

HONG KONG / JUDGMENT

HKSAR v. JI GUOBIN

COURT

Court of First Instance

DECIDED

30 July 2014

CASE / FILE NUMBER

HCMA243/2014

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bjbj HCMA 243/2014 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 243 OF 2014 (ON APPEAL FROM STCC 978/2014)

BETWEEN HKSAR Respondent and JI GUOBIN Appellant

Before: Deputy High Court Judge A. Wong in Court Date of Hearing: 24 July 2014 Date of Judgment : 24 July 2014 Date of Reasons for Judgment: 30 July 2014

REASONS FOR JUDGMENT

The Appellant pleaded guilty before a Magistrate to the following charges : Charge 1 : Using a false travel document for the purpose of Part II of the Immigration Ordinance, contrary to section 42(2)(b) of the Immigration Ordinance ; and Charge 2 : Making a false representation to an Immigration Assistant lawfully acting under or in the execution of Part II of the Immigration Ordinance, contrary to section 42(1)(a) of the Immigration Ordinance. The Magistrate sentenced him to 10 months imprisonment for each charge and further ordered the two sentences to run concurrently. The Appellant appeals against the sentences. At the appeal hearing, after having heard submission from both parties, I allowed the appeal to the extent that the sentence on each charge be reduced to 6 months imprisonment, and the two sentences to run concurrently. I indicated that I would hand down my judgment later. This is the judgment. FACTS OF THE CASE The Appellant presented himself for departure clearance at the Hong Kong Int'l Airport on the strength of this travel document. As the personal particulars shown on the two travel documents were different, further investigation was conducted. In an interview, the Appellant admitted under caution that he was actually known as JI, GUOBIN (hereinafter called first identity) and his date of birth was 12 February 1973. He also admitted that he was also called HOU

ZIYUAN (hereinafter called the second identity) but the date of birth stated in the Chinese Permit was false. He said when he was on his current trip, he intended to go to Bali via Hong Kong. He bought the air ticket with the passport bearing his first identity. When he entered Hong Kong, he produced the Chinese Permit bearing his second identity. The date of birth stated in the Chinese Permit was false. He also falsely represented to an Immigration Assistant that he was born on 3 February 1977. Reasons for sentence The Magistrate cited the following cases when he considered the sentences in the present case : HKSAR v Lin Peiluan , HKSAR v Mohamed Naseer Ahamed Fazloon , and HKSAR v Rakesh Kumar Sthapak . The Magistrate did not accept the submission that the Appellant should be considered as a transit passenger, the main reason being that the Appellant had in fact entered Hong Kong by going through an immigration check point. He adopted 18 months as the starting point for each charge and gave the Appellant 1/3 discount for his guilty pleas. He gave the Appellant a further discount of 2 months for each charge for the reason that the Appellant had not conducted or attempted to conduct any other illegal acts. He therefore passed a sentence of 10 months imprisonment on each charge and having regard to totality ordered the two sentences to run concurrently. GROUNDS OF APPEAL The Appellant was represented by Mr Andrew Bruce, SC, and Mr Kevin Tang on appeal. Their submission was that whilst it was proper for the Magistrate to order the sentences to run concurrently, the sentence imposed on each charge was manifestly excessive on the following grounds : The Magistrate failed to have sufficient regard to the lack of evidence that the documents which the Appellant produced were not genuine or unlawfully issued, or that the Appellant was not permitted by the authorities of PRC to use them for the purpose the Appellant had used the documents; The conduct in charge 2 was not for the purpose of gaining unlawful entry to Hong Kong, it was for leaving Hong Kong after having been here for a very short duration for the purpose of nothing more sinister than a holiday; The conduct in charge 1 was for no other purpose than to get to the airport and board a flight and not for the purpose of gaining unlawful entry; and The falsity was in relation to the date of birth only and it caused minimal if any harm to Hong Kong. Mr Bruce, SC, also pointed out that, whereas for his travel from Hong Kong to Bali, the Appellant had to present his PRC passport for departure clearance, there was no restriction on the entry of the Appellant into Hong Kong by using either of the travel documents in his possession. Had the Appellant only used his PRC passport, there would not have been this case. Mr Bruce, SC, stressed a special feature in this case : the Appellant arrived Hong Kong from mainland at the ferry terminal next to the Hong Kong International Airport and having gone through the immigration check point he proceeded directly to the Airport for the flight to Bali. The Appellant's stay on Hong Kong land for that purpose was only in the region of about 30 minutes. Counsel for the Respondent, Mr Daryanani informed the Court that the Respondent was not in a position to dispute this alleged fact and he has no objection to the Court considering the matter on this factual basis. DISCUSSION AND CONSIDERATION It has been consistently held in different cases, including HKSAR v Lin Peiluan and HKSAR v Mohamed Naseer Ahamed Fazloon cited by the Magistrate, that 18 months should normally be adopted as the starting point for these two offences. Mr Daryanani also brought to my attention other cases which support imposing this level of sentence : HKSAR v YIM Lee-kuen , HKSAR v Pahila and HKSAR v LUO Chunhong . In HKSAR v Pahila, McMahon J said that : In my judgment, sentences after plea of up to 18 months

