

HONG KONG / JUDGMENT

HKSAR v. CHAU HON KWONG

COURT

Court of Appeal

DECIDED

11 October 2007

CASE / FILE NUMBER

CACC453/2006

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Before: Hon Stuart-Moore VP, Stock JA and Wright J in Court Date of Hearing: 3 October 2007
Date of Judgment: 3 October 2007 Date of Reasons for Judgment: 11 October 2007

REASONS FOR JUDGMENT

Hon Wright J (giving the judgment of the Court): On the hearing of this application for leave to appeal against conviction we gave leave and, treating the hearing as the appeal, allowed the appeal, set aside the conviction and quashed the sentence. We ordered a retrial and directed that the appellant remain in custody. These are our reasons. The appellant had been convicted after trial before Deputy Judge Esther Toh and a jury of a single charge of trafficking in dangerous drugs contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134. The particulars of the offence were: CHAU Hon-kwong, on 23rd day of December 2005 outside number 81 Sa Po Road, Kowloon City, Kowloon, in Hong Kong, unlawfully trafficked in dangerous drugs, namely, 0.16 g of a mixture containing 0.01 g of heroin hydrochloride, 27.97 g of a mixture containing 7.49 g of heroin hydrochloride and 1.12 g of methamphetamine, and 27.10 g of a crystalline solid containing 26.42 g of methamphetamine hydrochloride. THE FACTS The facts, either as were admitted or as emerged at trial, showed that at around 1:45 a.m. that day two patrolling police officers noticed the appellant next to a private motor car. He was searched and a small packet, containing the first quantity of heroin referred to in the particulars, was found in his trouser pocket. The car was searched and in it was found the larger quantity of heroin/methamphetamine mixture as well as the methamphetamine hydrochloride (Ice): the heroin/methamphetamine mixture was found in a white envelope under the mat at the driver's seat of the car whilst the Ice was found concealed inside a cigarette packet lying on the passenger seat of the car. Also found in the car was cash amounting to \$82,700.80. The admitted facts also disclosed that: in the envelope found under the carpet of the driver's seat were found, in addition to the

heroin/methamphetamine mixture, four fragments of red plastic; on the road to the right of the appellant's car near the kerb were found several fragments of red plastic of "the same kind" as those found in the envelope, all of which were believed to be broken fragments of a box; and patches of white powder, swabs taken of which were subsequently found to contain heroin, were found on the road beside the fragments of plastic and also on the right front tyre of the appellant's vehicle. The appellant was arrested and was cautioned after each separate discovery. In respect of the small quantity of heroin found in his pocket he said that he had picked it up at the scene. He gave a similar reply in respect of the second quantity of heroin. In respect of the Ice it was the prosecution's case that he replied "I bought it in the Mainland for my own consumption" which was recorded in a subsequent post record. As is the usual procedure he was offered the opportunity of reading the record that had been made of what he had said. He availed himself of that opportunity saying "I want to make an alteration. The stuff in the Marlboro cigarette packet was not bought by me. It was picked up by me there. Just now when I said that it was bought in the Mainland it is a lie". It was the appellant's case at trial that he had not said that his reply in respect of the Ice had been a lie but, rather, a mistake as he had thought that the police had been referring to a quantity of Viagra which, apparently, was also found either on his person or in the car. Nothing turns, for the purpose of this appeal, on the question of whether the appellant lied or whether the alteration had been necessitated by mistake. Although nothing turns, either, on the nature of the lies direction given by the judge in the course of the summing up, it may be apposite to repeat the earlier observation of this court, differently constituted, that where a lies direction is given it should be given in full (see HKSAR v HUANG Song Fu CACC141/2005) and not in a truncated form. The appellant elected to give evidence during the course of which he testified that he had driven over the red plastic box and then discovered, no doubt to his delight and surprise he having testified that he is drug dependent, that that box contained the various drugs which are referred to in the particulars of offence. He decided to keep them. Shortly thereafter he was intercepted by the police officers. He gave a similar explanation during the course of an interview with the police after his arrest.

