

HONG KONG / JUDGMENT

HKSAR v. JARNAIL DASS

[2020] HKCFI 370**COURT**

Court of First Instance

DECIDED

5 March 2020

CASE / FILE NUMBER

HCMA575/2019

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bjbj HCMA 575/2019

**[2020] HKCFI 370 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO 575 OF 2019 (ON APPEAL
FROM KCCC NO 874 OF 2015)**

BETWEEN HKSAR Respondent and JARNAIL DASS Appellant

Before: Hon Campbell-Moffat J in Court Date of Hearing: 5 March 2020 Date of Judgment: 5
March 2020

JUDGMENT

On 25 November 2019, the appellant pleaded guilty to one count of remaining in Hong Kong without the authority of the Director of Immigration after having landed unlawfully contrary to section 38(1)(b) of the Immigration Ordinance, Cap 115 (unlawful remaining) on 16 December 2014. He was arrested on 10 March 2015, for an offence of Conspiracy to Defraud, at which time he was also arrested for unlawful remaining. The Conspiracy to Defraud was dealt with upon plea of guilty on 7 May 2015, and he was sentenced to a period of imprisonment of four months. He was due to be released on 6 June 2015. However, the unlawful remaining charge was outstanding and thereafter he remained in Lai Chi Kok on remand until 6 October 2015, when he was released on bail. In the interim he had made a CAT claim. That claim finally came to an end on 18 September 2019, when the Court of Appeal refused him leave to appeal to the Court of Final Appeal. As a result, he was brought back to the magistrate s court to be dealt with for the section 38 offence. For that offence he was sentenced to a term of imprisonment of 14 months. By his Notice of Appeal dated 27 November 2019, he seeks to appeal the sentence for unlawful remaining on the basis that it was too severe. After enquiry it appears that this appeal is premised upon a misunderstanding by the appellant. He believed that the magistrate should have deducted

his sentence of four months served for the Conspiracy to Defraud, from his sentence for unlawful remaining because he was also on remand for unlawful remaining at the same time as he was on remand for Conspiracy to Defraud. But, when he was sentenced for the Conspiracy to Defraud, all of the time he spent on remand was deducted from the time he had to serve for that offence. It cannot be credited twice. Time spent serving a sentence of imprisonment for an unrelated offence cannot be deducted from a subsequent sentence of imprisonment imposed by the magistrate. Time spent on remand for an offence is dealt with by the Correctional Services Department (the CSD) when they calculate a release date. It is not dealt with by a judge. Only time spent on remand outwith a sentence of imprisonment can be deducted by the CSD. In this case that was when he was on remand from 6 June 2015 to 6 October 2015 when he was released on bail. The appellant has confused what amounts to a period of remand deducted by the CSD when computing his release date and the power of the court to calculate the appropriate sentence of imprisonment for an offence. In respect of the charge of unlawful remaining the appropriate sentence after plea is one of 15 months imprisonment: R v So Man King [1989] 1 HKLR 142. However, because the appellant faced one other charge, for which he received a sentence of imprisonment of four months, the magistrate reduced the guideline sentence by one month and imposed a sentence of imprisonment of 14 months on charge two which was to run consecutively to the four months imprisonment on charge one. I am not wholly sure why she did so. These offences were entirely independent of each other. It may be that, because of representations made at the time of sentencing she felt the need to make it clear that this was an independent sentence but it has led to some confusion. The facts of the two charges were wholly dissimilar. They may have arisen at the same moment in time and he may have been on remand for both offences between 10 March 2015 and the date of his sentencing for the Conspiracy to Defraud on 7 May 2015. But there the similarity ends. The sentence for the Conspiracy to Defraud was served by 6 June 2015 and the whole of his remand from 10 March 2015 was credited for the sentence by the CSD. That should have been the end of the matter. There was no need to seek to make these sentences consecutive but there was nothing improper in so doing.

Conclusion

The factual case against the appellant was overwhelming. He does not dispute this. He pleaded guilty. As to the 14 months imprisonment, which he now disputes, it was entirely appropriate and within the discretion of the learned magistrate to make. She could not have been criticised had she thought it fit not to reduce the sentence on charge two by one month. To that end, the appellant had the benefit of the magistrate's generosity. I find no merit in this appeal. This appeal against sentence is therefore dismissed. (A P Campbell Moffat) Judge of the Court of First Instance High Court Mr King Chan PP, of the Department of Justice, for the respondent The appellant appeared in person - PAGE * MERGEFORMAT - 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 A B C D E F G H I J K L M N O P Q R S T U V }yumf h;F+ h'\d h{') gdVu gdVu gd'\d gd{') h'\d gdOUv h'\d hf v) hOUv hOUv gdn9 gd'\d xtmim hSyw h3(] h3(] hSyw h3(] hSyw gdn9 :p#ij & ## & ## & ## [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/

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