

HONG KONG / JUDGMENT

HKSAR v. CHAN CHI-YEUNG

[2020] HKCA 170

COURT

Court of Appeal

DECIDED

20 March 2020

CASE / FILE NUMBER

CACC49/2019

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bjbj CACC 48/2019

[2020] HKCA 170 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CRIMINAL APPEAL NO 48 OF 2019 (ON APPEAL FROM HCCC
NO 85 OF 2017)

HKSAR Respondent v MA Shu-keung Applicant

AND CACC 49/2019 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CRIMINAL APPEAL NO 49 OF 2019 (ON APPEAL FROM HCCC NO 84
OF 2017)

HKSAR Respondent v CHAN Chi-yeung Applicant

(Heard together) Before: Hon Zervos JA in Court Date of Hearing: 20 March 2020 Date of
Judgment: 20 March 2020

J U D G M E N T

These two leave applications are dealt with together as they relate to the same case. Ma Shu-keung (Ma) and Chan Chi-yeung (Chan) were jointly charged with the offence of trafficking in dangerous drugs, namely 24.42 grammes of a crystalline solid containing 23.98 grammes of methamphetamine hydrochloride and 18.31 grammes of a mixture containing 14.43 grammes of heroin hydrochloride (Count 1). Chan was also charged in the alternative to Count 1 with the

offence of being the tenant of a flat, permitted or suffered such place to be used as a divan or for unlawful trafficking in dangerous drugs (Count 2), and of possession of a dangerous drug namely 0.17 gramme of a crystalline solid containing 0.16 gramme of methamphetamine hydrochloride (Count 3). On 13 March 2017, in the Magistrate's Court, Ma pleaded guilty to Count 1 and was committed to the Court of First Instance for sentence; whilst Chan pleaded not guilty to Counts 1 and 3 and was committed to the Court of First Instance for trial. Ma appeared before Toh J (the judge), who adjourned sentencing because Ma had agreed to give evidence for the defence in Chan's trial. On 24 January 2019, Chan was convicted after trial of Counts 1 and 3, Count 2 being an alternative to Count 1. On 25 January 2019, the judge sentenced Ma and Chan. She sentenced Ma to a term of imprisonment of 6 years and 9 months on Count 1, and Chan to concurrent terms of imprisonment of 9 years on Count 1 and 6 months on Count 3. On 19 February 2019, Ma filed a notice for leave to appeal against sentence. On the same date, Chan filed a notice for leave to appeal against conviction and sentence. On 7 February 2020, Chan filed a notice of abandonment of appeal against conviction, which was formally marked dismissed. He still proceeds with his appeal against sentence. The sentence appeals The challenge by Ma and Chan to their sentence is in relation to the sentence imposed on each of them in respect of Count

1. It was alleged under Count 1 that Ma and Chan trafficked in the dangerous drugs as particularised, on 22 August 2016, at Room A2, 3rd floor, Wing Shun building, 14-16 Shui Wo Street, Kwon Tong, Kowloon (Room A2). The case against Ma. The outline of the facts admitted to by Ma and presented to the judge can be summarised as follows: On 22 August 2016, police officers raided Room A2, which was a residential flat of about 200 square feet, pursuant to a search warrant. There were two CCTV cameras installed outside Room A2 that were connected to a monitor inside Room A2. The CCTV had no recording function. The police officers entered Room A2, as Chan was opening the door for Ma to enter. There were four other persons inside. The police found the following items in Room A2:
 - (a) On top of a fridge of around 3 feet tall:- One plastic bag containing 17.0 grammes of a crystalline solid containing 16.7 grammes of methamphetamine hydrochloride, commonly known as ; A lot of empty resealable plastic bags; One packet of straws; and One roll of tinfoil.
 - (b) On a table next to the fridge:-
 - (i) One Ice bottle containing 9 ml of a liquid containing traces of methamphetamine; (ii) One Ice bottle containing 120 ml of a liquid containing 0.16 grammes of methamphetamine; (iii) One electronic scale; Three lighters; and One opened cash box.
 - (c) The said cash box contained:-
 - (i) One plastic bag containing 8.20 grammes of a mixture containing 6.47 grammes of heroin hydrochloride; (ii) Five plastic bags containing a total of 7.42 grammes of a crystalline solid containing 7.28 grammes of methamphetamine hydrochloride; (iii) Twenty packets (consisting of plastic wrappings) containing a total of 2.99 grammes of a mixture containing 2.36 grammes of heroin hydrochloride; and (iv) Thirty packets (consisting of plastic

wrappings) containing a total of 7.12 grammes of a mixture containing 5.60 grammes of heroin hydrochloride. Chan was the registered tenant of Room A2. Ma made the following statements in his video-recorded interviews:

