

HONG KONG / JUDGMENT

HKSAR v. ESTRELLA SHERWIN B

COURT

Court of First Instance

DECIDED

30 May 2012

CASE / FILE NUMBER

HCMA124/2012

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bjbj K;%B HCMA 124/2012 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO 124 OF 2012 (ON APPEAL FROM KCCC 463 OF 2012)

between HKSAR Respondent and ESTRELLA SHERWIN B Appellant

Before : Hon Barnes J in Court Dates of Hearing : 25 and 30 May 2012 Date of Judgment: 30 May 2012

J U D G M E N T

AUTONUMOUT The appellant was charged with the following offences: two charges of theft, contrary to section 9 of the Theft Ordinance, Cap 210 (Charges 1 and 2); and one charge of breach of condition of stay (overstaying), contrary to section 41 of the Immigration Ordinance, Cap 115 (Charge 3). AUTONUMOUT The appellant pleaded guilty before a magistrate and was sentenced as follows: Charge two months imprisonment; Charge two months imprisonment; and Charge four months imprisonment. AUTONUMOUT The magistrate ordered the sentences on Charges 1 and 2 to be served concurrently but consecutive to the four months sentence imposed in Charge 3, making a total of six months imprisonment. AUTONUMOUT The appellant appealed against sentence. AUTONUMOUT It should be noted that the appellant was also convicted of another offence of theft by the same magistrate upon the appellant's own plea (ESCC 2560/2011). That was a shop theft of various items including bacon and wine. The appellant was sentenced to two months imprisonment, to run consecutively to the sentences imposed in this case. The appellant did not appeal against that two months sentence. Summary of Facts AUTONUMOUT The summary of facts admitted by the appellant disclosed that he first stole a bottle of whisky from a convenience store on 13 January 2012 (Charge 1). Though the manageress realized it was the

appellant who had taken the whisky without payment when she viewed the closed circuit television, she did not take any action. AUTONUMOUT Two weeks later, when the manageress checked the stock on 27 January 2012, she found another bottle of whisky missing. She viewed the closed circuit television and again noted it was the appellant who had taken the whisky without payment (Charge 2). The manageress reported the matter to the police this time. AUTONUMOUT The appellant was spotted and intercepted by the police on 2 February 2012. The appellant admitted under caution he had stolen the two bottles of whisky. AUTONUMOUT When the immigration status of the appellant was checked, it was discovered that the appellant had overstayed in Hong Kong since 3 June 2004. Under caution, the appellant admitted that he had not extended his visa since 2 June 2004. Appellant s background and mitigation before the magistrate AUTONUMOUT The appellant is a 38 year old man with a clear record. The court was informed that he had cohabited with a Hong Kong resident and they have a daughter aged seven. The appellant was unemployed and was supported by his girlfriend. He admitted he stole the whisky out of greed for his own consumption. Reasons for sentence AUTONUMOUT When dealing with the two thefts, the magistrate noted that the items stolen were not those required for subsistence and that the appellant committed the same offence within two weeks at the same shop. At that time the appellant was already on bail in relation to another offence of theft which took place in June

2011. The magistrate was of the view that the greed, habitual disrespect for other s property rights and the law had driven the appellant to commit other offences. The magistrate viewed these as aggravating factors which took the case out of the ordinary impulsive, heat moment crimes. The magistrate was also of the view that he owed a duty to the law abiding citizens to send out a clear message of disapproval. The magistrate adopted a starting point of three months for each offence, and reduced each to two months upon the appellant s plea. AUTONUMOUT Regarding the overstaying, the magistrate bore in mind the period of overstaying was over seven years. After considering relevant authorities he adopted a starting point of six months imprisonment and reduced it to four months for the guilty plea. AUTONUMOUT The magistrate then considered the overall sentence and ordered the two sentences for the theft charges to run concurrently, but those sentences to run consecutively to the four months imposed for the overstaying charge. Grounds of appeal AUTONUMOUT It should be noted that although in the Notice of Appeal the appellant indicated he appealed against the sentences imposed on the two theft charges, before me he made it clear that he was appealing against the four months imprisonment imposed for the overstaying charge. Mr Tsang for the respondent raised no objection to this. AUTONUMOUT At the outset, the appellant accepted that he could not say that the magistrate s sentence was manifestly excessive. He informed me that at the hearing, the proceedings were so rushed that he did not have the opportunity to inform the magistrate, through his legal representative, his full background and how he came to commit the overstaying offence. He wished me to reduce the sentence on humanitarian grounds. AUTONUMOUT The appellant informed me that he came to Hong Kong in 1994 on the basis that he was a dependent of his father, who was a resident here. He has worked and paid tax

to the Hong Kong Government during his stay. By the time his visa expired in June 2004, he could have applied for permanent residency as he had already then stayed for over seven years. The reasons why he did not apply for permanent residency, or at least to renew his visa were two folds: firstly, a Thai restaurant ran by him and two partners had to close for business in 2004 due to the massive rise in rental, despite the fact that the business managed to survive during the very difficult SARS year in 2003; secondly, a baby daughter was born to him and his girlfriend and he was under tremendous stress facing a new baby with no job and no money. He said he was so stressed at the time that he did not make the necessary application to extend the visa. After failing to apply, he continued to overstay as he wanted to spend time with his daughter. AUTONUMOUT He told me that in the past years, he was totally dependent on his girlfriend to support him and he took up the role of carer in relation to his daughter, taking her to school. He told me that his health had not been good and he had operations to straighten some entwisted intestine in 2007 and

