

HONG KONG / JUDGMENT

HKSAR v. LI HA

[2024] HKCA 679**COURT**

Court of Appeal

DECIDED

16 July 2024

CASE / FILE NUMBER

CACC218/2023

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CACC 218/2023 [2024] HKCA 679 On appeal from [2023] HKCFI 3140 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO 218 OF 2023 (ON APPEAL FROM HCCC NO 212 OF 2023)

HKSAR Respondent v Li Ha Applicant

Before: Hon Zervos JA in Court Date of Hearing: 16 July 2024 Date of Judgment: 16 July 2024

J U D G M E N T

On 15 November 2023, the applicant confirmed her guilty pleas that she had entered in the Magistrate's Court of doing an act for the purpose of trafficking in a substance she believed to be a dangerous drug (Count 1), trafficking in a dangerous drug (Count 2), and keeping a divan (Count 3) before D'Almada Remedios J (the judge), who sentenced her to a total term of 10 years' imprisonment. On 22 November 2023, the applicant applied for leave to appeal against her sentence without specifying any grounds of appeal. She appears in person in the leave hearing, having had legal aid refused. The applicant at the hearing submitted defence counsel's case report to the Legal Aid Department, in which she listed potential grounds of appeal in respect of Count 1. The applicant confirmed that she wished to advance these grounds in support of her application for leave to appeal against her sentence. The grounds were as follows: the sentence of 9 years and one month's imprisonment was manifestly excessive, bearing in mind that the substances would not have caused any harm; the notional starting point of 18 years and 3 months' imprisonment was too high; a more favourable inference should have been drawn as to what the applicant thought she was trafficking; the weight given for the "no harm" factor was insufficient; and the overall sentence of 10 years' imprisonment was manifestly excessive. The

facts outlined to the judge and admitted by the applicant show that the offences were committed on 16 October 2020 when police officers armed with a search warrant raided premises in Yau Ma Tei. The police found the applicant and 23 other persons inside the premises. After a thorough search, the police seized 2 bags of a powder containing 552 grammes of caffeine, which the applicant believed to be heroin, 40 packets with a total of 10.8 grammes of a mixture containing 9.46 grammes of heroin hydrochloride and 2 bags of 26.7 grammes of a solid, which the applicant believed to be ice. The police also found on the premises other equipment for smoking drugs and on the wall a price list for drugs. The applicant confirmed that she was the keeper of the divan. She admitted under caution that she sold drugs to customers and allowed them to smoke the drugs in the divan. She would also assist in serving the customers. She further admitted that she was recruited to manage the divan by a male called “Ah Bong” two days before her arrest. She believed that the two bags of caffeine were heroin (which she denied belonged to her) and the two bags of a solid were ice. She said that “Ah Bong” would measure and pack the drugs. She worked as the nightshift keeper to manage the divan for a reward of \$3000 per day. She sat behind the work desk on the premises that usually contained drugs, scales, cash and smoking devices. She identified a duty list for keepers and a book that was used to record the drug transactions in the divan. At the time of the offence, the applicant was 58 years of age. In mitigation, it was submitted she was twice divorced and a drug addict, consuming heroin since 1997 and ice since 2019. In 2003, she was diagnosed with depression, which became more severe in later years. In the comprehensive reasons for sentence, the judge meticulously applied the sentencing principles to the facts and circumstances of the applicant’s case in respect of each offence. In respect of Count 1, the judge carefully applied the guidelines in *HKSAR v Cheng Ling Ling* [2019] 3 HKLRD 797. She adopted a drug purity of 87.6% for heroin and 96% for ice, explaining the basis for doing so. She calculated the notional starting point for each drug and then converted the ice according to the heroin guidelines and arrived at a starting point of 18 years and 3 months’ imprisonment. After a reduction of one third for the applicant’s guilty plea, the notional sentence was 12 years and 2 months’ imprisonment. She further reduced the sentence by 3 years and 1 month for the “no harm” factor, arriving at a final sentence of 9 years and 1 month’s imprisonment. The “no harm” factor accords the defendant a reduction to reflect the fact that the actual substances (caffeine), which the defendant believed to be drugs, brought with it little or no harm. As explained by this Court in *Cheng Ling Ling*, the greater the difference between what the defendant actually trafficked and what he believed he was trafficking, the greater the discount, provided it did not diminish the gravity of the offence or undermined the deterrent effect of the sentence. The key consideration is that the sentence should reflect the fact that the substances were not heroin or ice. The Court in *Cheng Ling Ling* discouraged framing percentage discount guidelines, which was a matter of sentencing discretion that was dependent on the particular facts and circumstances of the case. However, it is observed that the allowance for the “no harm” factor of 3 years and 1 month represented a 25% reduction to the notional sentence and a 50% (incorporating the one third discount for a guilty plea) to the notional starting point. In respect of Count 2, the judge adopted a starting point of 4 years and 9 months’ imprisonment, including an enhancement of 3 months for the applicant’s role, which she reduced by one third for the applicant’s guilty plea to 3 years and 2 months’ imprisonment. In respect of Count 3, the judge

adopted a starting point of 2 years' imprisonment, which she reduced by one third for the applicant's guilty plea to 1 year and 4 months' imprisonment. In applying the totality principle, the judge considered that a global sentence of 10 years' imprisonment after plea would adequately reflect the criminality involved. She ordered that 11 months from the sentence on Count 3 to run consecutively to the sentence on Count 1, while the sentence on Count 2 was to run concurrently with the sentence on Count 1. It was an admitted fact that the applicant had been recruited as a keeper of the divan (Count 3) two days before her arrest and that the divan was operated by "Ah Bong", who measured and packed the drugs for sale to the customers. However, the applicant admitted that she sold drugs to customers and arranged for them to consume the drugs on the premises. At the material time, there were 40 packets in plastic wrapping in the divan, which each had a mixture containing heroin (Count 2), and there were bags of substances on the premises that she believed consisted of heroin and ice (Count 1). The applicant's complaint against her sentence is only in respect of Count 1 (9 years and 1 month's imprisonment). Of the starting point adopted by the judge, the question was whether appropriate consideration was given to the applicant's role and culpability: *HKSAR v Herry Jane Yusuph* [2021] 1 HKLRD 290. Mr Raymond Chan, for the respondent, submits that the applicant's role was more than that of a courier or storekeeper for which the guidelines would usually apply, and therefore the starting point adopted by the judge cannot be said to be excessive. The applicant was actively involved in running a divan and selling drugs to customers. Of her state of belief that the bags of substances were drugs, it is highly relevant that she thought they were drugs for the purpose of being sold to potential customers of the divan. The fact that the substances were not the drugs that she believed she was to traffic and that they would not have caused anyone any harm was taken into account by the judge, who within her discretion gave an appropriate discount to the applicant. It has to be said that the judge meticulously and carefully applied the sentencing guidelines and principles to the facts and circumstances of the case. Accordingly, I do not consider that the grounds relied upon by the applicant are reasonably arguable and leave to appeal against sentence is refused. The applicant is informed that she has the right to renew her application for leave to the Court of Appeal, however, she is also informed that the Court has the power to make an order for the loss of any time which the applicant has spent in custody pending her appeal, if the Court were to come to the view that there was no justification for the renewal of the application. (Kevin Zervos) Justice of Appeal Mr Raymond Chan, SPP (Ag), of Department of Justice, for the respondent The applicant appeared in person

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Prepared on 29 October 2026 · Esheria