

HONG KONG / JUDGMENT

HKSAR v. LAJMAA DAVAA

COURT

Court of Appeal

DECIDED

15 March 2017

CASE / FILE NUMBER

CACC246/2016

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CAcc 246/2016

in the high court of the

hong kong special administrative region

court of appeal

criminal appeal no 246 of 2016

(on appeal from DCCC NO 160 of 2016)

BETWEEN

HKSAR

Respondent

and

Lajmaa Davaa (D3)

Applicant

Before: Hon Macrae JA in Court

Date of Hearing: 15 March 2017

Date of Judgment: 15 March 2017

J U D G M E N T

The applicant faced two charges, namely Theft, contrary to section 9 of the Theft Ordinance, Cap 210 (Charge 1), and Handling stolen goods, contrary to section 24 of the same Ordinance (Charge 4).

She pleaded guilty in the District Court to both charges and, on 27 July 2016, was sentenced by Deputy Judge Chainrai (“the judge”) to a total term of 32 months’ imprisonment.

On 9 August 2016, the applicant filed a Notice of application for leave to appeal against her sentence (Form XI).

The facts

The applicant is a Mongolian national. On 26 November 2015, one day after she had arrived in Hong Kong, the applicant together with two male accomplices also from Mongolia (who were the first defendant (“D1”) and the second defendant (“D2”) at the trial below), entered a shop exhibiting jewellery at the Hong Kong International Jewelry Show at Hong Kong Convention and Exhibition Centre (“HKCEC”) in Wanchai and stole 16 pairs of earrings valued at about HK\$47,000, together with the tray on which they were displayed.

The applicant and the two defendants entered the shop, known as “Aidect” (“Shop 1”) at Booth C5-7 of HKCEC, at 3:14 pm. D1 and D2 had been granted permits to enter HKCEC in their own names: the applicant used the permit of D1’s wife, having been earlier refused a permit herself. At the time, a salesman Mr Wong had taken out a display tray containing the 16 pairs of earrings in order to show them to prospective customers. The applicant then distracted Mr Wong and stood in a position which blocked other people from seeing what D1 and D2 were doing. D2 removed the display tray of earrings and passed the tray to D1 who put it into his bag.

After they had left Shop 1, Mr Wong found the display tray and the earrings missing. CCTV footage captured the course of the theft, which was duly reported to the police. These facts formed the subject matter of Charge 1.

Ms Wong was the manager of another jewellery shop called “Jewelpark” (“Shop 2”) situated at Booth AF30 of HKCEC. At about mid-day on 27 November 2015, Ms Wong discovered that 86 wrist chains, valued at about HK\$143,000, were missing. The wrist chains had originally been contained on a single display tray. No member of staff in Shop 2 had witnessed the theft of the wrist chains, nor was any CCTV camera installed in the premises. The applicant’s subsequent handling of these items formed the subject matter of Charge 4.

Subsequent comparison of the CCTV recordings with images captured at the registration counter, as well as at the hall entrances and exits of HKCEC, revealed the identity of the applicant, who was then placed on a Wanted and Watch list.

On 29 November 2015, the applicant was arrested at Hong Kong International Airport, while attempting to leave Hong Kong together with D1, D2 and D1’s wife. The police found part of the stolen goods in respect of Charges 1 and 4 in the applicant’s luggage and handbag. These included:

(a)

the display tray and one pair of earrings (relevant to Charge 1); and

(b)

34 wrist chains (relevant to Charge 4).

The police also found in the luggage and bags belonging to D1 and his wife other missing goods in respect of the two charges, in particular 52 wrist chains and 9 pairs of earrings. All 86 wrist chains, the subject matter of Charge 4, were therefore recovered, still with their price tags attached to them. However, 6 pairs of earrings, the subject matter of Charge 1, remain missing and have not been recovered.

On 30 November 2015, a video-recorded interview was conducted with the applicant, in which she stated that she had come to Hong Kong on business on 25 November 2015. She admitted, inter alia, handling all of the wrist chains in Charge 4, knowing that they were stolen goods.

