

HONG KONG / JUDGMENT

HKSAR v. JAVIER DUVAN AMADO PEREZ**[2021] HKCA 345**

COURT

Court of Appeal

DECIDED

18 March 2021

CASE / FILE NUMBER

CACC184/2020

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bjbj CACC 184/2020

[2021] HKCA 345 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CRIMINAL APPEAL NO 184 OF 2020 (ON APPEAL FROM
DCCC NO 343 OF 2019)

HKSAR Respondent v JAVIER DUVAN AMADO PEREZ Applicant

Before: Hon Zervos JA in Court Date of Hearing: 18 March 2021 Date of Judgment: 18 March 2021

J U D G M E N T

On 22 November 2019, the applicant pleaded guilty to two charges of trafficking in a dangerous drug and was sentenced to a total term of 3 years and 6 months imprisonment. On 21 October 2020, the applicant filed a notice of application for leave to appeal against sentence out of time in respect of a forfeiture order of HK\$24,000. It was stated in the summary of facts, to which the applicant had agreed when he pleaded guilty to the two offences, that on 30 January 2019, the applicant was intercepted by police leaving his flat. They found on his person a quantity of drugs hidden in a sock that was placed between two pairs of underpants that he was wearing, as well as various quantities of different currencies, two mobile telephones and three keys. The drugs found on his person consisted of 5.63 grammes of a solid containing 4.41 grammes of cocaine, which had been packaged in 10 red packets, each containing a resealable bag. A search of the flat uncovered in a cabinet a further quantity of drugs and related paraphernalia, consisting of 2 small electronic balances with traces of cocaine, 121 empty red packets, and 151 empty resealable bags, together with the HK\$24,000. The drugs found in his flat consisted of 13.2

grammes of a solid containing 10.6 grammes of cocaine, which had been packaged in 23 resealable bags. The applicant admitted that the drugs found in his possession were for the purpose of trafficking. At the sentencing hearing, the applicant was represented by counsel, who submitted mitigation on his behalf both in writing and orally before the judge. In his written submission, defence counsel opposed the prosecution's application for forfeiture of the currencies found on the applicant during a body search at the time of his arrest. They were listed as items 5 to 9 on a list of exhibits for disposal, consisting of HK\$1,510, RMB101, JP 1,000, US\$3.00 and 5.00. It was stated in the written submission that there was no evidence that these monies had any connection to the drug trafficking charges the applicant faced, or to any other offence. There was no reference in the written submission to item 13 on the list, which was HK\$24,000, consisting of three \$1,000 notes, thirty nine \$500 notes, and fifteen \$100 notes. Defence counsel explained to the judge that the applicant was a Columbian national who arrived in Hong Kong from mainland China on or about 25 or 26 November 2018. Since 4 December 2018, he rented the flat where the drugs and money were found at a monthly rental of HK\$6,000. Consistent with his written submission, defence counsel opposed the confiscation of items 5 to 9, but conceded that the HK\$24,000 be confiscated because of the circumstances in which it was found. There was a discussion between the judge and prosecuting counsel about the items to be confiscated, after which prosecuting counsel agreed to the return of items 5 to 9 to the applicant and the confiscation of item 13. Defence counsel also agreed with this method of disposal of the items in question. Having been addressed on the issue, the judge made an order for the confiscation of the HK\$24,000 under section 56 of the Dangerous Drugs Ordinance, Cap 134, on the basis that the monies had been used in connection with the offences. The applicant explains that the reason for his late application was because he was waiting for the police to return his property to him. I am informed that his property was returned on 15 October 2020, which obviously did not include the HK\$24,000. As already noted, he filed his application for leave to appeal against his sentence out of time on 20 October 2020. He also claims that his lawyer told him that the HK\$24,000 would be returned to him. I do not find this to be a credible explanation because it is clear from the record of the proceedings before the judge that there was no objection to the forfeiture of the HK\$24,000. Bearing in mind the circumstances of this case, the evidence is overwhelming that the HK\$24,000 was derived from his drug trafficking activities. The applicant came to Hong Kong in late November 2018 on a 3 months visitor's visa. He rented a flat on 4 December 2018, from which he operated his drug trafficking activities. In light of the quantity of drugs and the packaging of them, it is clear that he was actively involved in trafficking cocaine. There were also traces of cocaine found on the electronic scales. It is clear from the record of the proceedings that there was no objection to the forfeiture of the \$24,000. This was made clear in defence counsel's written and oral submissions to the court. I find that he would have been fully aware of this fact. I do not find his explanation for the late filing of his application reasonable and I refuse to grant an extension of time. However, more importantly, there is no merit whatsoever in his ground of appeal against the forfeiture order which was agreed by counsel on his behalf. The application for an extension of time to file the leave application is refused and had the matter proceeded for consideration for leave to appeal that would have also been refused because it is devoid of merit. The applicant is reminded of his right to renew his application for leave out of

time to the Court of Appeal, but he is also informed of the consequences of doing so, which may include a direction for any loss of time spent in custody pending his appeal, if the Court were to come to the view that there was no justification for the renewal of his application. (Kevin Zervos) Justice of Appeal Ms Rosa Lo, SPP of the Department of Justice, for the respondent The applicant appeared in person, present PAGE

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