

HONG KONG / JUDGMENT

HKSAR v. CHENG SOK IN

COURT

Court of Appeal

DECIDED

15 November 2007

CASE / FILE NUMBER

CACC83/2007

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bjbj : Hon Yeung JA and Beeson J in Court Date of Hearing: 8 November 2007 Date of Judgment: 8 November 2007 Date of Reasons for Judgment: 15 November 2007

REASONS FOR JUDGMENT

Beeson J (Giving the judgment of the Court) On 8 November 2007 we allowed this Applicant's application for leave to appeal against sentence, stating that we would hand down our reasons; our reasons follow. This Applicant pleaded guilty to one count of trafficking in a dangerous drug before Deputy District Judge S.T. Poon. The drug was 19.53g of mixture containing 17.52g of heroin hydrochloride. The Applicant was sentenced to 56 months imprisonment and appealed against that sentence. FACTS OF OFFENCE The Applicant aroused the suspicions of a party of police officers as she walked along Nathan Road; she was subsequently stopped and searched as she was leaving the toilet of a fast food shop. A full body search was eventually conducted. Two lots of dangerous drugs were found inside her briefs; 16 pellets containing 5.74g of heroin hydrochloride and 50 pellets containing 9.01g of heroin hydrochloride. Under caution the Applicant claimed the drugs were for her own consumption. The Applicant was remanded to Tai Lam Centre for Women. Three days later a further 13 packets of dangerous drugs were excreted by the Applicant. Under further caution the Applicant admitted that she had swallowed the drugs before her arrest. The Applicant was represented at plea. In mitigation the court was advised that she was aged 39 years; divorced; had two teenage daughters; was educated to Form 3 level and had a history of drug-taking. Her criminal record showed that she had been fined in 1988 for an offence of making, or causing to be made, a false statement or representation to an immigration officer. In 1996 she was sent to prison for eight years for two offences of trafficking. In 2005 she was fined \$1000 for possession of dangerous drugs. The judge noted that the tariff in Lau Tak-ming applied. For a narcotic quantity of 10g to 50g the starting point for sentence was in the range of five to eight years imprisonment. The judge observed, correctly, that the only mitigating factor of any value was the guilty plea entered by the Applicant. The judge commented that although the quantity of narcotic involved was relatively low, this was not her first offence of

trafficking and thus the Applicant could not have the same benefit that a first offender should have enjoyed in sentencing . He regarded it as an exacerbating feature that the drugs had been packed in numerous small pellets, considering that such packaging revealed an intention that they be distributed readily to a large number of people. When sentencing the judge took a starting point of seven years imprisonment. He gave one-third discount for the Applicant s guilty plea and reduced the sentence to 56 months. GROUNDS OF APPEAL The Perfected Grounds of Appeal were that the judge erred in adopting a starting point of 7 years imprisonment, because it was excessive in the circumstances of the case, particularly having regard to the suggested sentencing band in Lau Tak-ming. It was alleged that the judge had failed to take sufficient, or any, account of the various mitigating factors advanced and it was submitted that 56 months imprisonment was manifestly excessive. Mr Mughal, who appeared for the Applicant before us, pointed out that the starting point taken by the judge was almost at the top end of the relevant tariff band and in any event was at the maximum of the District Court sentencing jurisdiction. He produced a number of cases to support his contention that a quantity of 17.52g of narcotic, would normally attract a starting point in the range of five and a half years. The Applicant did not dispute the sentencing band in any way; the only issue was whether the judge was correct in taking a higher starting point because of the Applicant s record and the number of pellets involved. RESPONDENT S SUBMISSION The Respondent agreed that the judge was entitled to consider the record of the Applicant in deciding whether she was a persistent offender who should have a deterrent sentence. However the Respondent was represented by Ms Evena Chan, who conceded, very fairly, that as the Applicant s trafficking convictions had been committed 10 years before her offending could not be categorised as persistent . Further, the Respondent noted that the Court of Appeal stressed that it was the quantity of narcotic rather than the number of packets which was the proper basis for sentence. The court in HKSAR v Luk Chun-man [2006] 3 HKLRD 450 obviously thought, with some exceptions, that it was unlikely that the number of packets per se would ever be a substantial reason for increasing a courier s sentence when: - The guideline tariff is already a substantial one based, as it is, upon the narcotic weight of the heroin whether or not it has been divided into smaller packets . The Respondent agreed that the judge could consider both the record and the number of packets, but commented that the upward adjustment was substantial and the starting point higher, than in most of the cases involving a similar quantity.

CONCLUSION

We agree with the Applicant, as conceded by the Respondent, that the Applicant s previous record was not so serious as to justify treating her as a persistent offender which would warrant a substantial increase in the starting point for sentence. Nor was the division of the drug into a number of pellets a significant aggravating factor in the circumstances of this case. In our view it is undesirable, given the tariff sentences set out in Lau Tak-ming, that a substantial upwards adjustment is made to a starting point for sentence, which would cause an unnecessary disparity of sentence in comparable cases. The starting point, primarily, should be based on the quantity of narcotic, although other factors such as a large number of packets, in appropriate

circumstances, can be taken into account. [see consolidated judgment CACC 258/2002 CACC 370/2002 CACC 3712/2002 at p.4] This however was not a case where that needed be done. Accordingly we granted the Applicant leave to appeal and treating the hearing as the appeal, we quashed the sentence imposed by the judge. We adopted a starting point of 5 years and 6 months - gave the usual 1/3 discount for her plea of guilty and sentenced the Applicant to 3 years and 8 months imprisonment. (W. Yeung) (C-M Beeson) Justice of Appeal Judge of the Court of First Instance High Court Mr Hanif Mohamed Mughal, instructed by Legal Aid Department, assigned by D.L.A., for the Applicant Ms Evena Chan, SADPP of Department of Justice, for the Respondent 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 i\$&`G QVdW **^BDbn QVdW HCMA.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 28 October 2026 · Esheria