

HONG KONG / JUDGMENT

HKSAR v. KIMARO NAIMA ALLY

COURT

Court of Appeal

DECIDED

4 November 2016

CASE / FILE NUMBER

CACC52/2016

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bjbj cacc 52/2016 in the high court of the hong kong special administrative region court of appeal criminal appeal no. 52 of 2016 (on appeal from HCCC NO. 418 of 2014) BETWEEN HKSAR Respondent KIMARO Naima Ally Applicant Before: Hon Macrae and McWalters JJA in Court Date of Hearing: 4 November 2016 Date of Judgment: 4 November 2016 J U D G M E N T Hon Macrae JA (giving the Judgment of the Court): The applicant faced one charge of unlawfully trafficking in a dangerous drug, namely 551 grammes of a mixture containing 212.63 grammes of heroin hydrochloride and 44.21 grammes of 6-monoacetylmorphine hydrochloride, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134. On 30 September 2014, she pleaded guilty to the charge at Eastern Magistracy, as a result of which she was committed to the High Court for sentence. On 11 December 2014, the applicant duly appeared before Deputy Judge D Almada Remedios (the judge) in the High Court. She was sentenced on the same day to 8 years and 8 months imprisonment. On 22 February 2016, the applicant filed a Notice of application for leave to appeal against her sentence, by which time her application was more than 13 months out of time. No reason at all was given as to why this application is so far out of time. The facts admitted On 16 April 2014, the applicant arrived at Hong Kong International Airport from Dar Es Salaam, Tanzania, via Dubai. Suspecting that the applicant might have internally concealed dangerous drugs, she was sent by Customs officers to Queen Elizabeth Hospital for examination. At the hospital, she discharged on two separate occasions a total of 44 packets, later found to contain the drugs the subject of the charge. Upon arrest and caution, but without at that stage the presence of a Swahili interpreter, the applicant said in English that what she had discharged were indeed drugs but she did not know the type of drugs; a Nigerian had given them to her in Dar Es Salaam and told her that someone would collect her when she arrived in China; and he had given her US\$3,000. In a later record of interview conducted in the presence of a Swahili interpreter, the applicant elaborated that the Nigerian man, who was called Tony, had paid for her air tickets; she was instructed to bring the drugs to Guangzhou, where someone would collect them and arrange for her accommodation; and she would receive US\$6,000. The estimated retail value of the drugs at the time of her arrest was HK\$371,374. The applicant formally admitted that she had trafficked in the dangerous drugs seized. Mitigation In mitigation, it was submitted that the 28-year old applicant came from a poor background in Tanzania. She had had to support a large family of dependents by herself and was tempted into committing the offence by the reward of

