

HONG KONG / JUDGMENT

HKSAR v L

[2019] HKCA 1239

COURT

Court of Appeal

DECIDED

8 November 2019

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[2019] HKCA 1239 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL

HKSAR Respondent v L Applicant

Before: Hon Zervos JA in Court Date of Hearing: 8 November 2019 Date of Judgment: 8 November 2019

J U D G M E N T

On 13 November 2018, following her guilty plea in the Magistrate s Court to a single count of trafficking in a dangerous drug, namely 140 grammes of a solid containing 132 grammes of cocaine, the applicant was sentenced by Campbell-Moffat J (the judge) to 6 years and 8 months imprisonment. On 19 November 2018, the applicant filed a notice of application for leave to appeal against her sentence. She advances only one ground of appeal in which she complains that the judge erred in giving her a discount of only 3 months to her sentence for previous assistance she had rendered to the authorities. The brief facts The facts of the case supporting the conviction of the applicant were fairly straightforward. In the early hours of the morning on 24 August 2017, the police stopped a taxi in which the applicant was travelling for a routine check. She was searched and found inside a paper bag that she was carrying were 6 transparent resealable plastic bags, containing 132 grammes of cocaine narcotic. When questioned by the police under caution, she readily admitted that she was helping others to deliver the drugs. She also had in her possession 5 mobile telephones and some cash. The retail value of the cocaine seized at the time of the offence was about \$124,740. The sentence As the applicant had pleaded guilty to the offence at the earliest opportunity she was entitled to a one third discount to her

sentence. Other meaningful mitigation that was advanced on her behalf was the fact that she had, on 3 previous occasions, rendered assistance to the authorities which she prayed in aid for a further discount to her sentence. She also provided information in relation to the present offence but it was considered by the authorities not to be of any practical use because of its general and limited nature. In sentencing the applicant, the judge applied the tariff guidelines in *HKSAR v Lau Tak-ming* [1990] 2 HKLR 370 and adopted a starting point of 10 years and 3 months imprisonment for 132 grammes of cocaine narcotic. No issue is taken in relation to the starting point adopted by the judge. The judge reduced the starting point by 3 months for the pre-arrest assistance and by a further one third for the applicant's guilty plea, which resulted in sentence of 6 years and 8 months imprisonment. The applicant therefore received an overall reduction to her sentence of 35% (incorporating the one third discount for her guilty plea), which meant that she received a 1.7% discount for the pre-arrest assistance. The pre-arrest assistance There were three pre-arrest matters. Due to the sensitive nature of these matters, I will be fairly circumspect when discussing each matter in turn. The three matters involved the applicant providing information to the police by way of tip-offs about drug trafficking activities. She provided information relating to the general physical description of a person and particulars of a motor vehicle or location where drug trafficking activity was taking place. It was accepted that the information that she provided was useful and was not in the possession of the police. The information led, in each case, to the arrest of a person and eventual conviction for drug trafficking. For the first two matters the applicant was paid a reward for the information that she had provided. For the third matter the applicant received no reward. It would appear that the judge gave the additional discount of 3 months reduction to the applicant's sentence for the third matter only. Having already received a benefit in the form of a reward for the first two matters, it was entirely appropriate that the applicant not be given any further sentencing discount in relation to those matters. Discussion In the seminal case on assistance to the authorities of *Z v HKSAR* (2007) 10 HKCFAR 183, the Court of Final Appeal explained that in relation to pre-arrest assistance a sentencing court must first examine and understand the circumstances that led the defendant to assist the authorities:

19. Although pre-arrest assistance may be recognized, the court should examine the circumstances relating to it before deciding whether and if so, the extent to which it should be taken into account. In a pre-arrest case the reason for his co-operation may not be apparent and it is even more important for the court to understand the circumstances relating to his assistance before deciding whether and if so, the extent to which a reduction in sentence is merited. The Court went on to explain that in deciding whether in such circumstances a reduction in sentence is merited will depend upon the particular facts and circumstances of the case and in this respect gave some guidance by reference to various case scenarios, including where a defendant rendered assistance as a paid informer: 20. First, the defendant may have assisted the authorities out of good motives. He may have had a genuine wish to assist the authorities. His assistance in these circumstances would usually deserve full recognition in mitigation of sentence. Secondly, the defendant may have received payment or other consideration for his assistance. It has to be recognised that

