment. See *R v Lau Tak Ming* [1990] 2 HKLR 370 and *HKSAR v Chung Ping Kun* [2014] 6 HKC 106. After reducing the sentence by one-third for the applicant's guilty plea, the judge sentenced him to 14 years imprisonment. The applicant opposed an application by the prosecution for the forfeiture of the US\$1,500 that was found on him at the time of his arrest. He elected to give evidence on the issue and testified that the money was unconnected to the drug shipment. He stated that he earned US\$120 per month and that the US\$1,500 was his yearly salary that had been paid by the club manager together with some savings that he had accumulated. He claimed that he brought the money with him to Hong Kong as pocket money because the persons who had arranged for him to smuggle the drugs into Hong Kong had not given him any funds. Even though they were to provide him with accommodation, he was responsible for his own expenses. He further claimed that he had earmarked the funds to buy clothes which he intended to take back to Guinea to sell. In addressing the challenge to the forfeiture of the monies found on the applicant, the judge referred to and was guided by the authority of *HKSAR v Ngoma Juma Shabani* [2015] 5 HKLRD 57. She rejected the applicant's evidence and considered that there was sufficient evidence to establish that the funds were used in connection with the offence and ordered that they be forfeited. She gave a detailed ruling for her decision in which she pointed out that the applicant's claim that the US\$1,500 were his savings and unconnected to the present offence, was contradicted by his mitigation that he had committed the present offence because he was in financial difficulties. The applicant's submission On 6 November 2017, the applicant filed a notice of application to appeal against sentence on the basis that the judge had disregarded his participation in the anti-drugs campaign of Father John Wotherspoon, refusing to give him a discount, and that the judge erred in ordering the forfeiture of the US\$1,500. In a letter to the Court dated 18 December 2017, the applicant stated that he wished to abandon his appeal against sentence but proceed with the appeal against the forfeiture order. However, in another letter to the Court dated 6 May 2018, he alleged that Customs officers had refused to visit him in response to his offer to provide assistance and that other persons convicted of drug trafficking, where the drugs were of higher purity, had received sentences lower than the one imposed on him by the judge. The respondent's submission Ms Claudia Ng, for the respondent, submits that the starting point of 20 years imprisonment and the enhancement of 1 year for the aggravating factor of the international element were in accordance with the sentencing guidelines. She submits that there is no basis for complaint by the applicant for the sentence that was ultimately imposed on him by the judge. Ms Ng points out that it was not the case that the judge disregarded the applicant's

participation in Father Wotherspoon's anti-drugs campaign. A copy of a letter has been submitted to this Court dated 15 October 2017 addressed to the judge, but from the transcript of proceedings it appears that it was not submitted to her. The judge was therefore simply unaware of the letter. As noted by Ms Ng, the letter mentioned that the applicant had participated in Father Wotherspoon's campaign by writing three letters which were posted on Father Wotherspoon's website to warn others of the dangers of drug trafficking. She points out that the nature and extent of the applicant's participation was to warn others of the heavy sentences of imprisonment that would be expected by unlawfully trafficking dangerous drugs into Hong Kong, and that this did not expose him or his family members to any danger for having done so. She submits that under these circumstances, the granting of the discount is discretionary, and at most will entitle a recipient to a token discount of 3 months imprisonment. In *HKSAR v Kilima Abubakar Abbas* [2018] 5 HKLRD 88, Macrae VP explained, at paragraphs 91 and 92, that the participation by an offender in Father Wotherspoon's campaign was a matter that fell within the absolute discretion of the sentencing court and that if it was considered at all, it might warrant a token deduction of no more than 3 months. It is claimed by the applicant that Customs officers refused to see him in relation to his offer of assistance to them. We have been provided with detailed information which indicates that whilst the applicant requested Customs officers to visit him so that he could provide them with information, when they did do so, he refused to cooperate. Discussion The two areas of appeal are without merit. We are satisfied that the judge carefully and properly considered the applicant's claim that the US\$1,500 was his money and unconnected to his trafficking of the drugs into Hong Kong. She rightly rejected his claim, which as far as we are concerned was totally without foundation. Unless there are exceptional circumstances, it defies common sense that a drug courier should on the one hand claim that he was lured into becoming an international smuggler of drugs because of his dire financial circumstances, and yet on the other claim that the relatively substantial sum of cash in his possession is unconnected to his drug smuggling activities. A frequently used explanation by convicted drug traffickers is that the relatively substantial sums of cash found in their possession are to purchase goods in Hong Kong for trade back in their home country. It is not uncommon for drug traffickers to convert their ill-gotten gains this way in order to transfer the value of the funds to their home country or to make further profit in trading in the goods on their return there. For whatever reason, the applicant did not submit to the judge the letter from Father Wotherspoon. It appears the focus of the applicant's mitigation was his purported assistance to the authorities. As it transpired, no such assistance was ever forthcoming from the applicant, and the whole exercise was nothing more than a hollow and wasteful gesture on his part. The judge was right not to give the applicant any reduction to his sentence. Of his participation in Father Wotherspoon's campaign, it was limited to posting three letters on Father Wotherspoon's website. No submission was made to the judge in relation to this matter, and if he wishes to pursue the matter, he can take it up with the Executive at an appropriate time.

Conclusion

It follows from what we have said that we are of the view that the application in relation to the sentence and the forfeiture order is without merit. We therefore refuse the application and dismiss the appeal. (Andrew Macrae) (Kevin Zervos) Vice President Justice of Appeal Ms Claudia Ng SPP, of the Department of Justice, for the respondent The applicant appeared in person 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 D E F G H I J K L M N O P Q R S T U V h+ + gdi< gd) hRQ8 haG9 hx6U h+ + gdF% gdF% gdF% gdF% gd_j gdL" |sm|gc yqlgbWNEN< gdc\) gdvq gdmG gdBVQ h:`d h:`d h)6. h:`d h (Z hZRG h\_,u h (Z h1CZ hc\ ) gdf% gd8}< heUh kbYkbYk :p<G| [Content\_Types].xml \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/ theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q\_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .)x E /,EE} 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"/> setup hca.dot Windows User Microsoft Office Word Judiciary Hong Kong Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/ officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/ officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{66CDCFDC-E9D4-4B78-9B70-05DC8FCC451F}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/ customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/ officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Word 97-2003 Document MSWordDoc Word.Document.8

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