

HONG KONG / JUDGMENT

HKSAR v. CHAN SUNG WING

COURT

Court of Appeal

DECIDED

29 November 2007

CASE / FILE NUMBER

CACC52/2007

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Before: Hon Stuart-Moore VP and Beeson J Date of Hearing: 29 November 2007 Date of Judgment: 29 November 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court): This appeal, against a total sentence of 2 years and 8 months imprisonment, gives rise to what appears to be a new practice on the part of the prosecuting authority to charge the possessor of dangerous drugs with manufacturing when all the offender has done is to prepare the drugs he intends to consume himself in a way which technically amounts to manufacturing under the provisions of section 6(1)(a) and (2) of the Dangerous Drugs Ordinance, Cap. 134 (the Ordinance). This section provides: Manufacture of dangerous drug

- (1) Save under and in accordance with this Ordinance or under and in accordance with a licence granted by the Director thereunder and on the premises specified in such licence, no person shall-
 - (a) manufacture a dangerous drug; or
 - (b) do or offer to do an act preparatory to or for the purpose of manufacturing a dangerous drug.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction on indictment to a fine of \$5,000,000 and to imprisonment for life. Section 2 provides that manufacture is to be interpreted as meaning: any act connected with making, adulterating, purifying, mixing, separating, or otherwise treating a dangerous drug . In the present case, on the 1st charge, the appellant pleaded guilty to possession of 0.1 gramme of a solid containing cocaine and 0.02 gramme of a powder containing cocaine hydrochloride, contrary to section 8(1)(a) and (2) of the Ordinance. The 2nd charge to which the appellant pleaded guilty was that he manufactured a dangerous drug, namely cocaine, contrary to section 6(1)(a) and (2) of the Ordinance. Both offences were committed on 12 January 2006 at the appellant s workplace in Shamshuipo. Unfortunately, on the strength of the 2nd charge, this case found its way to the High Court. In our opinion, this was, for reasons we shall come

to shortly, pre-eminently a case which ought to have remained in the Magistrates Court. I gave leave to appeal against sentence when this matter was listed as an application for bail on 31 May 2007. On the same occasion, the appellant was given bail pending his appeal. The matter came before Deputy High Court Judge E Toh on 22 January 2007. The summary of facts was agreed and mitigation was advanced by Mr McGowan who also appears in these proceedings. The judge then adjourned sentence for the preparation of background reports. When sentencing on 6 February 2007, the judge concisely and accurately set out the facts as follows: The facts are not complicated in that in the evening of the day in question, the police officers who were waiting [at] the Lap Shun Motor Company in Sham Shui Po at about 9.30 pm, saw a person called Cheung Man-lung leave the shop and they subsequently went forward to intercept him. Then the police officers entered the premises and upon arriving at a wooden cubicle at the back of the shop, the door was locked and no one answered the police request to open the door so the door was broken with a hammer. After entering the cubicle, three persons were found inside, one of whom was the defendant. The police spotted suspected dangerous drugs scattered around a desk and they executed a search warrant and the defendant, upon being cautioned, admitted that the cocaine in the room was for his own consumption. Subsequently, the premises [were] examined by a Government chemist who found suspected cocaine and manufacturing paraphernalia inside the wooden cubicle which was air-conditioned and also had a ventilation fan. Amongst the things that were found inside were five lighters, two paper boxes of sodium bicarbonate and a pocket scale, three test tubes, two plastic straws and a stick, and some plastic bags containing white powder. Subsequently, these were brought back to the Government Laboratory to be examined and inside one of the paper packets found at the premises was found 0.1 gramme of a solid containing cocaine, on a metal rod found inside the premises were also traces of cocaine, also on a lighter, also on the paper boxes containing sodium bicarbonate, and a pocket scale, and also on the other paraphernalia, that is, the test tubes and two plastic straws, were also found traces of cocaine. And also the swabs taken from the top of the fax machine, from the ventilation fan and from the air-conditioning filters, also contained traces of cocaine. Dr Fung opined in her report that the current practice of cocaine manufacturing in Hong Kong involves the conversion of cocaine hydrochloride into cocaine base which is a form used for smoking. Now, this process can take place in a test tube by dissolving cocaine hydrochloride and sodium bicarbonate in water and when heat is applied, the chemical reaction then takes place and then the cocaine base is separated from the water and dried for consumption. And so it was her opinion that in [these] premises - and with the paraphernalia found - it was consistent with the process of making cocaine from cocaine hydrochloride. Now, the forensic chemist also was of the opinion that based on the paraphernalia found, she estimated that less than 2 grammes of cocaine base could be produced if the three test tubes were each used once as a reaction vessel for the manufacturing of cocaine base from cocaine hydrochloride and sodium bicarbonate. The defendant was subsequently interviewed and he was a partner in this motor company and he admitted that he bought the cocaine powder and he mixed it with baking soda and boiled it and then it was put into a cigarette for smoking. And he said that he consumed this

