HONG KONG / JUDGMENT

HKSAR v. FU CHIU WA

COURT
Court of Appeal

DECIDED
3 October 2007

CASE / FILE NUMBER
CACC452/2002

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

bjbj nomacro Appellant

Before: Hon Stuart-Moore VP, Stock JA and Wright J Date of Hearing: 3 October 2007 Date of Judgment: 3 October 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court): On 19 August 2002, the appellant was convicted by a jury of trafficking in dangerous drugs. He was sentenced to 12 years imprisonment on 20 August 2002. His original application for leave to appeal against conviction was abandoned on 25 June 2003. Thereafter, on 10 February 2006, an application to treat his abandonment as a nullity was rejected. On 31 August 2006, the Court of Final Appeal decided, in HKSAR v Hung Chan-wa and Anor [2006] 9 HKCFAR 614, that the presumptions raised by sections 47(1) and (2) of the Dangerous Drugs Ordinance, Cap. 134, if read as imposing persuasive burdens of proof upon defendants, were not compatible with the presumption of innocence protected by the Basic Law and that they should be read as evidential onuses. At trial in the present case, the judge directed the jury that the appellant had the burden of proving, on a balance of probabilities, that he had no knowledge of the drugs inside the bag in his possession. This accorded with the understanding of the law at the time of the summing up but not with the (subsequent) decision in Hung Chan-wa. The case now comes before this court because the appellant presented a petition to the Chief Executive by which he successfully sought a reference to this court under section 83P of the Criminal Procedure Ordinance, Cap. 221. In other words, the Chief Executive has referred the whole case to this court pursuant to the provisions of that section. The effect of this reference is that the case must be treated by this court for all purposes as an appeal. The position in law is unaffected by the fact that the previous application for leave to appeal was dismissed following the appellant s abandonment of his application and it is a position in law that is also unaffected by the fact that the appeal comes before us more than five years after the conviction. In a judgment of this court in HKSAR v Hung Chan-wa CACC 411/2003 (consolidated with HKSAR v Asano Atsushi CACC 61/2004) dated 26 January 2006, in which was canvassed an invitation by the respondent to render the ruling about the reverse onus provisions prospective only, the further question was raised about applications made out of time, where the ground for the application was the understanding of the law. Whilst we declined to render a judgment that was not related to specific cases, some

indication was given that leave out of time was by no means a foregone conclusion where leave out of time was sought because of such a changed understanding of the law, and we referred to authority to the effect that special circumstances would have to be shown to justify a departure from the principle of finality. In its judgment on the same issue, the Court of Final Appeal gave a similar intimation. Had this been an application for leave out of time, it is therefore far from certain that leave would have been given. Had this been a fresh application to treat the abandonment as a nullity on the basis of a misunderstanding of the law at the time of trial, it would not have succeeded. In this case, such issues of finality, exceptional circumstances for extending time, or the effect of abandonment are not now in our hands, for the decision to refer under section 83P makes such issues otiose before this court. We understand that no objection is to be made to a retrial and that the appellant now intends, upon re-arraignment, to plead guilty to the very offence the conviction for which we are now bound to overturn. In the circumstances thus described, we allow this appeal, quash the conviction and order a retrial. Meanwhile, the appellant will remain in custody. (M. Stuart-Moore) macrobutton nomacro Vice-President (Frank Stock) Justice of Appeal (A R Wright) Judge of the Court of First Instance Mr Robert S K Lee, SADPP of the Department of Justice, for the Respondent. Mr Richard T W Wong, instructed by Messrs Waller MA, Huang & Yeung, assigned by Director of Legal Aid, for the macrobutton nomacro Appellant 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 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 i$&`G Normal.dot setup Microsoft Word 9.0 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=58727

CASE PAGE https://chat.esheria.ai/case-law/hong-kong/hksar-v-fu-chiu-wa-2007

Prepared on 29 October 2026 · Esheria