payments to police informers are a fact of life and the use of informers is necessary in society's fight against crime. Although assistance for which payment or other consideration was given may be recognised as a mitigating factor, the court should carefully consider all the circumstances in deciding whether the assistance in the case in question deserves any reduction and if so, the amount of reduction. The more substantial the payment or consideration, the less sympathetic should the court be in this regard. Thirdly, the courts should be wary of the situation in which a defendant who is engaging or is intending to engage in criminal activities gives assistance to the authorities in order to build up credit for himself to be used later if apprehended for the purpose of minimising the consequences of his crimes. Although there is no bar against the recognition of assistance given in such a situation, the courts should proceed with considerable circumspection in deciding whether, taking into account all the circumstances, the assistance merits any recognition and if so the degree of any discount. It is undesirable for the courts to take an approach which has the effect of fostering potential defendants trying to build up goodwill in this way. In *HKSAR v Y* [2019] HKCA 456, the Court of Appeal had to address a similar situation to the one in the present case. The Court stated that:

9. In assessing the value of the pre-arrest assistance, the court will take into account the nature and the effect of the assistance. Mere tip-offs by informers unlikely to entail the giving of statements or evidence in court were not mentioned as any special category within the 33.3% to 40% range in *HKSAR v Lo Sze Tung Stephanie*, CACC 190/2017 (unreported). We are of the view, given the variety and circumstances involved in tip-offs, that each case must be decided on its own facts. The Court in *Y* also observed that the applicant had committed his offence some 9 months after he received payment for providing intelligence for a similar criminal activity. The Court felt that although the applicant might not have given intelligence to the police in anticipation of building up credit for himself, it was obvious that he was performing the role of a paid informer but at the same time participating in the drug trade. See *HKSAR v B* [2007] 5 HKC 178 where a defendant was denied further benefit for assistance that he had already received benefit. See also *HKSAR v C*, unreported, HCCC 172/2015. In the course of submissions, Mr Cheung Kam Wing, Adonis, for the applicant, accepted that the applicant had appropriately benefited in relation to the first two matters by the payment of a reward. The issue is whether the applicant had received an appropriate benefit in relation to her sentence for the third matter for which she received no reward. He submits that she should have received a 40 % discount (incorporating the one-third discount for her guilty plea) in relation to the third matter. Ms Lily Ho, for the respondent, opposes the application and argues that the applicant was given due recognition for her pre-arrest assistance by the judge when she discounted her sentence by 3 months which was the equivalent of a 35% discount (incorporating the one-third discount for her guilty plea). I note that the 35% discount given to the applicant resulted in a sentence of 6 years and 8 months imprisonment. A 40% discount would result in a sentence of 6 years and 2 months imprisonment. The difference between the two sentences is 6 months imprisonment. I also note that the three occasions when the applicant provided information to the police were in

July 2016, January 2017 and April 2017 respectively. Other than providing tip-offs, the applicant provided no statement or did anything additional. It was in August 2017 that the applicant was arrested for the present offence in which she was trafficking in a dangerous drug. Hence, some four months after she had provided intelligence to the police about drug trafficking, she herself was involved in the very same criminal activity. This is a matter that the judge would have been taken into account when determining an appropriate discount for the applicant's pre-arrest assistance. The issue is whether the 35% discount that was given for the third matter was so inadequate as to provide a reasonably arguable ground of appeal against sentence. In my view, it does not, given all the circumstances of this case, including the nature of the information provided, being in the form of a tip-off; the outcome of the information provided, resulting in the arrest and conviction of a person for drug trafficking; the circumstances of the applicant and her relationship with the police, namely she was involved in the drug trade as evidenced by her previous convictions for drug offences and was a paid informer; and the circumstances of the present offence in connection with her assistance to the police, namely she provided information to the police about the very same criminal activity that four months later she was involved in.

Conclusion

In light of the foregoing, I am of the view that the 35% discount fell within the range of discount for pre-arrest assistance. It follows from what I have said that the sole ground of appeal against sentence is not reasonably arguable and leave is therefore refused. The applicant is reminded of her right to renew her application for leave to the Court of Appeal, but she is also warned of the consequences of doing so, which may include a direction for any loss of time spent in custody pending her appeal, if the Court were to come to the view that there was no justification for the renewal of her application. (Kevin Zervos) Justice of Appeal Ms Lily Ho, SPP, of the Department of Justice, for the respondent Mr Cheung Kam Wing, Adonis, instructed by the Legal Aid Department, for the applicant At paragraph 11. PAGE

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