5. In the first video-recorded interview, under caution, the Defendant said inter alia:- He went to the flat to borrow money from a male nicknamed Hak Chai . He knew CHAN was the tenant of the flat. He knew the 5 bags of ; the two Ice bottles ; the empty resealable plastic bags; the roll of tinfoil, belonged to CHAN. CHAN would supply him with dangerous drugs upon payment.
6. In the second video-recorded interview, under caution, the Defendant changed his version and said inter alia:-
 - (a) He admitted full responsibility of the dangerous drugs found in the flat.
 - (b) He rented the flat from CHAN at HK\$8,500.
 - (c) He sold and heroin to drug addicts in the flat.
 - (d) All the dangerous drugs belonged to him and the two Ice bottles were left there by his customers. The retail value of the drugs was about \$24,000. Ma admitted he was trafficking in the drugs. The sentencing of Ma The judge remarked that there was nothing remarkable about his background, except that he had eleven previous convictions, four of which were for drug offences, including one for trafficking in a dangerous drug in 2002, for which he was sentenced to 4 years imprisonment. She commented that the only meaningful mitigation was Ma s guilty plea. When sentencing Ma, the judge refused to give him the usual one third discount for a timely plea of guilty because he gave evidence at Chan s trial and was not believed by the jury as evidenced by their guilty verdicts of Chan for the charges he faced. She noted Ma had initially stated the drugs belonged to Chan and he went to his flat to borrow money, but later stated the drugs were his and he rented the flat from Chan. She also noted Ma gave evidence at Chan s trial in which he repeated the drugs were his and had nothing to do with Chan. However, she observed Ma went further in his evidence in that he said the police hit Chan with a truncheon, and this had not been substantiated by any other evidence. She considered this was a strong indication of Ma s lack of full remorse, and was a waste of the court s time. Rather than the normal one third discount for a timely plea of guilty, the judge instead gave him a discount of 25% of the notional sentence of 9 years imprisonment, thus resulting in a sentence of 6 years and 9 months imprisonment. The judge made it clear she adopted the same starting point of 9 years imprisonment on Count 1 as she did in Chan s case. The case against Chan The following is a summary of the prosecution case in relation to Count 1, which the jury must have accepted by its verdict, which the judge provided in her summing-up to the jury. On the morning of 22 August 2016, the defendant was inside Flat A. That is the subject premises. And according to the prosecution witnesses, Ma was seen going to the door of those premises and, subsequently, the door was opened by the defendant. Police then followed Ma and gained entry into those premises. It is not disputed that the police upon entry saw all the drugs openly displayed