Mitigation

The applicant was 43 years of age at the time of the offences and had 5 previous convictions in Hong Kong, all of them in 2004. She was married with a 10-year-old son. The applicant had developed uterine cancer and, according to a medical report which had been called for by the court and was dated 19 July 2016, had experienced lower abdominal discomfort following a resection of her right ovary in June 2015, for which she had been referred for further specialist investigation. In addition, it was said that her 74-year-old mother was a Hepatitis C carrier and suffered from liver cancer; however, the applicant lacked the money to obtain proper medical treatment for her.

Counsel for the applicant urged the passing of concurrent sentences in respect of Charges 1 and 4, citing the case of HKSAR v Tsogbadrakh Otgon in support of his contention.

Reasons for sentence

Apart from the applicant's pleas of guilty, which the judge found were indicative of remorse, she attached little weight to the mitigation advanced. The judge noted, from the medical report referred to above, that the applicant's physical and mental health condition had been unremarkable during the period of her detention.

The judge referred to HKSAR v Padilla Gerardo Gonzaga & Others (also referred to in Tsogbadrakh Otgon at para 30) where the Court said, at para's 22-23:

"The court was however entitled – indeed, duty bound – to give effect to features in aggravation of the offence of theft, though without recourse to the Organized and Serious Crimes Ordinance. The aggravating features were the international element and the facts that the offence was planned and committed by several persons."

In our judgment, those aggravating features in the context of a public exhibition of expensive jewellery, warranted in each case a sentence, prior to discount for mitigating features, of four years' imprisonment."

In the result, the judge adopted starting points of 3 years and 9 months' imprisonment in respect of Charge 1; and 12 months' imprisonment in respect of Charge 4.

Granting the applicant a full one-third discount in respect of each starting point, and bearing in mind the overall totality of sentence, the judge ordered that 2 months of the resulting sentence of 8 months' imprisonment in respect of Charge 4 should be served consecutively to the sentence of 2 years and 6 months' imprisonment in respect of Charge 1, resulting in a total term of 2 years and 8 months' imprisonment.

Grounds of appeal

The applicant did not articulate any grounds of appeal in her Form XI, save to plead that the sentence was "too heavy". However, in an undated letter (written in Mongolian with an English translation) filed with the Court on 8 November 2016, the applicant stated that her husband was suffering from liver cancer and that their son had had to leave school in order to look after him. The applicant asked that her sentence be reduced on humanitarian grounds.

The applicant subsequently filed a further letter with the court, dated 28 November 2016, attaching a medical report in respect of her husband issued by 'Grand Med Hospital'. The radiological "impression" (as distinct from "diagnosis") was recorded, inter alia, as "multifocal HCCs" in segments 6 to 8 of the liver, with the recommendation of an oncologist's examination and computed tomography of the chest.

Before me this morning, the applicant has reiterated her concerns about the effects of her incarceration on her family's health and welfare, to which I have just referred.

The respondent's submissions

Mr Ira Lui, in his written submissions on behalf of the respondent, submitted that whilst there are no sentencing guidelines for the theft of jewellery items, the sentence imposed on Charge 1 was in line with *Padilla Gerardo Gonzaga & Others* and *Tsogbadrakh Otgon*, as well as the recent decision of this Court in *HKSAR v Cheng Xiangrong & Another*.

Mr Lui also submitted that the sentence in respect of Charge 1 was entirely proper bearing in mind the aggravating features present, namely:

(a)

The offence involved an international element;

(b)

It was clearly planned and organised; and

(c)

It was executed by several persons acting in concert.

Regarding Charge 4, Mr Lui submitted that, as with Charge 1, there were no sentencing guidelines. Nevertheless, he referred to the English case of *R v Bernard Webbe & Others* [2002] 1 Cr App R (S) 22, where the Court of Appeal of England and Wales identified 9 factors which might be regarded as aggravating features in the context of offences of handling stolen goods. He argued that the factors which were applicable in the present case included:

(a)

The proximity of the handler to the primary offence (factor 1);

(b)

The particular seriousness in the primary offence (factor 2);

(c)

The high value (including sentimental value) to the loser (factor 3);

(d)

The degree of sophistication involved in the handling (factor 5); and

(e)

The high level of profit made or expected by the handler (factor 6).

