

HONG KONG / JUDGMENT

HKSAR v. JIN BIN

[2019] HKCA 1240

COURT

Court of Appeal

DECIDED

4 December 2019

CASE / FILE NUMBER

CACC139/2019

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

bjbj

Before: Hon McWalters and Zervos JJA in Court Date of Hearing: 7 November 2019 Date of
Written Submission: 26 November 2019 Date of Judgment: 4 December 2019

J U D G M E N T

Hon Zervos JA (giving the Judgment of the Court) This is an application for leave to appeal against sentence to correct the sentence imposed on the applicant by Barnes J (the judge) on 12 April 2019. The judge discovered that a sentence imposed by another court in relation to the case had been served by the applicant which she had made concurrent to the sentence that she imposed on the applicant. After notification from the judge about the matter, the applicant filed a notice for leave to appeal against his sentence on 30 April 2019. The case history and facts On 31 July 2017, police officers entered a hotel room where the applicant and another person were staying. The police officers found in their possession 16.9 grammes of methamphetamine hydrochloride (commonly known as); 879.5 grammes of gamma-butyrolactone (); Part 1 Poisons; and apparatus fit and intended for inhaling of a dangerous drug. The applicant and the other person were jointly charged for possession of the Part 1 Poisons and possession of the apparatus in the Magistrate s Court (STCC 2899/2017), to which the applicant pleaded guilty. On 8 January 2018, he was sentenced to a total term of 3 months imprisonment. It should be noted at this juncture that as the applicant had been remanded in custody since his day of arrest on 31 July 2017, it meant that the full sentence of 3 months had been served by 28 October 2017. The applicant and the other person were also jointly charged with a single offence of trafficking in a dangerous drug in relation to the Ice and GBL (HCCC 233/2018). The applicant pleaded guilty to this offence and was committed for sentence in the Court of First Instance before the judge. On 12 April 2019, the judge sentenced the applicant to 5 years and 2 months imprisonment for the trafficking offence

and added that the sentence was to run concurrently with the 3 months imprisonment imposed for the two offences dealt with in the Magistrate's Court. Counsel for the applicant had urged the judge to make the concurrent order not realising that the applicant had already served his term of imprisonment of 3 months. After sentencing the applicant, the judge discovered that the applicant had already served the 3 months sentence and brought the matter to the attention of the legal representatives of the applicant in a letter from the judge's clerk dated 11 June 2019. It was noted in the letter that the judge had observed there was no sentence outstanding to run concurrently with the sentence in the present case of 5 years and 2 months imprisonment and therefore she did not make an order that the present sentence was to run with the 3 months imprisonment. The applicant's submissions Mr John Hemmings, for the applicant, submits that because the applicant had already served the term of 3 months imprisonment for the other two offences, it was not possible for the Correctional Services Department (CSD) to treat the sentence in the present case as concurrent with the earlier sentence. Mr Hemmings further submits that had the judge been aware that the other sentence had already been served, she would have reduced the sentence for the present offence by 3 months to take account of the sentence already served in accordance with section 67A of the Criminal Procedure Ordinance, Cap 221. See *Ma Zhu-jiang v Secretary for Justice* [2008] 6 HKC 464,467. He accordingly invites the Court to reduce the applicant's sentence to 4 years and 11 months imprisonment. The respondent's submissions Mr Bobby Cheung, for the respondent, does not oppose the appeal, but through a different line of reasoning he argues that the sentence should be reduced by 5 months to 4 years and 9 months imprisonment. He explains that the applicant served the full 3 months of his sentence and was not given the usual one-third remission for good conduct during his period in custody. Mr Cheung informs the Court that according to the CSD: the applicant served his sentence of 3 months (in STCC 2899/2017) from 31 July to 28 October 2017; the sentence of 5 years and 2 months (in HCCC 233/2018) commenced to run on 29 October 2017; it was impossible for the CSD to treat the sentence of 5 years and 2 months to run concurrently with the sentence of 3 months because the latter sentence had already been served by 28 October 2017; the sentence of 3 months served by the applicant could not be counted towards the sentence of 5 years and 2 months; and the applicant had been, as at the time of this application, of good behaviour during his period in CSD custody. Mr Cheung points out that the one-third remission for good conduct under Rule 69 of the Prison Rules, Cap 234A, was not available because by the time the applicant was sentenced on 8 January 2018 in STCC 2899/2017, he had been remanded in custody for more than 3 months, that is, since 31 July 2017. Taking this factor into account, Mr Cheung submits that the applicant in fact served the equivalent of a sentence of 4.5 months imprisonment which when reduced from the sentence of 5 years and 2 months imprisonment would result in a sentence of 4 years and 9.5 months imprisonment. This would equate with a sentence, when rounded off, of 4 years and 9 months imprisonment.