imprisonment are justified in respect of both sorts of offences. (His Lordship was referring to the same two offences for which the Appellant in the present case was convicted.) It appears that His Lordship anticipated situations where sufficient aggravating features exist call for a starting point as high as 27 months. To this I agree. Mr Bruce, SC, stressed that there was substantial difference in the facts between the present case and the cases cited by the Magistrate. In the former case cited by the Magistrate, the appellant had used the false travel document to enter Hong Kong unlawfully. Deputy High Court Judge (as she then was) M. Poon said : I also agree that a starting point of 18 months imprisonment with offences involving offenders making use of false travel documents and offences relating to misrepresentation to immigration officers in order to land illegally in Hong Kong is by no means manifestly excessive nor wrong in principle. In the latter case, the appellant had been an illegal immigrant and had overstayed in Hong Kong for 5 years before his arrest. Besides, he did not make any admission when his identity was challenged. Mr Bruce, SC, submitted that a lower sentence may be imposed if the purpose of committing the offence(s) is not for entering into or staying in Hong Kong. In support of his submission, he cited the case of HKSAR v Nguyen Bui Khang . In this case, the Appellant pleaded guilty to two charges including a charge same as Charge 2 with which the Appellant in the present case was charged. In that case, the Appellant gave a false identity, both in relation to name and date of birth, to the Immigration Department after having been arrested by the police for unlawful remaining in Hong Kong. He was sentenced to 12 months imprisonment which was reduced to 8 months on appeal. Barnes J accepted that the general and most cases of making false representation are for the purpose of entering and thereby remaining in Hong Kong unlawfully, and even obtaining of unlawful employment here. The learned Judge emphasized that the Appellant did not make a false representation for the purpose to enter and remain in Hong Kong unlawfully, but to extend his time of detention in Hong Kong after the arrest. I note that, in that case, the appellant voluntarily informed the authority of his previous false representation, as he then wanted to return to Vietnam immediately. One fact which might have persuaded the learned Judge in ordering a lower sentence was that, as she said, it should be noted that after making the false representation, the appellant was still a person who had lost freedom and in the custody of the Immigration Department and could not move around freely within the territory. The falsity in the present case is the date of birth of the Appellant. In HKSAR v Mohamed Naseer Ahamed Fazloon, Mackintosh J said that sentencing practice for the offence of making false representations to an immigration officer whether by name or date of birth or production of false or forged document is now well established. Identification of a traveler is of extreme importance in immigration control anywhere in the world, in particular as the travelling population has been growing fast and there is constant threat of terrorism. To achieve effective immigration control, immigration officers often have to rely on the genuineness of travel document and representation made by the traveler. Genuineness of a travel document means not only that it is not forged in the sense that it is actually issued by the proper authority, but also that every particular in it which will help in the precise identification of the holder is true and accurate. If any of the material personal particulars of the holder is false, there is a real risk that an immigration official will be misled or unable to ascertain the real identity of the holder who seeks to enter or leave the territory. The gravamen of the offence is therefore that the real identity of the traveler may be concealed or at

least the task of immigration officials in ascertaining the identity of the traveler is made much more difficult, or even that he might be misled. With this in mind I am of the view that this nature of offence in general calls for a sentence with general deterrent effect. Section 42(5) of the Immigration Ordinance provides that, in the context of the offences created by section 42, false means false in a material particular. Mr Bruce, SC, did not seek to argue that date of birth is not a piece of material information in a travel document. He was clearly right not to do so. Date of birth must be one of the information Immigration authorities rely on to ascertain the identity of the holder of a travel document, otherwise this information will not be stated in the document. I have no doubt that this information is material information. Nevertheless, I have no firm idea as to whether different personal particulars bear the same degree of importance as far as immigration control is concerned. No information on the degree of importance of the date of birth for this purpose was provided, either at the trial or at this appeal. I have to consider this appeal under this limitation. Mr Bruce, SC, also submitted that the Appellant in the present case should be treated as a transit passenger. The Magistrate did not accept this was the case. He noted that the Appellant was not a passenger waiting for the onward flight at the transit hall, he did enter Hong Kong using a passport and was intercepted for investigation when he was leaving Hong Kong at an Immigration check point. He cited in support of his view the decision of Stock J (as he then was) in *HKSAR v CHU Man* which was quoted with approval in *HKSAR v Rakesh Kumar Sthapak*. Mr Bruce, SC, submitted that the Magistrate had taken too narrow a view on the concept of transit passenger. In any case, he asked the Court to consider the special circumstances of the case, in particular bearing in mind the fact that immediately after having gone through the immigration check point at the Ferry Terminal the Appellant proceeded to depart Hong Kong for Bali at the Airport. I do not consider it necessary in the present case to have a firm ruling whether the Appellant was a transit passenger or not. In my judgment, what happened constituted a very special circumstance which the Court should take into account in sentencing. I now consider the first point raised by Mr Bruce, SC, in his Grounds of Appeal. I doubt very much the PRC authority would have issued the Chinese Permit to the Appellant if they were aware that the date of birth was false. Even though there was no direct evidence before me that the authority would not have done so, and without admissible evidence I was not entitled to speculate, it totally defies common sense to suggest that the Authority would agree to state in an officially issued travel document a false date of birth. If the travel document is forged, it must be a negative factor which the Court has to take into account in deciding the appropriate sentence. In the present case, the Chinese Permit is not forged. Nevertheless, I am of the view that the most important consideration is that the immigration authority had been misled and the system of immigration control had been compromised. The thrust of the second and third points raised by Mr Bruce, SC, is that the Appellant only used the false travel document when he was leaving Hong Kong and made the false representation for the same purpose. Mr Bruce, SC, submitted that the harm thus caused to Hong Kong was minimal, in particular as the Appellant did not seek any employment here. Whilst accepting that a person who entered Hong Kong with an illegal mean seeking to stay here unlawfully and worse still to seek employment presents a much more serious scenario, to treat over leniently those who commit the offence(s) only when leaving Hong Kong will be a failure to give due weight to the duty Hong Kong owed to the international