inside the premises, and it is from the photographs that you can see that the drugs were not hidden. They were openly displayed. It is also not disputed that keys to the premises were found on the defendant. It is also not disputed that the defendant was a tenant of these premises. He was responsible for paying the rent to these premises. It is not disputed that the CCTV camera and equipment were installed after the defendant took over the tenancy. According to Mrs Cheng, she noticed it only after renting to the defendant. So the prosecution says that it is a clear-cut case that on the evidence that the defendant is a tenant of those premises, he had keys to the premises, the drugs were openly displayed, scales were found in the premises, weighing scales, packaging equipment like the scales and the resealable plastic bags were found, and pots were also found in the premises, so the prosecution says that there is no doubt that these premises were used for trafficking in dangerous drugs and that you may infer from the evidence that the defendant was connected and was trafficking in dangerous drugs. And so what the prosecution is saying is that you should have no doubt because when the police entered and interviewed the defendant, he admitted to trafficking in dangerous drugs. He admitted that there were two knives inside the premises which were used for his enemies in case they came, and he was of sound mind. He knew what he was saying to the police when the police entered. And the prosecution says that upon looking at the first video-recorded interview, he did answer, make similar answers to the questions put by the police officers, and it was only later on as the interview went on that he became more sleepy, and they decide the police decided to stop the questioning. The defence case was that Chan had sublet the premises to Ma. Chan went to the premises on the day in question to tell Ma to leave because of a complaint from the landlady. Chan asserted in his defence that he was not involved in the drug activities at the premises. The sentencing of Chan As observed by the judge, there was no meaningful mitigation submitted on Chan s behalf. She noted Chan had a poor criminal record with over 20 prior convictions, seven of which were for drug offences, including one for trafficking in a dangerous drug in 2011, for which he was sentenced to 16 months imprisonment. When sentencing Chan, the judge stressed the seriousness of the offending involved and the repeat offending by him. She said: Now, this is no ordinary case of trafficking. It is not a simple courier taking drugs from one place to another. The defendant was a tenant of the premises in Unit A in Shui Wo Street, Kwun Tong, and those premises were openly being used for packaging in dangerous drugs. When the police entered the unit, the drugs were openly displayed on all the tables in the unit, and a CCTV camera had been installed at the front door in order for the person inside to monitor who was at the door, at the gate and the corridor. Also found on the premises was a scale and pots and the resealable transparent plastic bags. It was not a small operation. When the police raided the premises, apart from this defendant inside the premises were also other people. So a total of six persons, including the defendant, were arrested from those premises. The drugs, as I have indicated, were made up of heroin and methamphetamine hydrochloride, and I would take the approach adopted in Yip Wai Yin [2004] 3 HKC 367 which is the combined approach. And if one added the amounts of methamphetamine with heroin hydrochloride would give us in the region of 38.41 grammes. And so if following the guidelines in Tam Yi Chun [2014] 3

HKLRD 691 for methamphetamine, it would be in the region of 7 to 11 years for trafficking in between 10 to 70 grammes. As I have said, the Court of Appeal in fact has said that in assessing sentence, the individual judge has to look at the individual cases. It is not a mathematical approach. The sentencing guideline laid down is merely a general guideline, and still the individual sentences have to be tailored to the facts of a particular case. As I have said, this is not an ordinary case of courier trafficking, carrying drugs from one place to another. This was not a small operation of packaging dangerous drugs either. As Mr Cheung correctly pointed out, there is no mitigating factor in this case. The grounds of appeal Mr Francis Cheng, for Ma, advances two grounds of appeal against sentence. The first ground is that the judge was wrong in principle not to afford Ma the full one third discount to reflect his plea of guilty at the earliest opportunity. The second ground is that the judge erred in adopting a starting point of 9 years imprisonment, which was manifestly excessive and wrong in principle. Mr Victor Cheung, for Chan, advances a single ground of appeal against the sentence on Count 1. It is complained that the sentence of 9 years imprisonment was too high and was not calculated with the combined approach by adding two different types of dangerous drugs together. I will first deal with the ground concerning the starting point of 9 years, and then deal with the ground concerning the discount of 25% on Ma's sentence. The starting point of 9 years The judge adopted the combined approach in sentencing Ma and Chan: HKSAR v Yip Wi Yin & Anor [2004] 3 HKC 367, 372, at [10]. The drugs involved consisted of 23.98 grammes of Ice narcotic and 14.43 grammes of heroin narcotic. The total quantity of drug narcotic was 38.41 grammes which the judge used to calculate the starting point according to the sentencing guidelines for Ice as laid out in HKSAR v Tam Yi Chun [2014] 3 HKLRD 691. The quantity of narcotic fell within the band of 10 to 70 grammes which corresponds to a range of 7 to 11 years imprisonment. This resulted in a starting point of 8 years and 10 months imprisonment (106.7 months). However, the judge made it clear that she was enhancing the sentence because the drug operation at the premises was substantial. She made the observation that the criminality involved was not the usual courier trafficking, and the packaging of the drugs was not a small operation. Even though the judge noted the previous criminal record of both Ma and Chan for drug offences, particularly for an offence of trafficking in a dangerous drug, she does not allude to giving any enhancement to their sentences for this factor. Mr Cheng checked this sentence against the conversion test (99.8 months), the absurdity test (106.7 months) and the ratio test (98.5 months). He accepts the combined approach would be the fairest way of determining the sentence in this present case. He submits the starting point should have been 95 months with an enhancement of 5 months for the multiple drugs, thus arriving at a notional starting point of 100 months. Mr Cheung also agrees that in the circumstances of this case the sentence should be determined by the combined approach. By his calculation, allowing for the fact that 60% of the drug narcotic was ice and 40% was heroin, the notional starting point should have been 99 months. He has not included any enhancement for the fact that there were multiple drugs involved. Mr Felix Tam, for the respondent, submits that the notional starting point of 9 years imprisonment was correct. He also checked the sentence against the various tests and arrived at similar sentences as submitted by Mr Cheng. He