US\$6,000, which was the equivalent in Tanzania of 5 years salary. It was submitted that her role was only that of a courier and that the person Tony had arranged everything. It was also said that Tony had given her the US\$2,700 odd found in her possession and promised her a further US\$3,000. The court was told by defence counsel that the applicant was very concerned about the money, for fear that Tony might look to her family to get his money back, although counsel said he had explained to her that those caught trafficking dangerous drugs could not be seen to be profiting from their crimes. It was further submitted that the applicant had fully cooperated with the authorities, and had a clear record. Counsel accepted that the 6-monoacetylmorphine hydrochloride component of the dangerous drugs should be treated in the same way as heroin hydrochloride. The judge was invited not to take a purely mathematical calculation for sentence but to adopt a starting point of around 12 years imprisonment. It was submitted that an enhancement of starting point of no more than 6 months imprisonment should be given for the international element involved in importing into Hong Kong less than 1 kilogramme of heroin narcotic. Reasons for sentence In her reasons for sentence, the judge took into account the applicant's background. The total quantity of heroin narcotic concerned was 256.84 grammes, for which the sentencing range under the relevant guidelines was between 12 and 15 years imprisonment. A starting point of 12 years and 6 months imprisonment was adopted, enhanced by 6 months imprisonment for the international element involved, thus producing a notional sentence after trial of 13 years imprisonment and a discounted sentence after plea of 8 years and 8 months imprisonment. Forfeiture order The prosecution sought an order for the disposal of exhibits in accordance with a written schedule submitted to the judge after sentencing, which included, *inter alia*, an application that the US\$2,702 found in the applicant's possession be forfeited. Defence counsel did not dispute the application nor the order sought; accordingly, an order in terms was granted by the judge. Grounds of appeal In her Form XI dated 22 February 2016, the applicant said she was seeking the return of the money in her possession, since she did not understand what was being said at the time of her arrest and was interviewed without an interpreter. She asserted that her statement in interview about being given US\$3,000 was not true. She has amplified these matters in a further letter to the court dated 24 October 2016. No reasons, however, were given for the delay in filing her application for leave to appeal against the forfeiture order. Today, however, she says that she was waiting for the Customs authorities to return her belongings and only then realised that they were not returning the money to her. The applicant does not take issue with the term of imprisonment passed upon her. The respondent's submissions Ms Sabra Lo, on behalf of the respondent, opposed the granting of leave to appeal out of time, since no good reason had been offered for the delay in her application. It was pointed out that during the application for disposal of exhibits, the applicant had been represented by experienced counsel, who did not dispute the order for disposal of exhibits or the application in respect of the US\$2,702 in cash. No evidence had been provided by the defence on the issue of the money, and there was a clear *prima facie* connection between it and the offence, deriving from the facts admitted by the applicant and her own counsel's mitigation. Moreover, the amount was far in excess of the amount of money the applicant earned, as indicated in both the antecedent statement and mitigation. Since the money was obviously connected with the offence of trafficking in dangerous drugs, and the onus was on the applicant to show that she should be

entitled to its return, which she had failed to fulfil, the application should be dismissed. Consideration No reason, let alone a good one, has been given by the applicant as to why her application is being made now 13 months late. In any event, so far as the order of forfeiture is concerned, it is clear that there was an obvious connection between the possession of the US\$2,702 and the trafficking of the dangerous drugs from Dar Es Salaam across the border into Hong Kong. That much was made plain from the facts which she admitted and from her own counsel's mitigation. Even if there might have been possible scope for misunderstanding by the Customs officer who recorded her initial admission in respect of the money, there can have been no misunderstanding by the time she admitted the facts relevant to her conviction in both the magistracy and before the High Court; on both of which latter occasions she had the benefit of a Swahili interpreter and counsel. Moreover, it was clearly accepted by her counsel in the High Court that the US\$2,702 formed part of what she had been given by the man Tony in order to carry out the offence. Indeed, counsel had evidently explained to her before the hearing why the money must be forfeited. Accordingly, counsel made no objection to the prosecution's application to forfeit the money concerned. It is also clear from the comments the judge herself made to prosecuting counsel during the application for disposal of exhibits concerning the apparent lack of consistency in applications for forfeiture by the prosecution that she considered the money to be connected with drug trafficking and thus liable to forfeiture. She said I have said all along that well, in particular in a case like this it's obvious that the money was from trafficking and, of course, it should be forfeited because the defendant just doesn't have the money (sic) to earn this money. We are satisfied that the judge was right to make the order forfeiting the US\$2,702 in this case.

Conclusion

There is no merit whatsoever in the appeal against sentence. Since no good reason has been given as to why this application is so late, the application for leave to appeal against sentence out of time must be refused. (Andrew Macrae) Justice of Appeal (Ian McWalters) Justice of Appeal Ms Sabra Lo SPP (Ag), of the Department of Justice, for the Respondent The Applicant appeared in person Appeal Bundle, p 18B-C. Appeal Bundle, p 18D-K. HKSAR v Chung Ping Kun (unrep., CACC 85/2014, 2 July 2014). Appeal Bundle, pp 24-26. Appeal Bundle, pp 21T-22B. 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 A B C D E F G H I J K L M N O P Q R S T U V {ti{i{ti{t hhMB gdePZ gdePZ h!@f hhMB h&AA hf^v hH7y h&AA hH7y h&AA hf^v pbTb h&AA ytVs hEw5 hEw5 D !v ytVs [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"

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Prepared on 29 October 2026 · Esheria