dangerous drug in the office with the knowledge of another person who was found in the premises. He admitted that he became a habitual user of cocaine about six months prior to his arrest and he said that the other person who had left the premises when the police came, Cheung Man-lung - was only in his office to set up a computer. (Appeal bundle pp. 19-21) The appellant's previous criminal record was of no relevance to the case, and the judge was right to have ignored it altogether. The judge then dealt with her assessment of the offence for the purposes of sentence, saying: Manufacturing of a dangerous drug is a very serious offence and, as has been pointed out by Mr Liu, the Court of Appeal has said before that it is only in exceptional circumstances that a sentence would be less than 10 years imprisonment. But one has to look at the case in which the Court of Appeal said that and it is clear that the Court of Appeal was referring to [a] manufacturing operation that was far far greater than what the defendant was doing in this case. I accept that the defendant was distilling the cocaine hydrochloride base for himself. It is clear from the forensic chemist's report that even if three test tubes were used on one occasion, it would come up to about 2 grammes of cocaine base. So it wasn't by any stretch of the imagination a major operation and so I do accept he was doing it for his own consumption. However, the fact that he was freely doing this in front of his friends and the fact that Cheung Man-lung who had just left his office when he was arrested for dangerous drug, shows that there is a danger of latent risk. This is the sort of case that although it wears a label of manufacturing, I do consider that it should not have been brought in the High Court. It is clear from the circumstances that the defendant was only diluting or manufacturing the cocaine to cocaine base for his own smoking. It was [a] very very very tiny operation and so in the circumstances, this sort of case should have been brought in the District Court. However, as Mr Liu has explained, because of the Court of Appeal's decision in the 1980s where the Court of Appeal said that it is only in exceptional circumstances that manufacturing cases would merit a sentence less than 10 years, obviously the person advising the case in the Department of Justice felt that it should therefore be brought in the High Court. But I did ask Mr Liu to convey this to the Department of Justice that in cases of this nature where a person is manufacturing for his own consumption that it is the type of case that should never be brought to the High Court. Now, in sentencing, as I have said, I have to look at all the facts of this case and also consider that this was not a one-off operation in the sense that traces of cocaine had been found in the air-conditioning filter, in the ventilation fan, so obviously the defendant -- this was not the first time the defendant had been making the cocaine base for himself. And so the latent risk is therefore a serious one. I have considered all the cases that have been properly submitted by both Mr Liu and Mr McGowan and I thank both of them for their assistance in this case. Mr McGowan has also, with the assistance of Mr Liu, referred me to several cases in the District Court with similar facts. They are helpful but, however, I consider that each case turns on the facts of that case. (Appeal bundle pp. 21-23) (Emphasis added) The judge was plainly right to have commented that, despite the labelling of the case as one involving the manufacturing of dangerous drugs, it should not have been sent to the High Court. The explanation that the judge had been given, to the effect that a [Court of Appeal] decision in the 1980 stated that only in exceptional circumstances would a sentence of less than 10 years