points out that the judge enhanced the sentence because the offence involved a significant drug operation at the premises. He also points out that there were additional aggravating factors for the involvement of multiple drugs and the repeat offending for drug trafficking by both Ma and Chan. By taking the combined approach the total narcotic content of both quantities of drug is added together, which is 38.41 grammes. When applying the guideline tariff for Ice the starting point is 8 years and 10 months imprisonment (106 months), and for heroin the starting point is 7 years and 1 month imprisonment (85 months). Clearly, some adjustment downwards needs to be made to allow for the fact that 40% of the total drugs was heroin, which has a slightly lower guideline tariffs for smaller quantities of the drug. There were the additional aggravating factors of the serious drug trafficking activities taking place in the premises, the multiple drugs involved, and the prior criminal record of both Ma and Chan for drug trafficking. The judge placed great emphasis on the fact that this was not a small operation. There was an elaborate and extensive range of drug activities taking place in the premises. There was equipment for packaging of drugs as well as for the consumption of drugs. On this factor alone the judge was fully entitled to enhance the sentence of both Ma and Chan. It cannot be said that in the circumstances of the offence and of Ma and Chan that the notional starting point of 9 years imprisonment is manifestly excessive or wrong in principle. I do not find this ground of appeal is reasonably arguable, and in any event there is no basis for the Court of Appeal to disturb the notional starting point of 9 years imprisonment. The discount of 25% The judge did not give Ma the normal one third discount for his timely plea of guilty. Mr Cheng submits that she was wrong to do so. He notes that the apparent basis was because Ma gave evidence for the defence at Chan's trial and was not believed by the jury. He points out that Ms's testimony was consistent with what was contained in the summary of facts that he agreed to when he pleaded guilty. Although, the judge referred to the fact that he gave evidence about the police being violent towards Chan which was not substantiated. Mr Tam argues that the judge was justified in not giving Ma the full one third discount in the circumstances of his case. He relies on the cases of *HKSAR v Chan Man Chau and Anor.*, unrep., CACC 503/1999, 7 November 2000; and *HKSAR v Ng Chi Wong and Ors.*, unrep., CACC 386/2002, 6 June 2003. It has to be said that the summary of facts sets out Ma's admissions in his second video-recorded interview, in which he took full responsibility for the drug activities in the premises and exonerated Chan. In fact, the sentencing of Ma was adjourned because he was to be a defence witness in Chan's trial. I find this ground reasonably arguable. It raises for consideration to what extent, if at all, can a sentencing court take into account the fact that a defendant has given evidence on behalf of a co-defendant at his trial. I also note that this Court has on numerous occasions stressed the importance of a summary of facts for the purposes of a plea of guilty, noting that they should be a true and accurate account of the criminality involved.

Conclusion

For the above reasons, I do not find the ground of appeal concerning the starting point of 9 years reasonably arguable and I therefore refuse leave on this ground. I find the ground of appeal concerning the discount of 25% reasonably arguable and grant leave on this ground. The end result is that leave is granted to Ma to appeal his sentence on the ground concerning the discount of 25%, and leave is refused to Chan to appeal his sentence. (Kevin Zervos) Justice of Appeal Mr Felix Tam, SPP of the Department of Justice, for the respondent Mr Francis Cheng, instructed by C O Yu & Co, assigned by the Director of Legal Aid, for Ma Shu-keung (CACC 48/2019) Mr Victor C F Cheung, instructed by Johnnie Yam, Jacky Lee & Co, assigned by the Director of Legal Aid, for Chan Chi-yeung (CACC 49/2019) Appeal Bundle (CACC 48/2019), 10C D. Appeal Bundle (CACC 49/2019), 14K 15J. Appeal Bundle (CACC 49/2019), 15O S. Appeal Bundle (CACC 49/2019), 63R 64M. Had the combined approach been taken according to the sentencing guidelines for heroin of R v Lau Tak Ming [1990] 2 HKLR 370. PAGE

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