

HONG KONG / JUDGMENT

HKSAR v. CHIANG WAN LUNG

COURT

Court of First Instance

DECIDED

14 December 2007

CASE / FILE NUMBER

HCMA875/2007

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj HEADNOTE The broad complaint that the Magistrate had passed a sentence based on the Appellant's previous convictions rather than on the facts of the present case was not justified. Of course a court must not allow an offender's bad criminal record to result in a sentence of any severity disproportionate to the gravity of the offence or offences for which it is sentencing him. But a bad criminal record can increase the punishment that an offender deserves after due account is taken of any matter or matters properly to be taken into account in mitigation. More importantly, a bad criminal record can also be indicative of the need to pass a sentence aimed at deterring the offender and others in order to protect the public. However the Magistrate did err in this way. He took a starting point, discounted it for the guilty plea and then increased the discounted term to reflect the bad criminal record. The appropriate approach, however, is to factor the bad criminal record into the starting point so as to increase it, and then discount the increased starting point for the guilty plea. HCMA 875/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 875 OF 2007 (ON APPEAL FROM KCCC 4528 OF 2007)

BETWEEN HKSAR Respondent and f 18 months imprisonment passed on the Appellant by Ernest Lin, Esq. in the Magistrate's Court at Kowloon City on a charge, to which the Appellant pleaded guilty, of attempting to steal seven wrist watches, of a total value of \$6,195, from a shop in Mongkok. The circumstances of the offence may be taken from the Magistrate's Reasons for Sentence where this is said: According to the Brief Facts admitted by the defendant, at about 5 pm on 3rd September 2004 the staff of a watch company situated in Nathan road found the defendant wandering furtively at the entrance of the shop. At the same time he found 7 wrist watches (total value at \$6,195) missing from the display shelves. He was alerted by a passerby that the watches were inside a plastic bag on the ground near the defendant. He checked the plastic bag and found that in fact it was the case. Subsequently the defendant was arrested by the police and under caution he admitted that was about to steal the watches. After he was granted police bail, the defendant absconded and was only arrested upon his recent return from Taiwan. After saying that, the Magistrate dealt with the prevalence of such offences, as to which he said this: Offences of this kind are amongst the most common ones this court has to deal with every day.

Turning to the Appellant's antecedents, the Magistrate noted the following matters: At the time of the offence the defendant was a man well into his 40s. He was also a repeated offender: prior to the present offence he had 19 previous convictions, 12 of which were dishonesty related. I noted that the last conviction dated 28th April 2003 was also one of Attempted Theft for the which he was sentenced to a term of imprisonment for 18 months. That means short after his release he committed the present offence. Obviously the rather hefty sentence did not succeed as a deterrence. Then the Magistrate explained how and why he arrived at the sentence which he passed, saying as follows: By reasons of matters stated above, the only sentencing option available in this case is a term of imprisonment. In my view this case is akin to a burglary: entrance as a trespasser with the intention to steal: the differences are of course it was a shop opened to members of the public and the defendant had partially carried out his design. In view of his conviction record I am of the view that a deterrent sentence is called for. I therefore adopted a term of imprisonment of 24 months as a starting point. This is reduced to 16 months to take into account of his guilty plea. Also in view of the fact that he was repeated offender I would also add 2 more months to the sentence. I have also considered the mitigation submissions by his lawyer. As a fugitive of the law he had gone to Taiwan where he was serving a term of imprisonment after which he was deported back to Hong Kong where his wife and 3 young children are. He was hoping to return to them as soon as possible. While my sympathies are with the defendant's family and in particular the 3 young children, the defendant could have no one else to blame. If he was so concerned with the wellbeing of family, he should have thought of them before embarking on these criminal activities and before deciding to become of fugitive of the law. None of the matters relating to his personal circumstances merit any exceptional mercy. For the reasons stated above, I therefore ordered the defendant be sentenced to a term of imprisonment for 18 months. The perfected grounds of appeal against sentence filed on the Appellant's behalf are lengthy, but should be set out in full. They read:

