

HONG KONG / JUDGMENT

HKSAR v. CHOI WING KUEN

COURT

Court of Appeal

DECIDED

18 December 2007

CASE / FILE NUMBER

CACC41/2006

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

bjbj 8l k)

Before: Hon Stuart-Moore VP, Yeung JA and Saunders J Date of Hearing: 18 December 2007 Date of Judgment: 18 December 2007 J U D G M E N T Stuart-Moore, VP (giving the judgment of the Court):

Background

This is an application for leave to appeal against a sentence of 16 years imprisonment imposed on 25 January 2006 by Deputy High Court Judge Wright (as he then was) in respect of a count of conspiracy to traffic in a dangerous drug, contrary to section 4(1)(a) and (3) and section 39 of the Dangerous Drugs Ordinance, Cap. 134 and section 159A of the Crimes Ordinance, Cap. 200. The particulars of the charge were that the applicant: on divers days between an unknown day in April 2002 and the 21st day of May, 2002 in Hong Kong, conspired with Ngai Ying-cheung and other persons unknown to traffic in a dangerous drug, namely, methamphetamine hydrochloride . Although the weight was not stated in the charge, the methamphetamine hydrochloride () with which the applicant was specifically concerned, as the respondent accepted, was just under 2.39 kilogrammes in a crystalline solid weighing slightly over 2.421 kilogrammes. Originally, three conspirators were arrested at Hong Kong Airport on 20 May 2002. These men, who included Ngai Ying-cheung (Ngai), were duly dealt with in HCCC 306/2002 by Beeson J who adopted a starting point of 21 years imprisonment for the offence. Ngai pleaded guilty and was sentenced to 13 years imprisonment. Later, he gave information which led to the arrest of the applicant and this was recognised in due course by an appeal out of time and the reduction of Ngai s sentence to 11 years imprisonment. In the present case, the applicant pleaded guilty but sentence was postponed to enable him to give evidence against a further conspirator, Leung Wai-hung (Leung). In due course, the applicant did so and, in recognition of this, a starting point of 27 years imprisonment was reduced by a third to reflect his guilty plea and by a further 2 years because of the evidence he had given against Leung. Grounds of appeal The two points of importance raised in this application are whether the 27-year starting point taken by the judge

was manifestly excessive and whether a 2-year reduction, giving an overall reduction of just over 41 percent from the starting point, was adequate having regard to the applicant's assistance to the authorities. The facts were relatively simple. The applicant and Ngai were each working as truck drivers at the same transportation company. The applicant told Ngai that he was looking for someone to join a travel-tour to Guam and, for a reward, to take ice there. Ngai was keen to earn quick money and he promised he would do it. The applicant then made sure that Ngai renewed his BNO passport which had expired. When this had been done, Ngai gave his passport to the applicant and he was told by the applicant that he would be informed once the arrangements to go to Guam had been made. Eventually, on 20 May 2002, Ngai was told to go to a certain place from where he was taken to a hotel in Mongkok. There, he and another man, Liu Ming-sze (Liu), had plastic bags which were filled with ice tied to their legs and thighs by Ken Shum Yu-hon (Shum), the third conspirator in HCCC 306/2002. Ngai had his passport returned to him by Shum. At the same time, Ngai was given some cash. He was then told to go to the airport with Liu. These three men, as we have already indicated, were arrested at the airport.

Approximately twenty-two months later, the applicant was stopped at Lok Ma Chau Border Crossing Point on his return from the Mainland. When confronted with the allegation that he had conspired with Ngai, Liu and Shum to traffic in the ice, he replied that he was only the middle-man and that Ah Hung had called him to find someone to carry ice to Guam. It was then, he said, that he had found Ngai, who he referred by his nickname Chocolate, to assist him. Later he made a full confession to his role stating, amongst other things, that Ngai had agreed to take 2 kilogrammes of ice for a reward of \$30,000. He asserted that he was a middle-man with no other participation. In passing sentence on 25 January 2006, the judge recognised that the applicant's sentencing had been postponed since 7 December 2004, the date on which he had originally pleaded guilty, so that the applicant could give evidence against Leung. This was the man who the applicant had referred to as Ah Hung in his confession statements to the police where he effectively described Leung as the originator of the scheme. Leung had pleaded not guilty at his trial and the applicant, true to the promise he had made, gave evidence for the prosecution. Without his evidence, there would have been no case against Leung. The jury ultimately convicted Leung in that trial. Passing sentence on the applicant on the same occasion as Leung, the judge, in a passage which is at the root of one aspect of this application, said: In so far as you are concerned, Choi, you are entitled to the one-third discount which arises as a result of your early plea of guilty. The discount recognises the fact of your previous good character. That reduces the sentence from the starting point of 27 years to one of 18 years. You are entitled to a further discount for your having testified against Leung. It is not an edifying spectacle to see one criminal turn upon another simply for the sake of maximising the benefits which he is to receive. But the reality of life is that it is frequently necessary for this to occur and for it to be encouraged by way of additional discounts on sentence to ensure that others are brought to justice. You did give evidence in accordance with the facts which you admitted at the time of your conviction and substantially in accordance with your witness statement. I will afford you a further 2 year reduction in sentence. (Appeal bundle p. 8) (Emphasis added) It seems plain that the judge had adopted a 27-year starting point because he considered that the applicant's criminality in the conspiracy involved not merely Ngai, who was recruited by the applicant, but also the second

