

HONG KONG / JUDGMENT

HKSAR v. LI LAM

COURT

Court of Appeal

DECIDED

4 December 2007

CASE / FILE NUMBER

CACC64/2007

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bjbj Ng3t) Hon Stuart-Moore V-P and Beeson J in Court Date of Hearing: 29 November 2007 Date of Judgment: 29 November 2007 Date Reasons for Judgment Handed Down: 4 December 2007

REASONS FOR JUDGMENT

Beeson J (giving the judgment of the Court) The Applicant pleaded guilty in the District Court to one charge of Trafficking in a Dangerous Drug; being 47.3 grammes of a mixture containing 9.47 grammes of heroin hydrochloride. Deputy Judge Woodcock sentenced the Applicant to 2 years and 8 months imprisonment. The Applicant applied for leave to appeal against that sentence. The facts, which were not disputed, were that at 10:50 p.m. on 6 July 2006, the Applicant was stopped by police on a Mongkok street. She was searched and a handbag was found inside a red paper bag that she was carrying - the drugs the subject of the charge, in 3 separate packages, were found in the concealed, zipped compartment of the handbag. The Applicant, under caution, told police that she had bought the white powder on the mainland for her own consumption and in a subsequent video-recorded interview maintained this account, saying that she had bought the heroin in Shenzhen and had brought it into Hong Kong on 5 July 2006. Immigration records confirmed that she had left Hong Kong for China at 9:39 p.m. on 5 July 2006 and had re-entered Hong Kong at 10:49 p.m. the same day. Perfected Grounds of Appeal The Applicant's submission on appeal, in summary, was that the judge ought to have accepted that the drugs were for her own consumption in the circumstances of the case. Those circumstances, which were placed before the judge in a Newton enquiry, were also relied upon as grounds of appeal. They were that:

- (1) the Applicant was addicted to heroin;
- (2) her claim that she had bought the drugs in China was supported by the travel records;

- (3) her reason for having the drugs in the street, namely, to avoid detection of the drugs by her son or his babysitter, was consistent with her caution in stopping drug deliveries to her home, so her son would not have contact with drug traffickers, and consistent with her claim that she stayed at home when her cleaner was there, to ensure the cleaner did not find any drugs;
- (4) the risk of arrest when she carried the drugs in the street did not occur to her because she had a clear record at the time;
- (5) the Applicant's monthly earnings were sufficient to allow her to buy drugs in bulk; and
- (6) a bulk purchase was necessary because the drugs had to last throughout the summer, while her son was staying with her. The Applicant maintained that she had the drugs for her own consumption only which meant her offence was technical trafficking confined to importing the drugs into Hong Kong. As the prosecution, rather unhelpfully, adopted a neutral stance and did not comment on the basis of the plea, the judge held a Newton enquiry being unwilling to sentence on the basis of the Applicant's version without so doing. The charge related to the street in Mongkok where the Applicant was arrested. The question to be resolved, therefore, was whether the drugs then in the possession of the Applicant were for the purposes of trafficking. The Applicant relied on the factors earlier listed, but the judge rejected her evidence, as she did not believe that the Applicant had taken the drugs out of the house for fear of detection by her son or her helper. Nor did she find there was any urgent need for the Applicant to go out, nor did she believe that the Applicant would risk carrying drugs in the street unnecessarily. After hearing the evidence and having considered submissions the judge stated: I find it was trafficking drugs not just because she imported the drugs into Hong Kong but I also find she possessed heroin for the purposes of trafficking. I am sure she had possession of it in Mongkok to deal with it, meaning to deliver or possibly supply it to others. It was for the judge to decide what, if any, of the Applicant's evidence she accepted. She had the advantage of being able to see and hear the Applicant and having done so, did not believe her. Having rejected the Applicant's account, the judge proceeded to sentence. She noted the *R v Lau Tak-Ming* ([1990] HKLR 370) sentencing guideline, which, for a quantity of up to 10 grammes of heroin, is 2 to 5 years imprisonment. She adopted a starting point of 4 years imprisonment, based on the narcotic content of 9.47 grammes. She took into account the Applicant's clear record and despite having rejected her evidence on the Newton enquiry, which could have justified a lesser discount, gave the full one-third discount for her plea. The sentence imposed was 2 years and 8 months imprisonment. The Applicant's clear record could not have had any bearing whatsoever on a case of this seriousness, and we are not able to understand why, with respect, a 5-year starting point was not adopted or why, following an unsuccessful Newton hearing, the Applicant was allowed to retain her full discount. In these circumstances, the sentence can be described as a lenient one. The sentence imposed was not excessive. Nothing counsel has submitted convinces us otherwise. Accordingly, this application for leave to appeal is dismissed. (M. Stuart-Moore) Vice-President (C-M Beeson) Judge of the Court of First

Instance Mr Tam Sze-lok, SGC of the Department of Justice, for the Respondent Ms Monica Chow, instructed by Messrs Lee & Chow, assigned by the Legal Aid Department, for the Applicant - PAGE - A B C D E F G 1udk 1udk CACC.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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