1. The learned Magistrate erred in taking into account the conviction record of the Appellant twice in sentencing the Appellant: (1) to call for a deterrent sentence of 24 months imprisonment as starting point, and (2) add 2 more months to the sentence of 16 months imprisonment. Further or alternatively, the learned Magistrate erred in fact that last term of sentence was of a term of 18 months of his last conviction dated 28th April 2003 of Attempted Theft which was reduced to 13 months on appeal and thereby erred about the time lapse between his release and the commission of the present offence. Further or alternatively, the learned Magistrate erred in finding that the present case is akin to a burglary case. Further or alternatively, the learned Magistrate had non-directed himself to the fact that: the present case is not the worst type of its kind; and the maximum sentence after trial to be passed by the learned Magistrate is 24 months imprisonment. In any event the learned Magistrate erred in adopting a starting point of 24 months or the effective starting point of 27 months resulting to the final sentence of 18 months imprisonment after taking into account of his guilty plea. Further or alternatively, the learned Magistrate erred in passing a sentence of imprisonment based on the Appellant's previous convictions rather than on the facts of the present offence. Further or alternatively, the learned Magistrate had

failed to have regard, or sufficient regard to the following matters: that the degree of planning, if any, is not high; that the Appellant was not acting in concert with any other person and was acting alone; that the offence was committed out of greed; that the victim suffered no loss for all stolen property have been recovered; that the Appellant made admission at the earliest opportunity and pleaded guilty to the offence; that the value of properties involved is \$6,195; that the court would dispose first time offender of shop theft by way of financial penalty; that it is an opportunistic offence; and that the appellant did not use any tools or equipment other than a plastic bag.

8. In all the circumstances the sentence is manifestly excessive. I will deal with all of these grounds, but not in numerical order. The last ground, Ground 8, is simply a contention based on the grounds which precede it. As for Ground 7, I do not think that the Magistrate failed to have sufficient regard to any matter of substance set out in this ground. I do not consider the broad complaint made in Ground 6 to be justified. Of course a court must not allow an offender's bad criminal record to result in a sentence of any severity disproportionate to the gravity of the offence or offences for which it is sentencing him. But a bad criminal record can increase the punishment that an offender deserves after due account is taken of any matter or matters properly to be taken into account in mitigation. More importantly, a bad criminal record can also be indicative of the need to pass a sentence aimed at deterring the offender and others in order to protect the public. Ultimately, I propose to deal with Grounds 1, 4 and 5 together. Before that, I would say this about Grounds 2 and 3. The error in Ground 2 is unlikely to have influenced the Magistrate. And I think that the same is to be said of his view that the present case is akin to burglary (although I do not regard that equating the present offence with burglary as appropriate). That is Ground 3. As to Grounds 1, 4 and 5 taken together, I say this. The Magistrate took a starting point, discounted it for the guilty plea and then increased the discounted term to reflect the bad criminal record. I do not commend that approach. In my view, the appropriate approach is to factor the bad criminal record into the starting point so as to increase it, and then discount the increased starting point for the guilty plea. Counsel for the Appellant submits that with the bad record factored into it, the appropriate starting point should be 11 months, and that the sentence should be reduced from that by a third to reflect the guilty plea. That would mean a sentence of 7 months when rounded down to the nearest month. Counsel for the Respondent submits that with the bad record factored into it, the appropriate starting point should be 24 months, and that the sentence should be reduced from that by a third to reflect the guilty plea. That would mean a sentence of 16 months imprisonment. In other words, counsel for the Respondent does not seek to uphold the sentence imposed by the Magistrate, but resists a reduction as great as the one contended for by counsel for the Appellant. Having considered everything that had been submitted by both counsel and all things considered, I am of the view that counsel for the Respondent is right. I allow the appeal to reduce the sentence, but only by 2 months so as to arrive at a sentence of 16 months. In the result, the sentence is reduced to 16 months. (V. Bokhary) Judge of the Court of First Instance High Court Mr Jim Chun-ki, Jacky, instructed by Messrs

Raymond Chan, Kenneth Yuen & Co., (assigned by the Legal Aid Department), for the
Appellant Ms Olivia Tsang, of the Department of Justice, for the Respondent 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 i\$&`G eC6 eC6 user HCMA.dot setup Microsoft Word 9.0 Judiciary Hong Kong
Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=59584
CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-chiang-wan-lung-2007>

Prepared on 26 October 2026 · Esheria