

HONG KONG / JUDGMENT

HKSAR v. CHEUNG HOI LAM

COURT

Court of Appeal

DECIDED

8 May 2007

CASE / FILE NUMBER

CACC389/2004

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Before : Hon Stuart-Moore VP, Stock JA and McMahon J in Court Date of Hearing : 8 May 2007
Date of Judgment : 8 May 2007

J U D G M E N T

McMahon J (giving the judgment of the Court) : AUTONUMOUT This is an application for leave to treat the applicant's abandonment of his appeal against sentence as a nullity. AUTONUMOUT On 25 June 2004 the applicant, together with his two co-accused, pleaded guilty before a magistrate to two robbery offences and was committed to the High Court for sentence. AUTONUMOUT He was sentenced by Lugar-Mawson J to a total of six years imprisonment on 20 August 2004. On 6 September 2004, the applicant lodged a notice of appeal against that sentence with this court. He contended that the sentence was manifestly excessive. AUTONUMOUT Following that, on 26 October 2004, the applicant filed a Form VII Notice of Abandonment of his appeal and, by the operation of Rule 39 of the Court of Appeal Rules, his appeal was dismissed. AUTONUMOUT Some 21 months later, on 3 August 2006, the applicant, by way of affirmation, applied for the restoration of his appeal. AUTONUMOUT On 9 October 2006, that application was mentioned in chambers before Yuen JA who dealt with it, as we will, as an application for leave to treat the abandonment of the applicant's appeal as a nullity. The applicant claimed to have been suffering from mental illness at the time he had decided to abandon his appeal and was advised by Yuen JA to obtain medical reports in support of that assertion. AUTONUMOUT The applicant then informed the court that he intended to abandon his application as he thought obtaining a medical report would be very troublesome. The court told the applicant that if he wished to abandon his application he should write to the court to that effect. AUTONUMOUT He did not do so but, rather, wrote to the Registrar on 15 October 2006 informing him that he wished to continue with his appeal. AUTONUMOUT We are satisfied therefore that the original application

to treat the abandonment of the applicant's appeal as a nullity was never disposed of and is still extant and proceed on that basis. AUTONUMOUT The applicant claims by his affirmation that he had been suffering from schizophrenia before and after the trial of the case and that he had been mentally disordered for a period of time after the sentence and had lost the normal ability to think and judge AUTONUMOUT He has provided us with two psychiatric reports from Dr K.C. Tso and Dr T.H. Lee, visiting psychiatrists at the Siu Lam Psychiatric Centre (Siu Lam) dated 27 May 2004 and 9 October 2004 respectively which relate to psychiatric examinations of the applicant undertaken shortly after he commenced serving his sentences. AUTONUMOUT Tso was of the view that the applicant was at that time suffering from schizophrenia, though his condition had significantly improved with treatment. The applicant was apparently discharged from Siu Lam shortly after that and within a few months returned when he was then examined by Dr Lee who found him to be suffering from no diagnosable psychiatric illness. AUTONUMOUT To succeed in his application, the applicant must satisfy us that at the time he signed and lodged his Form VII notice, his act of abandonment of his appeal was a nullity, that is, that he did not appreciate the nature of his act, or its effect, so that his mind did not go with the act of abandonment: see R. v. Medway [1976] 62 CAR 85; R. v. Bridges [1998] 104 ACLR 322 and HKSAR v. Lai Siu Cheung [2005] 1 HKLRD CA. AUTONUMOUT The only evidence the applicant has placed before us as to his state of mind at the time he abandoned his appeal suggests that he had, with treatment, successfully overcome his schizophrenic symptoms by 9 October 2004 and, there being no assertion that he suffered any relapse, was free of those symptoms at the time he abandoned his appeal by way of the Form VII notice on 26 October 2004. AUTONUMOUT Even if the applicant, as he claims, exercised poor judgment in doing so (which we think is not necessarily so), that still falls short of him not appreciating the nature, or effect, of his act. We are not satisfied on the evidence before us that the applicant's abandonment of his appeal should be treated as a nullity and his application is dismissed. (M. Stuart Moore) Vice-President (F. Stock) Justice of Appeal (M.A. McMahon) Judge of the Court of First Instance Miss Mary Sin, SADPP and Mr Derek Lai, SGC of Department of Justice, for the Respondent The Applicant in person PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$ 4or~ Rs~/ (Q\*<< ,DGpH ~ B; <(z&; NFaF4\ B[UN` (BQ VhrLO ,7)a~D ^|r ~ B; ,7)a NFaF (BQ B[UN D\$ti \TvV UH2 & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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