Mr Lui submitted that, in view of the total value of the items stolen in Charge 4 (about HK\$143,000), the judge could well have adopted a higher starting point of 2 years' imprisonment in respect of that charge. As such, he argued that no complaint could conceivably be made by the applicant about a starting point of 12 months' imprisonment in respect of handling such valuable items where an international element was involved. It may be noted that the maximum sentence on indictment for handling stolen goods is 14 years' imprisonment.

As for the humanitarian circumstances relied on by the applicant, it was submitted that, given the gravity of the present case, the adverse effect that the applicant's imprisonment might have upon her family members had a limited value in mitigation: see *HKSAR v Lkhajav Bayanmunkh*.

Consideration

The starting point of 3 years and 9 months' imprisonment in respect of Charge 1 was properly within the judge's discretion for an offence of this nature, and in accordance with the approach to sentence taken by the Court in *Padilla Gerardo Gonzaga & Others*, *Tsogbadrakh Otgon* and *Cheng Xiangrong & Another*; in all of which cases, different Courts approved a starting point of 4 years' imprisonment for significant thefts from the Hong Kong International Jewelry Show at HKCEC by defendants acting in concert. Indeed, I note that in *Tsogbadrakh Otgon*, the Court of Appeal ordered four weeks' loss of time by the applicant for renewing her application for leave to appeal against sentence to the Court, which it described as "totally unmeritorious", having first been refused leave by the Single Judge. Like all of those cases, this was an organised and planned theft by a group of defendants who had clearly come to Hong Kong in order to steal from exhibitors at

HKCEC; the judge having rightly rejected the notion that this was an opportunistic crime.

The international element involved in the offence and the fact that a number of defendants acting in concert took part were, on the authorities, serious aggravating features of both offences. As this Court has recently reiterated in HKSAR v Yang Xingyun, at para 46:

“Hong Kong is a hospitable city, which is visited by millions of people each year who come to do business and enjoy what the city has to offer. We wish to make clear that if people come to Hong Kong for the purpose of committing serious crimes which threaten the order and security of the people of Hong Kong and the reputation of this City, they can expect no mercy from the courts.”

It is difficult to see how organised gangs of thieves who come to Hong Kong for the sole purpose of preying upon those who are trying to go about their lawful business at international fairs and exhibitions being hosted in this City could not be said to be threatening the order and security of the people of Hong Kong and jeopardising its reputation.

The applicant could not have complained if the sentence passed on Charge 1 after trial had been 4 years’ imprisonment; and the sentence passed after plea of guilty had been 2 years and 8 months’ imprisonment.

As for the sentence on Charge 4, this was a separate and distinct offence involving property stolen from a different victim. The value of the items handled by the applicant was about HK\$143,000 and, although all of these items were recovered, such an amount could hardly be said to be insubstantial. Accordingly, it was entirely appropriate and in conformity with authority for part of the sentence on Charge 4 to be made consecutive to the sentence on Charge 1. I agree with Mr Lui that the starting point in respect of Charge 4 could have been rather higher than 12 months; and the consecutive element correspondingly greater.

Again, it seems to me that the applicant could not have complained if the consecutive element passed in respect of Charge 4 after plea of guilty had been in the region of 4 to 6 months’ imprisonment.

There are no sufficient humanitarian considerations in this case to warrant any reduction in sentence by the Court of Appeal. Such health issues as the applicant presents can be, and are being, adequately dealt with by the medical facilities available to the Correctional Services Department. As for her husband’s unfortunate health issues in Mongolia, they can provide no basis for reducing an otherwise proper sentence on the applicant for crimes deliberately perpetrated in Hong Kong. And as for the applicant’s mother’s health problems, the applicant knew about them before she came to Hong Kong to steal.

Conclusion

The application for leave to appeal against sentence is refused. In light of what I have said about the sentences in para’s 28 and 30 above, namely that the applicant could not have complained if her total sentence had been longer, I should give the applicant this specific warning. She has the right to renew her application for leave to appeal to the Court of Appeal, but she is also warned of

the consequences of so doing, which may include a direction for any loss of time spent in custody pending her appeal, if the Court of Appeal were to come to the view that there was no justification for the renewal of her application for leave.

(Andrew Macrae)

Justice of Appeal

Mr Cliff Ip PP, of the Department of Justice, for the Respondent

(Mr Ira Lui SPP in written submissions for the Respondent)

The Applicant appeared in person

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