courier, Liu, as earlier in his sentencing remarks, the judge had said: Close to the end of this period you, Leung, indicated to Choi that another person would be joining Ngai in the journey. Choi, you conveyed this information to Ngai. It is clear, therefore, that each of you participated in the conspiracy involving at least two couriers, albeit that there is no direct evidence that either of you actively recruited the second person. An airline ticket, hotel accommodation and hotel transfers were arranged which Ngai and the other man who was to join him, Liu, would use to travel to and stay for a short period in Guam. On the appointed day, 20 May 2002, eight packets containing the were strapped to the lower limbs of each of Ngai and Liu who then set off for the airport where at the check-in counter for the flight they were apprehended. The quantity of the found on the body of Ngai was 2,389.98 grammes, contained in a slightly large[r] crystalline solid, whilst that found on the body of Liu was 2,386.26 grammes. It is stating the obvious to say that the amount of being carried by each of the couriers was huge. The aggregate being only a little under 5 kilogrammes. (Appeal bundle p .6) (Emphasis added) Merits of the application Whilst there was certainly evidence against Leung to show that he had conspired to traffic in ice using two couriers, in the applicant s case there was, with respect, no such evidence. The Summary of Facts, providing the factual basis of the applicant s plea of guilty, described the applicant as having only arranged for one courier to take ice to Guam. This evidence came solely from the applicant s admissions to the police about the role he had played in the conspiracy. These admissions were set out in the Summary of Facts where there is no reference to the applicant s recruitment of a second courier. If, as seems to be the case, the applicant had stated during Leung s trial that he merely became aware of a second courier who would be joining Ngai on the journey to Guam, this was, in our view, not a sound basis on which to increase the sentence or to reflect a greater degree of criminality on the applicant s part. Unfortunately, also, the judge gave no indication to trial counsel that he intended to sentence the applicant on the basis of a conspiracy involving over 5 kilogrammes of ice represented by the combined quantity carried by the two couriers, Ngai and Liu. In the result, no argument was ever advanced as to why this was not a proper foundation for sentencing purposes as it almost certainly would have been if this issue had been raised with counsel. In these circumstances, we consider that a 27-year starting point was manifestly excessive for an offence involving less than 2.5 kilogrammes of ice. However, there was a further relevant consideration in regard to the starting point. The judge had been informed of the 21-year starting point taken by Beeson J in the case of two out of the three conspirators (Liu and Ngai), sentenced earlier. As to this, the Court of Appeal s judgment in Ngai s appeal against sentence (CACC 604/2002) had been placed before the judge in these proceedings and, as he rightly commented when sentencing the applicant: the Court of Appeal took the view that the starting point adopted by the sentencing judge was low given the quantity of drugs and the international aspect of the offence in question. (Appeal bundle p. 7) Whilst, therefore, a higher starting point for the applicant in these proceedings than that adopted for Ngai was justified, we consider that the addition of 6 years to the starting point taken in the earlier proceedings, even bearing in mind the organising role played by the applicant but keeping in mind also the quantity of ice involved, was manifestly excessive. The last important aspect to be addressed in this application is the failure on the part of the judge to give the applicant a discount of about 50 percent which is usually accorded to defendants who have acted as he had done (see:

HKSAR v Lee Yat-fan, CACC 414/1999 [unreported judgment given on 30 May 2001]). Here, the applicant, having pleaded guilty, had not merely given information leading to the arrest of Leung but had actually given evidence against him at trial. The judge provided no reason for giving a discount in the region of only 41 percent which, in our view, did not adequately reflect the substantial cooperation given by the applicant. We do not know to what extent the judge was influenced in his approach to sentence by his observation that it was not an edifying spectacle to see one criminal turn upon another simply for the sake of maximising the benefits which he is to receive but we are, with respect, satisfied that this remark was misplaced having regard to the firm policy of this court to encourage defendants to cooperate with the authorities in the interests of justice. In our opinion, a full discount of 50 percent was justified at that time. However, since then, we have learnt that Leung made a successful appeal against his conviction and that a retrial was ordered. Again, the applicant gave evidence for the prosecution and it is not suggested in these proceedings that he gave testimony which was anything other than the truth. We propose, therefore, to follow the decision in HKSAR v W [2004] 3 HKC 376 at 383, where a discount of rather more than 50 percent was given after the assistance rendered put the prisoner into a category beyond the normal case of assistance leading to arrest and giving evidence. There, the prisoner had persisted in his assistance and the same may be said for the applicant in this case. It is to the applicant's credit that he agreed to testify a second time and we think that a failure to recognise this in some tangible way might discourage others to take a similar course if faced with a situation of this kind in the future. In all the circumstances, we consider that the applicant's role, bearing in mind that he was instrumental in organising a part of this serious trafficking offence, merited a starting point of 24 years imprisonment. Discounting this to recognise the considerable assistance the applicant has rendered in two trials, we consider for the reasons we have given that a sentence of 11 years imprisonment would be appropriate.

Conclusion

Accordingly, we shall grant leave and, treating the hearing as the appeal, we allow the appeal. The sentence of 16 years imprisonment is quashed and, in substitution, there will be a sentence of 11 years imprisonment. (M. Stuart-Moore) macrobutton nomacro Vice-President (Wally Yeung) Justice of Appeal (John Saunders) Judge of the Court of First Instance Ms Louisa Lai, SADPP, of the Department of Justice, for the Respondent. Mr James F D Collins, instructed by Messrs Tsang, Chan & Woo, assigned by Director of Legal Aid, for the Applicant. PAGE - A B C D E F G H I J K L M N O P Q R S T 1udk 1udk "0 "0 "0 i\$&`G Normal.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=59567

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-choi-wing-kuen-2007>

Prepared on 26 October 2026 · Esheria