

HONG KONG / JUDGMENT

# HKSAR v. CHENG YAT MING

## COURT

Court of Appeal

## DECIDED

20 July 2007

## CASE / FILE NUMBER

CACC455/2006

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bjbj ton nomacro Applicant

Before: Hon Stuart-Moore macrobutton nomacro Ag CJHC and Stock JA Date of Hearing: 20 July 2007 Date of Judgment: 20 July 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro Ag CJHC (giving the judgment of the Court): This is an application for leave to appeal against an overall sentence of 4 years imprisonment imposed on 19 October 2006 by Deputy District Judge Mierczak on two charges of trafficking in dangerous drugs. The applicant pleaded guilty. Both offences were committed on 5 June 2006. The 1st charge related to trafficking in 4 grammes of powder containing 3.43 grammes of ketamine. This relatively small quantity was found on the applicant as he emerged from a flat which he had earlier been sent to enter. The police then used the keys found on the applicant to search his flat. The drugs itemised in the 2nd charge were found inside, namely, 166.88 grammes of powder containing 142.06 grammes of ketamine, 11.13 grammes of a solid containing 8.75 grammes of cocaine and 155 tablets containing a total of 1.05 grammes of methamphetamine and traces of N, N-dimethylamphetamine. In addition, scales, spoons and plastic bags suitable for packaging the drugs were found. In mitigation, the judge was told that the applicant had been the victim of a serious accident which had caused him to be laid off work and he was said to be in need of psychiatric help for depression. The offences were committed, it was said, because the applicant had been trying to earn extra money to support his wife and children. The applicant has three previous convictions none of which were for offences of the kind now before the court. The judge looked at each separate quantity of drugs in the 2nd charge. He indicated that an appropriate starting point for the ketamine was 2 to 4 years imprisonment after trial for between 25 and 400 grammes. (This equates with the guideline sentencing for ecstasy in HKSAR v Lee Tak-kwan [1998] 2 HKC 371 and [1998] 2 HKLRD 46 which was, in the absence of other guidelines, used as a basis for sentencing for ketamine in HKSAR v Leung Chun-fung [2003] 2 HKLRD 282) The judge calculated that a starting point of about 30 to 33 months imprisonment would be justified for the ketamine standing by itself. With regard to the cocaine, for which the appropriate guidelines are the same as for heroin (see: Attorney General v Pedro Nel Rojas [1994] 2 HKCLR 69), the judge considered that the starting point would be about 4 years imprisonment as the guideline for up to 10 grammes was in the range of 2 to 5 years. The

