

HONG KONG / JUDGMENT

# HKSAR v. CHONG YAU SHING

## COURT

Court of First Instance

## DECIDED

14 August 2007

## CASE / FILE NUMBER

HCMA539/2007

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bjbj HCMA 539/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 539 OF 2007 (ON APPEAL FROM ESCC 5614/2006)

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BETWEEN HKSAR Respondent and CHONG YAU SHING Appellant

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Before: Deputy High Court Judge E Toh in Court Date of Hearing: 14 August 2007 Date of Judgment: 14 August 2007

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## J U D G M E N T

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The Appellant had pleaded guilty in the Magistrate s Court to one charge of possession for the purpose of, or in the course of, any trade or business of infringing copies of copyright works with a view to committing any act infringing the copyright without the licence of the copyright owner, contrary to section 118(1)(d) and section 119(1) of the Copyright Ordinance, Cap. 528. In the particulars of the offence, he is charged that he had in his possession 35 CD-ROMs software and one CD game disc, being infringing copies. He had pleaded guilty to the 2nd charge which involved possession of a dangerous drug, is namely 0.12 grammes of ketamine. This appeal concerns only the sentence of a training centre imposed upon him in respect of charge 1. The evidence shows that on the 17 July 2006, outside Shop No. 146, Upper Ground Floor 298, Computer Zone, at 298 Hennessy Road, Wanchai, undercover officer saw, the Appellant was shouting to customers If you have ticket, come and get your disc. They saw three customers give the Appellant some tickets or slips of paper and the Appellant after comparing those slips, took from the floor a plastic bag and gave each of those three customers a plastic bag inside which the officers suspected were infringing copies. One of the undercover Customs Officers then ran up to the Appellant and revealed his identity. The Appellant tried to flee but was subdued by the

Customs Officer. Under caution, the Appellant said that it was his first day of working. He was paid \$300 a day. The Customs officer then confiscated the 35 CD-ROMs software and one CD game disc. The learned Magistrate in considering sentence had first of all called for various reports, among them were the Detention Centre/Training Centre (DCTC) report as to his suitability for detention in the detention centre or training centre and also a probation officer's background report. The learned Magistrate considered that this offence was a serious one and that if the Appellant was an adult he would be sentenced to a relatively long-term of imprisonment. The learned Magistrate then said that he had considered the Appellant's background and he was unemployed and also he had considered the probation officer's report and the DCTC report and it is clear from the report that the Appellant's willingness to be law-abiding is rather weak. The learned Magistrate also considered several cases, one of them being *Wong Chun-cheong v HKSAR* [2001] 4 HKCFAR 12. After considering the relevant authority and the background of the Appellant, he considered that it would be of benefit both to the Appellant and to society to sentence him to a training centre. The Appellant appeals against that sentence and on his behalf, Mr Butt had submitted several grounds of appeal. The main ground is that the sentence was manifestly excessive because of the length of incarceration in a training centre as compared to a detention centre. Particularly, in this case, Mr Butt said the Intake officer of Correctional Services had recommended that the defendant be detained in a detention centre. He also relied on the ground that there is a general disparity because he submitted that the average period of detention for an adult offender on the same facts could be a period of about 5 months and if the Appellant was sent to a training centre he would be serving an excessively long time as compared to the average adult offender. Mr Butt's argument is therefore that the learned Magistrate had failed to consider this and thus deprived the basic right of the Appellant to his individual liberty. It is at this stage, opt to refer to *Wong Chun-cheong's* case (*supra*) where the Court of Final Appeal had considered the approach that the sentencing judge should take when considering making a training centre order. There are two threshold conditions and first of all the offence must be one punishable with imprisonment and the offender should be aged between 14 and 21. The court had to consider the interests of the community, especially when that interest requires the offender to receive rehabilitative treatment. Looking at the circumstances overall, the interest of the community might require that the need for rehabilitative treatment give way to a punitive or deterrent sentence. And thirdly, the Court of Final Appeal said: When no overriding community interest precluded the making of a training centre order, the court must be satisfied that the order would be expedient for the offender's reformation and for the prevention of crime. In determining this, the Court had to consider the offender's character; his previous conduct; the circumstances of the offence, namely the specific facts and the nature and gravity of the offence. The mere fact of a conviction, however trivial, could not be used as justification to consider whether the Appellant needed reformation by detention in a training centre. So it is clear therefore that the Court has to consider not only the facts, the type of sentence, the nature of the offences but also the background of the offender in every case. When looking at the reports, it is clear that the Appellant had all along lacked guidance. He was not given any formal guidance from his parents. His academic performance was poor. He had befriended triad elements while he was still in school. He, therefore, caroused with them and that had affected his academic

performance. He had afterwards attended a Construction Industry Training Authority course and then he started indulging in taking drugs, although he denied that he is addicted. Because of the influence of this undesirable peers, he indulged in drugs which resulted in his conviction in 2006 for possession of dangerous drugs and he was fined. In this case, he revealed to the Intake-officer that he had poor self-control and fell under the influence of his triad friends. He had continued to sniff Ketamine and the help of his triad friend he got this job to sell infringing copyright disc in Wanchai. It is clear that there is hope for this particular Appellant because the Intake officer had found him to be polite in attitude and playful but he had weak self-control. The mother of the Appellant and his elder sister were interviewed. It is clear that they are very concerned about him. The probation officer's report also is very telling because his father had not shown up for the interview leaving his wife to handle the matter. The probation officer said that although the mother and the elder sister showed concern for the Appellant, their seriousness about formulating the rehabilitation plan was doubtful. It is clear that the Appellant in this case need proper guidance and with proper guidance he would be able to rehabilitate himself and divorce himself from undesirable elements. So the paramount concern, therefore is what sentence would be suitable for this particular Appellant. Granted, the training centre option, if one looked solely at the length of incarceration, carries a longer period of loss of freedom than in a detention centre. But, one has to look at the overall picture. One cannot compare the length of incarceration solely between a detention centre and a training centre because they are two different types of rehabilitation. One is suitable as a short sharp treatment for a young man. In order to shock him back into the law-abiding and proper course. The other takes a longer period of rehabilitation where he is taught various skill and also a longer period where he is removed from undesirable elements so that he can educate his real power of self-control to divorce himself permanently from any undesirable elements. Mr Butt criticized the learned Magistrate for not setting out reason why he did not follow the Intake officer's recommendation that the Appellant is more suitable to be sent to a detention centre. It is clear from the learned Magistrate overall reasons for sentence that he did consider the relevant cases and he did consider the background and the report and therefore he considered that overall it is more beneficial to the Appellant that he be incarcerated in a training centre. As I have said, although theoretically if one looks solely at the punitive element it seems to be harsh but in actual fact when one looks at all the circumstances particularly the Appellant's background, it will be beneficial to him in the long run to be in a training centre. Though the sentence may be considered harsh, I cannot say that it is manifestly excessive or wrong in principle. Sentencing is an art and particularly in the sentencing of young offenders where the court wants to assist both the community and the young person, himself, to get back on the right track and I consider therefore in this case that the sentence cannot be considered manifestly excessive or wrong in principle and therefore the appeal is dismissed. (E Toh) Deputy High Court Judge Mr Joseph Wong, Senior Government Counsel of Director of Public Prosecutions, for the Respondent Mr Anthony Butt, instructed by Messrs K Y Woo & Co., for the Appellant

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