imprisonment be justified for offences of manufacturing, related to wholly different circumstances where professional traffickers were manufacturing dangerous drugs. It would have been more helpful to us if we had been provided with the case reference the judge had in mind but it seems, from the authorities which Mr Tam for the respondent has placed before us, to have been *R v Wong Chun-ping* [1984] HKLR 247. The judge's conclusion that there was a serious latent risk of cocaine finding its way into the hands of others arising from the fact that the appellant had obviously, by virtue of the traces of cocaine in the air-conditioning filter, not been engaged in a one-off operation and was carrying on this activity in front of others, is also not open to sensible criticism and Mr McGowan has not sought to suggest otherwise. On the other hand, this was a minute quantity of cocaine and it was the appellant's first offence of this kind. We would, in normal circumstances, have expected such a case to be dealt with either by an order for detention in a Drug Addiction Treatment Centre or a relatively short term of imprisonment or by way of a fine in the Magistrates Court. The judge, however, was asked to consider a number of decisions of the Court of Appeal relating to the manufacturing of dangerous drugs, after which she observed: I do accept that the defendant was manufacturing for himself and the possession on the 1st count, the possession of 0.1 gramme of a solid containing cocaine and 0.02 gramme of a powder containing cocaine hydrochloride, I consider that a proper starting-point should be one of 18 months imprisonment. And because of the defendant's plea, it is reduced to 1 year's imprisonment. On the 2nd count, having considered all the cases that have been referred to me and the circumstances of this case, I consider that a proper starting-point should be one of 4 years imprisonment. Because of his plea, it is reduced to 2 years and 8 months. And in considering the totality principle, I therefore make the 2 years 8 months on the 2nd count concurrent to that of the 1st count. So the defendant goes to prison for 2 years and 8 months. (Appeal bundle p. 23) We have no hesitation in saying that the use of the charge of manufacturing in circumstances such as these was utterly misconceived. Quite obviously, manufacturing drugs was intended as an offence in relation to those who are trafficking in dangerous drugs, very often to provide an enhanced sentence (above the normal tariff sentences given to couriers and storekeepers) for those who are engaged in the practice. If such a charge is to be preferred every time against those who simply possess drugs for their own consumption and who have, in a purely technical way, been engaged in manufacturing in the sense of adulterating, purifying, mixing, separating or otherwise treating a dangerous drug, the whole purpose and gravity of such a charge is negated. Thus, one of the most serious criminal charges is being severely devalued by misuse. A charge of manufacturing dangerous drugs should be reserved, in suitable cases, for those engaged in trafficking. We are not able to envisage any circumstances where such a charge would ever be appropriate for someone in simple possession of dangerous drugs as the appellant in this case was. This was manufacturing of a wholly technical kind and, as such, the 2nd charge should never have been brought. The prosecuting authority is there, amongst other things, to filter out unmeritorious prosecutions for offences of a technical nature. The way this is expressed in the Statement of Prosecution Policy and Practice [2006], issued by the Department of Justice, is in these terms: 7 The Decision to Prosecute 7.1 The prosecutor must consider two issues

in deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued? That policy is consistent with the policies applied by prosecution agencies throughout the common law world. (Emphasis added) As the 2nd charge was proceeded with, it should not, with respect, have led to any increase in the sentence for the possession of cocaine having regard to the wholly technical nature of the offence. Turning to the 1st charge, the sentencing approach in possession cases taken by this court in HKSAR v Wan Sheung-sum [2000] 1 HKLRD 405 and HKSAR v Mok Cho-tik [2001] 1 HKC 261 about which we have been reminded in these proceedings, related to sizeable quantities of methamphetamine hydrochloride (ice) and heroin, respectively, but these decisions have no application to the present case which the judge had rightly categorised as very, very, very tiny . We shall, therefore, allow the appeal. The sentences of 12 months imprisonment on the 1st charge and of 2 years and 8 months imprisonment on the 2nd charge are quashed. In their place, we substitute a formal sentence of 1 day s imprisonment on 2nd charge which the appellant has already served and, on the 1st charge, having regard to the year the appellant has already spent in custody prior to bail being granted, we shall again impose a nominal 1 day s imprisonment which, it is obvious, the appellant has already served. The appellant, therefore, is entitled to immediate release. (M. Stuart-Moore) macrobutton nomacro Vice-President (C-M Beeson) Judge of the Court of First Instance Mr Tam Sze Lok, SGC, of the Department of Justice, for the Respondent. Mr James McGowan, instructed by Messrs Littlewoods, assigned by Director of Legal Aid, for the Appellant. 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 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 "0 "0 "0 i\$&`G Normal.dot setup Microsoft Word 9.0 pQU2 3uU2 Judiciary Hong Kong Title ~vU2 ~vU2 ~vU2 Microsoft Word Document MSWordDoc Word.Document.8

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