remaining drugs in the 2nd charge, which the judge referred to as fake ice, were disregarded for the purposes of achieving an overall sentence. The judge went on to state that he considered 6 years as a proper starting point on this charge which he reduced by a third to reflect the guilty plea. On the 1st charge, a concurrent sentence of 4 months imprisonment was imposed after the judge had taken 6 months as the starting point for that offence. Mr Boyton, in his ground of appeal, submitted, on behalf of the applicant, that the 6-year starting point on the 2nd charge was manifestly excessive as this was not a just overall sentence. He contended that the applicant had effectively received two cumulative, deterrent sentences for the same offence. He made no complaint about the individual starting points which the judge adopted for the cocaine and the ketamine but he contended that as the guidelines which are available for sentencing traffickers of both kinds of drugs are proportionately heavier at the lower ends of the tariff brackets to act as a deterrent, it was wrong in principle to take two lower or even middle band tariffs and to treat them as deserving in large measure consecutive sentences. In his written submissions, Mr Boyton invited us to consider what was said in *HKSAR v Yip Wai-yin and Anor* [2004] 3 HKC 367, where this court reviewed the approach taken in other cases to the sentencing of offenders who have engaged in trafficking more than one type of dangerous drug. In some cases, an individual approach would be required (as in *HKSAR v Lai Kwok-hung* CACC 564/2002) where each component in a cocktail of drugs or batch needed to be looked at to establish the sentence relevant to each individual drug before an appropriate adjustment to the overall sentence was made. In other cases, a combined approach could be taken where a sentence for the most serious drug can be calculated before an upward adjustment can be made to take into account significant quantities of the other less serious drugs in terms of their potency. Ma CJHC, giving the judgment of the court, made reference to three authorities when setting out the combined approach. These were *HKSAR v Yip Pik-kwai* [1999] 3 HKLRD 42, *HKSAR v Wong Kam-wo* [2001] 2 HKLRD 290 and *HKSAR v Cheung Kwok-leung, Lowence* [2003] 3 HKLRD 542. The difficulty being faced in cases of the kind where either an individual or a combined approach is adopted only arises where the sentencing brackets for the types of drugs are markedly different. Where drugs of a comparable kind, such as heroin, cocaine and methamphetamine hydrochloride (ice) are being trafficked the combined approach, where a global sentence is taken, can usually be used (see, for example, *HKSAR v Chan Hei-kam*, CACC 229/1999). Mr Boyton's argument was that the applicant had been placed in double jeopardy by the adoption of a 6-year starting point under what may be described as the individual approach. This allowed for a sentence reduction by only 6 months on the 2nd charge, to take into account totality (i.e. 2 years rather than the full starting point of 2 years for the ketamine when this was added to the 4-year starting point for the cocaine). He submitted that, by using the combined approach, the starting point ought to have been 5 years imprisonment with a 4-year starting point for the cocaine enhanced by 12 months for the ketamine. In saying this, he relied to an extent upon what was done in *Yip Wai-yin and Anor*. However, there was a particular reason for the reduction of sentence in that case in that the appellants believed they were only dealing in ecstasy whereas in fact they were also found in possession of methamphetamine mixed with ketamine. Mistake as to the nature of the drugs being trafficked has no application in the instant case. Mr Richard Ma, in his written submissions for the respondent, argued that whether a combined or an individual approach was taken to the

drugs in the present case, the result in sentencing terms would be more or less the same. The 4-year starting point for the cocaine was, as Mr Boyton had conceded, a proper one. The significant quantity of ketamine was also given an appropriate starting point of about 2 years imprisonment which, Mr Ma submitted, with 6 months of that term being made concurrent, led to a fair overall starting point of 6 years imprisonment. He added that it needed also to be borne in mind, as this court said in *HKSAR v Cheung Po-cho*, Tommy CACC 233/2005, that: The presence of more than one type of drug in a drug trafficking offence must itself be an aggravating factor. Whilst the reason for this is not stated in the judgment, no doubt the rationale was that the trafficker in more than one type of drug is able to cater to a far wider market than the trafficker in only one kind of drug. Mr Ma referred lastly to *HKSAR v Lai Kwok-hung* s case (above) and reminded us of the passage appearing in paragraph 13 which reads: If a man is in possession of three different and distinct types of drugs (each in a substantial quantity) for the purposes of trafficking, then it is entirely appropriate to look at and to apply the tariff applicable to each drug whether at the time of seizure they remain unblended or whether they have been mixed into tablet form. In the case of tablets, it is certainly not appropriate to ignore one substantial constituent drug simply because it is apparently less significant (or perhaps arguably less dangerous ) than another and therefore to be regarded as no more than as a form of dilutant (see *Cheung Kwok Leung*, Lowence above).

14. By that process the sentencer will arrive at what might be described as an initial view of the appropriate starting point and from there he will proceed to attempt to achieve a just overall sentence taking into account, among other things, the fact of the combination of the drugs (if that has any relevance); the general mitigation and the principle of totality. We consider in the present case that the judge had given proper consideration to the overall sentence he imposed having given proper regard to totality. In any event, we cannot regard 4 years imprisonment after guilty pleas for trafficking in this quantity of cocaine and ketamine to be manifestly excessive. Accordingly, this application is dismissed. (M. Stuart-Moore)  
macrobutton nomacro Chief Judge, Ag CJHC (Frank Stock) Justice of Appeal Mr Richard Ma, SGC, of the Department of Justice, for the Respondent. Mr David Boyton, instructed by Director of Legal Aid, for the macrobutton nomacro Applicant 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  
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