

HONG KONG / JUDGMENT

HKSAR v. JAVID KAMRAN

COURT

Court of Appeal

DECIDED

3 May 2007

CASE / FILE NUMBER

CACC400/2004

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bjbj CACC 400/2004 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL criminal APPEAL NO. 400 OF 2004 (ON APPEAL FROM HCCC NO. 331 of 2003)

BETWEEN HKSAR Respondent and javid kamran Applicant

Before: Hon Stuart-Moore VP, Burrell J and McMahon J Date of Hearing: 3 May 2007 Date of Judgment: 3 May 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court): The applicant pleaded guilty to two counts of trafficking in dangerous drugs (counts 1 and 3) and one count of dealing with property known or believed to represent the proceeds of an indictable offence (count 5) when he appeared before Deputy High Court Judge Wright (as he then was) on 23 August 2004. There were other counts on which the prosecution did not proceed. The applicant was sentenced on the same day to 8 years imprisonment with consecutive effect in part to a sentence imposed in the District Court which he was then serving. Leave to appeal was granted by the single judge against this sentence and on, 12 April 2005, a differently constituted Court of Appeal concluded that the sentence should be reduced, in overall effect, by twenty months to 6 years and 4 months imprisonment. However, the court made no alteration to the order that this was to be consecutive to part of the 3-year sentence earlier imposed in the District Court. At the time of the earlier proceedings, an application by the prosecution for the confiscation of certain of the applicant s assets was outstanding, the application having been made, and then adjourned, on 23 August 2004. This was not heard until 25 October 2006 when the judge made a confiscation order in the sum of \$523,831.20. He further ordered that this sum should be paid within 6 months or a further sentence of 18 months imprisonment should be served in default. This application, by notice filed on 17 November 2006, is for leave to appeal against the confiscation order. In his reasons, for making the confiscation order, which were handed down on 1 November 2006, the judge referred to the drug trafficking activities which had been monitored by police in a covert operation prior to the applicant s arrest on 20 May 2003. Thereafter, the applicant s home was searched and passbooks relating to three

bank accounts were found there. Two of these were in the applicant's name and the other was in the name of Javed Zeeshan. The judge continued: On 28 August 2003 an ex parte restraint order was granted in respect of those three accounts which, between them, were \$637,124.85 in credit: the bulk of those moneys was in the Zeeshan account. On 22 October 2003 there was an inter partes hearing in which the Respondent [the applicant in the present proceedings] appeared as the First Respondent: Javed Zeeshan was cited as the Second Respondent but did not appear. The restraint order was continued until further order. The judge then set out a concise history of the case in which he referred to each of the offences to which the applicant had pleaded guilty as specified offences for the purposes of section 25 of the Organised and Serious Crimes Ordinance (OSCO), Cap.

455. The judge went on to describe what was at issue in the proceedings before him and the basis of his conclusion, as follows:

5. The amount with which the Respondent admitted dealing was \$1,190,264.00. This was the amount which the Respondent acknowledged had been paid in cash into his two bank accounts in the period October 2001 to May 2003.
6. A statement dated 6 October 2004 by Detective Senior Inspector Tsang Chiu-fo was filed in support of the application [for confiscation] pursuant to the provisions of section 10 of the Ordinance. The Respondent, by affirmation dated 30 May 2006, responded to a number of the issues in that statement. An answering statement dated 26 July 2006 by Detective Senior Inspector Chow Chi-kwan was then filed on behalf of the applicant. After a number of adjournments the application was listed for hearing on 25 October 2006.
7. At the hearing the Respondent accepted that he had benefited from the specified offences and that the proceeds of the offences were not less than \$1,190,264.00. He further accepted that the moneys standing to the credit of the two bank accounts operated in his name were realisable property as set forth in section 12 of the Ordinance and were liable to confiscation.
8. The sole issue that remained for determination was whether the moneys standing to the credit of the Zeeshan account were realisable property in the hands of the Respondent and similarly liable to be confiscated and, thereafter, the actual amount to be realised.
9. It is the prosecution's case that the irresistible inference to be drawn is that the Respondent had effective control over the bank account and that moneys which he deposited were the proceeds of the offences.
10. Javed Zeeshan is the Respondent's younger brother. Records of the Immigration Department show that he first arrived in Hong Kong on 18 July 2002 and departed for China on 10 September 2002. There is no record of his having returned to Hong Kong since. The Respondent testified that he is resident in Pakistan.