THE GROUNDS OF APPEAL

Despite the prosecution's contention that the appellant had, initially at least, admitted having imported the Ice from the Mainland, the indictment contained but the single count set out above, the prosecution proceeding on the basis that the appellant was in possession of all of the drugs on the day and at the place set forth in the particulars for the purpose of trafficking in those drugs. Six grounds were advanced in the perfected grounds of appeal against conviction. We need only the deal with the first ground as that was the basis upon which leave was granted: suffice it to say, there was no merit in any of the five remaining grounds. The first ground read

The learned judge erred in directing the jury to consider the applicant submission that he had imported the drugs into Hong Kong as a basis for convict the applicant. When explaining the drawing of inferences whilst summing up the case to the jury the judge said The prosecution says that the only irresistible inference that the defendant was trafficking in these drugs, because the prosecution says, he admitted in Exhibit P29 that he bought the ice in Mainland China and brought them into Hong Kong for his own consumption. And that therefore is one aspect of trafficking, which is importing into Hong Kong, and coupled with that, the prosecution says, he says he rarely takes ice, so the only inference therefore, in all the circumstances, is that he

intended to supply to others. [Emphasis supplied] The judge later defined trafficking for the jury in the following terms What in law is trafficking? It is defined in the Dangerous Drugs Ordinance as this, and Mr Poon has read it out to you, that trafficking includes importing into Hong Kong, exporting from Hong Kong, procuring, supplying or otherwise dealing in or with the dangerous drugs. Common examples of trafficking are selling or distributing or disposing of the dangerous drugs in any way by one person to another or others. So as Mr Woon pointed out, if a person moves the dangerous drugs from one person to another, or one place to another, he is a courier and that is also trafficking. [Emphasis supplied] Unfortunately, the judge went on to say The prosecution need not prove that the defendant gained any financial or monetary benefit from it. As I have said, it usually it is not easy to have direct evidence of a person's intention. In this case the prosecution asserts that the defendant told the truth initially to PC 50262, has recorded in p 29, that he had brought the ice, the sixth, in China for his own consumption. The prosecution submits that you should accept that as the truth, that he admitted importing the Ice to Hong Kong and so therefore that is already trafficking in dangerous drugs. [Emphasis supplied] It is quite apparent, therefore, that although the prosecution had been based on possession of all of the drugs on the date and at the place set out in the particulars of offence and although the prosecution had made the point that the importation by the appellant of the Ice allegedly for his own consumption when he was not an Ice user was a factor which the jury was entitled to take into account in drawing inferences as to why the appellant possessed the drugs, the prosecution was not relying on the fact of importation to found an offence of trafficking. However, the judge directed the jury in such terms as may well have led the members of the jury to believe that they would be entitled to convict the appellant if they were satisfied that he had made the admission of importing the ice. The importation of the ice by the appellant, assuming it had occurred, would have constituted a separate and identifiable offence distinct from the offence charged. It certainly could not have occurred at the place alleged in the particulars of offence. There was no evidence as to when, if it had occurred, it did occur. Whilst trafficking in a dangerous drug by way of possession for that purpose would be a continuing offence, the offence of trafficking by way of importation would be complete once the importation had been effected. Given that the basis of the prosecution case was not, for whatever reason, the apparently admitted importation of the ice but the continuing possession of it, with the heroin, for the purpose of trafficking, the direction given to the jury was a material misdirection. We feel it appropriate to add, even though no reference appeared to this issue in the perfected grounds of appeal or in argument, that the judge ought to have clearly laid before the jury the fact that matching shards of plastic were found, adjacent to heroin, next to the wheel of the appellant's vehicle and also in the envelope containing the larger quantity of heroin/methamphetamine mixture and to have indicated to the jury the use that they would have been entitled to make of this physical evidence, should they so wish, insofar as it may be thought to support the appellant's version of events. Because of the nature of the direction given in the light of the facts of this case we were unable to apply the proviso. (M. Stuart-Moore) (Frank Stock) (A R Wright) Vice-President Justice of Appeal Judge of the Court of First Instance Mr Robert S K Lee, SADPP, Department of Justice, for Respondent Mr M K Wong SC leading Miss Samantha CHIU, inst d by M/s Pansy Leung, Tang & Chua for the Applicant PAGE PAGE A B C D E 1udk 1udk 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

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