community on immigration control. In HKSAR v Mohamed Naseer Ahamed Fazloon, Mackintosh J expressed his concern that one of the consequences was that the Hong Kong immigration authorities did not know that he had left the territory when they caught him unlawfully remaining, after he came back; they had no basis to make the connection with the earlier entry and overstay. Of course the facts in that case was different from the present one, nevertheless, what His Lordship said highlighted the importance of having proper immigration control even when a foreigner is leaving the territory. In HKSAR v Nguyen Bui Khang, Barnes J observed : The offence is serious because of deceiving immigration officers. In all the circumstances, I am of the view that the offences committed by the Appellant were serious but there are grounds to depart from the starting points usually applicable in this nature of case. The degree of departure is to be assessed by considering the whole circumstances of the present case. I note that it was not a case of inadvertence which caused the inclusion of a false date of birth in the travel document. It was the result of a deliberate act on the part of the Appellant and he used the document knowing full well that a piece of material information in it was false. On the other hand, there is no evidence that any sinister motive, at least against Hong Kong, was involved in mis-stating the date of birth. The Appellant did not seek employment in Hong Kong, which is a matter which causes the Court much concern in deciding sentence in cases involving immigration offences. He arrived at Hong Kong and sought departure within around 30 minutes on the same day. The only thing he had done in Hong Kong was to proceed to the Airport from the neighboring ferry terminal. Having considered all the relevant circumstances, bearing in mind the need for general deterrence, in my judgment a starting point of 9 months is called for regarding both charges. In adopting this starting point I have already taken into account the lack of evidence that the Appellant had created any real harm to Hong Kong. I have adopted the starting point without the benefit of information about the significance or degree of importance of the date of birth in the process of proper identification of the holder of a travel document. If date of birth is information of more significance than I think it has, I would have taken a less generous view on the sentences. The Appellant was of course entitled to a 1/3 discount for his guilty pleas. No further discount is, nevertheless, justified. What the Magistrate had taken into account in reducing the sentences by 2 months have already been reflected in adopting these low starting points.

CONCLUSION

By reason of the matters aforesaid, I allow the appeal against sentences to the extent that the sentence on each charge is reduced to 6 months imprisonment and both sentences are to run concurrently. The total sentence imposed on the Appellant is varied to 6 months imprisonment. This decision was made on the very special factual circumstances of the case. (A. Wong) Deputy High Court Judge Mr Prakash Lachmandas DARYANANI, SPP of Department of Justice, for the respondent Mr Andrew Bruce, SC & Mr Kevin T K Tang, instructed by Pauline Wong & Co, for the appellant Cap. 115, Laws of Hong Kong. HCMA 373/2003. The case cited by the Magistrate was HKSAR v Liu Peiluan HCMA373/2013. As Counsel for the Respondent, Mr Daryanani, pointed out, that case was in relation to an offence not immigration in nature. He suggested that the case which the Magistrate had considered might have been HKSAR v LIN Peiluan, HCMA 373/2003. I

accept this might well be the case. HCMA 827/2010. HCMA 1180/2004. HCMA 1187/2002.

[2007] 1 HKLRD 410. HCMA 145/2014. HCMA 50/2012. Paragraph 25 in the judgment. HCMA 1012/1998. HCMA 1180/2004. PAGE hK6[h-2h h-2h gd*| h-2h h-2h h-2h h-2h h n> hK6[h n> gdk91 gdk91 h n> h-2h h-2h h-2h h n> h n> gddN gd?c` h n> h n> h n> h n> h n> gd6% gd\*| h-2h h-2h h n> gd\*| h?c` h?c` h n> wrd^d h@ I h@ I - 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 [Content\_Types].xml Iw}, \$yi} \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v )I`n 3Vq%#q x}r :TZaG I u3 L+M2 e\O* \$*c?)6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> z* i\$&x CVhz user HCMA.dot Judiciary Microsoft Office Word Judiciary Hong Kong Title Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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Prepared on 25 October 2026 · Esheria