11. The Zeeshan account was opened on 25 July 2002. Between the time that account was opened and Javed Zeeshan left Hong Kong \$49,000.00 had been deposited into the account and \$46,298.00 had been withdrawn from it: there were seven deposits and five withdrawals during that period.
12. Subsequent to the departure of Javed Zeeshan from Hong Kong on 10 September 2002 an amount of \$681,100 was deposited into the Zeeshan account on 19 occasions, the last occasion being 20 May 2003, the day the Respondent was arrested. There were but three withdrawals, to which I shall refer later.
13. In his affirmation the Respondent acknowledges that he made nine of the deposits and says that the moneys which he deposited had been given to him by three business partners of his brother, one of whom was a person by the name of Khaled. Khaled was one of the three persons arrested with him at the time the police operation went overt: he, too, was found in possession of dangerous drugs on that occasion. The remaining deposits into the Zeeshan account were made, the Respondent asserted, by his brother's business partners.
14. In paragraph 8 of his affirmation the Respondent states These three persons do business with my brother and they told me that I was to deposit the money into my brother (sic) account on their behalf . He contradicted this most fundamental of issues when he gave evidence by saying that when the Zeeshan account was opened his brother proposed travelling to China on business and had asked him to keep his bank book, his brother telling him that his partners would deposit money and he should update the bank book to check whether they had done so or that they may themselves give him money for him to deposit into the account.
15. When he gave evidence the Respondent said that on nine occasions it was he who had effected deposits into the Zeeshan account. That number coincides with the number of occasions he is identifiable on closed-circuit television effecting a deposit. There are further occasions when persons are seen making a deposit into the Zeeshan account but the quality of the recording is insufficient to provide identification. The Respondent denies that it was he who is depicted in those instances. I reject that: the Respondent was an entirely unconvincing witness who contradicted both his affirmation and his oral testimony.
16. The nine deposits which the Respondent acknowledges having made resulted in an aggregate amount of \$406,000.00 being credited to the Zeeshan account. During that same period, 10 September 2002 to 20 May 2003, the Respondent withdrew \$510,500.00 in cash from the two bank accounts operated in his name.
17. I am satisfied that the irresistible inference to be drawn in the circumstances of this matter is that all of the moneys which the Respondent withdrew from the two bank accounts operated in his name found their way into the Zeeshan account. As a result those moneys constitute realisable property under section 12 (1) of the Ordinance.

18. It was the Respondent's evidence that his brother has been aware of the restraint order since soon after his, the Respondent's, arrest. He testified further that his brother is also aware of these proceedings having received communications from the prosecution. The statement of Detective Senior Inspector Tsang confirms that a copy of the restraint order and summons was sent to Javed Zeeshan on 8 September 2003 and 31 October 2003 but no response had been received to either.
19. There were three withdrawals from the Zeeshan account: a transfer of \$20,000.00 on 6 December 2002, and two cash withdrawals of \$20,000.00 each on 6 June and 11 July 2003. The Respondent points to the latter two withdrawals as having occurred when he was already incarcerated: he points out, also, that when his residence was searched no card affording access to an automatic teller machine relative to the Zeeshan account was located. Each of these assertions is factually correct but neither singly nor combined in any way detract from the inference that the moneys withdrawn from the Respondent's own accounts were paid into the Zeeshan account.
20. They do, conversely, give rise to other possibilities the most obvious of which is that others in addition to the Respondent had access to or were using the Zeeshan account: such a situation would not preclude the moneys deposited by him being held by the Respondent in that account or being subject to his effective, albeit joint, control. A further factor of interest is the Respondent's assertion in his evidence that the ATM card for the Zeeshan account is with his brother in Pakistan. These issues effectively preclude the drawing of the irresistible inference that all of the moneys in the Zeeshan account emanated from the Respondent.
21. As a consequence I determined that the Respondent has benefited from the specified offences; that the value of the proceeds of the specified offences is \$1,190,264; that the amount that might be realised is less than that amount. I consequently certified that the amount to be recovered from the Respondent be the sum of \$523,831.20 being the realisable property of the Respondent comprised of the full amounts standing to the credit of the two accounts operated in his own name as well as the sum of \$510,500.00 standing to the credit of the Zeeshan account. (Emphasis added.) In the applicant's original notice of application, he claimed that there had been unfairness in allowing a determination of the confiscation proceedings to take place over two years after he had been sentenced and he suggested that an application should have been made by his counsel for a stay of those proceedings. In this regard, all that we need to say is that the applicant had been represented by counsel throughout and it has, so far as we are aware, never previously been suggested that any unfairness had arisen as the result of the delay. Indeed, it is difficult, bearing in mind the applicant's circumstances, to see how any unfairness could have arisen from his point of view and he has utterly failed to demonstrate that there has been any. In a second ground the applicant reiterated the contention he had made in the earlier proceedings that the money in the Zeeshan account should not be the subject of any confiscation. In particular, he stated that the order of confiscation was unfair to him because he had pleaded not guilty to the 6th count alleging that he dealt with \$725,100 known or believed to represent the

proceeds of an indictable offence and yet the confiscation order did not appear to have taken this into account. Today, he has added that there were two others involved in his case who were not investigated and that this seemed unfair to him. As Ms Evena Chan for the respondent was right to point out in her helpful written submission, the applicant had admitted dealing with over \$1 million which was the amount he had deposited into the two bank accounts in & & me a confiscation order is made against the defendant is-

- (a) the total of the values at that time of all the realisable property held by the defendant, The judge, in the course of his judgment, which we have set out almost in its entirety, had rejected the applicant's version so far as it concerned the Zeeshan account and he was satisfied that the monies which had passed through the applicant's accounts had found their way into the Zeeshan account. There is no merit in these grounds. In a later set of grounds, dated 19 April 2007, the applicant more or less repeated his earlier grounds of appeal. However, the applicant did add one further dimension by suggesting that the judge, in making the present order, was attempting to achieve the same kind of sentence as that which he had originally imposed before the Court of Appeal reduced it. In fact, as the applicant may well have appreciated, but has not seen fit to mention it, the maximum alternative sentences are set out in section 13(2) of OSCO. A maximum term of 18 months imprisonment is provided where confiscation orders are for in excess of \$200,000 but not exceeding \$500,000. As the figure in the present case was certified as having been \$523,831.20, it is quite clear that the order for 18 months imprisonment in default of payment cannot be criticised. There is no merit in this application and it is dismissed. (M. Stuart-Moore) macrobutton nomacro Vice-President (M. P. Burrell) Judge of the Court of First Instance (M. A. McMahon) Judge of the Court of First Instance Ms Evena Chan, SADPP, of the Department of Justice, for the Respondent. The Applicant, in person. 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 "0 "0 i\$&`G Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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