2008. He said he could have applied and obtained another visa on the strength of his father's residency without problem. AUTONUMOUT In view of what the appellant had told me, I adjourned the matter so that Mr Tsang for the respondent could take instructions. AUTONUMOUT Today, I learnt that the appellant was indeed allowed to stay in Hong Kong on the strength of his father's residency. He was issued a Hong Kong identity card and there was no restriction on him to work here. Mr Tsang took no issue that the appellant had operated a Thai restaurant before and that he was hospitalized. AUTONUMOUT The appellant also informed me that his passport also expired in July 2004 and he neglected to renew that as well. I can see from the passport photograph that the appellant had lost a lot of weight since the time when that photograph was taken. AUTONUMOUT While the Immigration Department could not confirm whether the appellant would have been granted an extension of stay had he applied in time in 2004, Mr Tsang fairly conceded that there was nothing known to the Immigration Department regarding the appellant which would have made it act differently should the appellant apply in time. AUTONUMOUT The father of the appellant came to court to support him today. He informed me that all his three children are now in Hong Kong. The appellant, who is the eldest child, is the only one who had not yet applied for permanent residency. AUTONUMOUT asked Mr Tsang to let me know what would happen to the appellant after he completes his jail sentence. Would he be detained at the Immigration Department pending further action? Or would he be allowed bail so that he can apply either for an extension of stay or permanent residency, or both. AUTONUMOUT was informed by Mr Tsang that once the appellant finishes his sentence, he would be taken to the Immigration Department pending action by the Deportation Board's decision whether he should be deported. While the said Board consider the appellant's case, the appellant may or may not be granted bail. Should the Board decide not to deport the appellant, the appellant can then apply to renew his visa and also apply for permanent residency. The Immigration Department will not entertain such applications from the appellant while he is still serving his sentence. My consideration AUTONUMOUT The appellant's breach of condition of stay is not the run-of-

the-mill kind of such cases. This is not someone who has been allowed to stay to visit and then in breach of the condition, stays on or even seeks employment here (like in the case of a two-way permit holder for the Mainland). This is not a case of someone who has been allowed to stay on the strength of a particular employment, stays on when he/she is no longer working under that particular employment (as in the case of domestic helpers for the Philippines or Indonesia). The appellant came to Hong Kong for the purpose of family reunion: his father was and is still a permanent resident in Hong Kong. The appellant has been in Hong Kong since 1994 and there was no restriction on him to work here. He ran a business but suffered from a loss. He and his girlfriend had a baby daughter at the time when his visa was about to expire and he neglected to do anything to his status in Hong Kong due to the stress he was suffering from. It seems to me that the appellant had let himself go to pieces and he neglected to take care of his own status of his stay in Hong Kong. It would appear that had he gone to the Immigration Department to renew his visa, there was no reason why he would not have been successful. Having failed to regularize the matter, and having allowed the visa to expire, he then hid and dodged from the authorities for seven years! AUTONUMOUT The breach of condition of stay offence would not have come to light but for the appellant's persistent stealing of bottles of whisky! It does appear the appellant has got himself into a hopeless situation and he acted irresponsibly. AUTONUMOUT After considering the particular circumstances of this case, I am satisfied that this is a proper case for me to treat the appellant with mercy and allow him to come out of jail earlier. AUTONUMOUT have ascertained from the Correctional Services Department that the estimated date of release in the appellant's case would be:

- (1) 15 July 2012 (on the basis of eight months imprisonment); and
- (2) 4 June 2012 (on the basis of six months imprisonment). AUTONUMOUT In order to achieve my aim of allowing the appellant to be released earlier around 4 June 2012, and to avoid having to deal with the difficulty presented by a consecutive sentence of two months imposed in the other case, I decide to order the total sentence of six months in this case to be substituted by one of four months, thereby making a total of six months when taking into account the two months imprisonment imposed in the other case. AUTONUMOUT The appellant's appeal against sentence is allowed. The individual sentences imposed remain unchanged, that is: Charge two months; Charge two months; and Charge four months. The magistrate's order that the sentences imposed on Charges 1 and 2 to run concurrently also remain unchanged. I quash the magistrate's order that the four months imprisonment imposed on Charge 3 to run totally consecutively to the sentences imposed on Charges 1 and 2 and substitute that with the following order: two months of the four months imposed on Charge 3 to run consecutively to Charges 1 and 2; thereby making a total term of four months imprisonment in this case. (Judianna Barnes) Judge of the Court of First Instance High Court Mr Tsang Ting Hang, Michael, PP of Department of Justice, for the respondent Appellant in person, present 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 hEhE hEhE hEhE hEhE hEhE hEhE hEhE hEhE hEhE hEhE hEhE gdO|G gdO|G gdO|G hf wz hEhE hEhE hEhE hEhE hEhE gdO|G h2h4 h2h4 h%4+ hf wz h%4+ h%4+ gd'b2 hL3< hO|

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