Conclusion

It follows from what has transpired that the judge would undoubtedly have taken into account the fact that 3 months of the sentence she imposed on the applicant had already been served and appropriately adjust the sentence with this fact in mind, taking into account the one-third remission for good conduct that in the circumstances would have been granted. Quite rightly, there is no opposition to this appeal. In order to ensure that justice is done, we treat the leave application as the hearing of the appeal and allow the appeal. We set aside the sentence and substitute instead a sentence of 4 years and 9 months imprisonment. See *HKSAR v Ng Kong Ling*, unreported, CACC 161/2003, 16 September 2003. (Ian McWalters) (Kevin Zervos) Justice of Appeal Justice of Appeal Mr Bobby Cheung, SPP, of the Department of Justice, for the respondent Mr John Hemmings, instructed by Chan & Tsu Solicitors, assigned by the Director of Legal Aid, for the applicant PAGE

- 6 - 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 A B C D E F G H I J K L M N O P Q R S T U V yhyh^yh h];1 hL)o hL)o hL)o h];1 gd%J gd];1 gd];1 gdn gdWk gdaE; gdWk }m}YPJPAJ;AP hL)o haE; hL)o bTJT hL)o hL]; hWFP hL)o hL)o hwRg haE; gdwRg gdaE; hrfK hwRg hwRg haE; hPlg hwRg hi9Y hrfK gd7I gd/w gd/w ukaW hxqi rerVrH hka2 r p# r p# hka2 09&P :pcx [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/ theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /,EE} 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"/> 0B(\$ Z]=lK r]G> Fldh 0B(\$ 6^kq C|i, ,\$~\ Xg8h *M(+ ! b"n !?|(D !K|T "cD q9T" Uu\$ | 'hB.+)()d) EGe) g)Dh dDw*~\$ *M(+ hB.+n6 4>a, C|i, [b?. 4}+.7&o1 ci0,\$~\ 0@[x= QGR1 7&o1 *)o1g2 '=12 hY4SC !5cD "Nz5V mih6 7J|0T 8v/T ?G.: 3&<d))B;= A8s=Dh @[x=-m = eAh =qNRR (;>= Ah1S 6'YAg2 BXg8h ?| (D7&o1 l2DcU 'QLD Sq]DK|T \ESC N"Fp d0F7&o1 BhFM\ Eb}FV> H~iv\]FH eAh]xH+ J1P[r .8hJ K?(D P7K Nm%L N)B;= ^iN,\$~\ N +fb qNRRp J|0T5 .+VT "V^u }XcD xZ+ -`([ ~-[xs ^iv\ ,,\$~\?G.: +)@]v? Ns)? a!^1P[r !/\_8R `*)o1 _Nfa7&o1 +fb r1d_Nfa do@~j jdqe%4 f1P[r Xg8h eAh J]Hh ({vj o@~jK lGMk b"n b"n5L s6&p 6^kq 1P[rp &xr?G.: s_Nfa t +fb 5Dny pi_z wc { PE{'QLD xo| Setup Normal.dotm Windows User Microsoft Office Word Judiciary Hong Kong Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/ officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/ officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{A67964B6-4AEA-4A76-B8B4-1FC27079FF99}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/ customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/

officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Word
97-2003 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=125863

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-jin-bin-2019>

Prepared on 27 October 2026 · Esheria