

HONG KONG / JUDGMENT

HKSAR v. LAM WAN MAN, JANET

COURT

Court of Appeal

DECIDED

16 March 2016

CASE / FILE NUMBER

CACC52/2014

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CACC 52/2014 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL CRIMINAL APPEAL NO 52 OF 2014 (ON APPEAL FROM HCCC 44/2013)

BETWEEN HKSAR Respondent and LAM WAN MAN, JANET Applicant

Before: Hon Lunn VP and Pang JA in Court Date of Hearing: 3 March 2016 Date of Judgment: 3 March 2016 Date of Reasons for Judgment: 16 March 2016 R E A S O N S F O R J U D G M E N T

Hon Pang JA (giving the reasons for judgment of the court): This is an application to treat as nullity the abandonment of an application for leave to appeal against sentence. Factual Background On 5 February 2014, in High Court Case No. 44/2013, the applicant pleaded guilty to an indictment containing two counts, namely trafficking in 25.71 grammes of methamphetamine hydrochloride, referred to hereinafter as “ICE” (Count 1), and possessing 1.05 grammes of the same (Count 2). The facts were that on being stopped by the police in the street, the applicant was found to be holding the ICE in Count 1, then concealed in a wet tissue packet. Under caution, she admitted to be involved in the business of drug trafficking and was on her way to taking the ICE to another. Later, at the conclusion of a house search which yielded no result, the appellant admitted on her own volition that there remained a small amount of drug hidden inside her undergarment. This led to the discovery of the ICE in Count 2 which, according to the applicant’s uncontested version, was for her own consumption. For the above two charges, the applicant was sentenced by Deputy Judge Wright, the trial judge, to a total of 5½ years’ imprisonment. More specifically, having been accorded with the customary discount of 33% for pleading guilty, she was sentenced to 5 years and 2 months’ imprisonment for Count 1 and 10 months’ imprisonment for Count 2. Four months of the sentence on Count 2 was, however, ordered to run consecutively to that on Count 1 thus giving the said total. But that is not the end of the matter. For about four months after the commission of the above offences, the applicant was caught in another case of drug trafficking, High Court Case No. 138/2013, to which she had also pleaded guilty before Deputy Judge Wright and was due to be sentenced on the same occasion. Insofar as this application is concerned, the facts of that case are unimportant. All that needs to be said is that,

for trafficking in 209.81 grammes of ICE, the applicant was, after a reduction of one-third, sentenced to 8 years and 4 months' imprisonment. As regards the overall sentence to be imposed on the two cases, Cases No. 44/2013 and 138/2013, the judge took into account the totality principle and capped the final term of imprisonment at 10½ years. Having correctly identified as aggravating factors the applicant's criminal record and commission of Case No. 138/2013 whilst being on bail in respect of Case No. 44/2013, the judge added a further 6 months to the sentence thus giving a total of 11 years' imprisonment.

Procedural History

On 17 February 2014, the applicant filed her notice of application for leave to appeal against sentence. Her complaint was that: "I was charged with two counts of offences and was given consecutive sentences. I think my sentences are excessive. However, the judge eventually added 6 months to that." Ten months later, on 10 December 2014, she filed her notice of abandonment and, in a sheet attached to the that notice, stated the following: "I have considered it carefully and I have decided to abandon." Now, almost 7½ months after the event, the applicant asks to revive her application. This is what she said in her affirmation dated 28 July 2015: "I [name and prisoner number] had withdrawn an application for leave to appeal against sentence on 10 December 2014. However, as I can now put forward a more reasonable ground, I have decided to reapply to the High Court for the sentences to run concurrently" The ground that the applicant alluded to was explained in her letter of 17 February 2016, in which she cited to this Court two cases, HKSAR v Ip Yuet Ho [2008] 6 HKC 35 and HKSAR v Or Wai Tong CACC 250/2009 (3 December 2009, unreported). Also attached to that letter was a photocopy of a passage of the Court's judgment in HKSAR v Chiu Hoi Yan CACC 295/2014 (21 July 2015, unreported). The applicant's point is that, in a situation such as that in Case No. 44/2013, the sentences, one for trafficking and the other for simple possession, should be wholly concurrent. That is the full extent of her complaint. Discussion Having filed her notice of abandonment, upon the receipt of which her application for leave to appeal was duly dismissed, the applicant can only revive her appeal if her abandonment can be treated as a nullity. The position is as summarized by Fok JA, as Fok PJ then was, in HKSAR v Wu Chi-keung CACC 120/2000 (4 January 2013, unreported): "12. There is no dispute that the only circumstances in which an abandoned appeal may be restored for hearing is, if, as a matter of law, that abandonment may properly be treated as if it had never occurred, and the only circumstance in which that course is permissible is if that abandonment was in law a nullity (see the judgment of this court in HKSAR v Lai Siu Cheung [2004] 3 HKLRD 1 at §24). The kernel of the nullity test is that the court is satisfied that the abandonment was not the result of a deliberate and informed decision, in other words that the mind of the applicant did not go with his act of abandonment: *ibid.* at §25. Of the circumstances relevant to the consideration of whether or not the abandonment was a nullity, the judgment goes on to state at §28: 'The person who, properly informed, knows what the document is that he or she is signing and who, properly informed, knows what the effect is of the document he or she is signing and, with that knowledge, deliberately signs the document, will be hard pressed to show that that act is a nullity. Wrong advice given as to the merits of an appeal is not advice that goes to the nature,

or to the effect of the signing of, the document.’ 13. The greater the delay between the filing of the notice of abandonment and the application to the court to have the abandonment treated as a nullity, thereby vitiating the dismissal of the application, ‘... the harder it might be for an applicant to establish that he was not simply having second thoughts about the merits of his appeal’: see the judgment of this court in *HKSAR v Mohd Syafiq Bin Mansor*, unrep., CACC 188/2010, 22 February 2012 at §11. 14. Of the irrelevance, at this stage, of a consideration of the merits of the application for leave to appeal against conviction, Ma CJHC (as he then was) said in the judgment of this court in *HKSAR v Law Kam Fai* [2006] 2 HKLRD 879 at 893 H-J, at §44: ‘The court does not inquire into the merits of the actual application for leave to appeal at all; nor should it until the said test has been satisfied. In other words, the outcome of an application to treat the abandonment as a nullity does not depend on the validity or cogency of the underlying application whose abandonment is sought to be nullified. How good or bad the underlying application for leave to appeal against conviction or sentence may be, this is irrelevant.’” Before us, after much prevarication, all that the applicant could come up with in terms of an explanation is that she was misled by Correctional Services officers into believing that her abandonment was temporary, and that she could revive her application if and when a valid ground of appeal became available. That allegation is, of course, nowhere to be found in her affirmation. It also sits in ill comfort with what she had stated in her notice of abandonment, namely, she had given the matter careful consideration, and it was her decision to give up the appeal. We are not satisfied that, when abandoning her appeal, the applicant’s mind was not at one with her action. In any event, we are satisfied that the overall sentence of 11 years’ imprisonment is not manifestly excessive or wrong in principle. Disposal The applicant’s application is refused. (Michael Lunn) (Derek Pang) Vice President Justice of Appeal Mr Wong Chun-hin, Derek, SPP of the Department of Justice, for the respondent The applicant appeared in person

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