

HONG KONG / JUDGMENT

HKSAR v. LI XIA

COURT

Court of First Instance

DECIDED

21 June 2007

CASE / FILE NUMBER

HCMA300/2007

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bjbj HCMA 300/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 300 OF 2007

HKSAR and LI Xia

Before: Hon Wright J in Court Date of Hearing: 21 June 2007 Date of Judgment: 21 June 2007

JUDGMENT

The appellant was convicted on 17 February 2007 by a magistrate on her own pleas of guilty to offences of a breach of condition of stay contrary to s. 41 of the Immigration Ordinance, Cap. 115 and of using a forged identity card contrary to section 7A(1) of the Registration of Persons Ordinance, Cap. 177. The summary of facts which she agreed told only a part of the story. Insofar as it related to these two offences it revealed that on 27 July 2005 the appellant entered Hong Kong and was permitted to remain here for 14 days subject to a prohibition against obtaining employment. On 27 October 2005 a routine inspection was conducted at a home for the elderly in North Point where the appellant was found to be employed. When her identity card was to be inspected, she fled. On 15 February 2007 the appellant was arrested in respect of these offences. Under caution she admitted that she had taken up employment at the home for the elderly in October 2005 and that when doing so she had produced a forged Hong Kong identity card. Based upon her pleas of guilty and her agreement of those facts the magistrate convicted her. He then imposed a sentence of 14 months imprisonment on the first charge, breach of condition of stay, and three months imprisonment on the second charge, using a forged identity card. Quite properly, in his statement of findings the magistrate points out that he inadvertently reversed the sentences when imposing them: he had intended the first offence to carry a period of three months imprisonment and the second, 14 months imprisonment. This is a matter which will

have to be corrected in accordance with the outcome of this appeal. The summary of facts makes no mention of what happened in respect of the appellant between her detection in October 2005 and her arrest on 15 February 2007. At the time of sentencing the appellant the magistrate was made aware of the fact that in July 2006 the appellant had been sentenced in Eastern Magistracy in respect of three offences: the first of using a forged Hong Kong identity card and the second and third each of breach of condition stay. In respect of the first charge she was sentenced to serve a period of eight months imprisonment and in respect of each of the other two charges a period of two months imprisonment, one month of each of which was ordered to be served consecutively to the other sentences. The aggregate sentence imposed upon her was thus 10 months imprisonment. That aggregate sentence was substantially less than the appropriate sentence to be imposed in respect of the first charge consequent upon a plea of guilty, namely, 15 months imprisonment: see HKSAR vs LI Chang-li [2005] 1 HKLRD 864. The sentencing magistrate in that matter may have decided to reduce the sentence as a result of mitigation placed before him. It is self-evident from these facts that subsequent to her flight from the home for the elderly in October 2005 the appellant remained in Hong Kong and re-offended in identical fashion. It was that re-offending which attracted the prosecution in Eastern Magistracy. When she had served those sentences she was, as is the usual practice, to be repatriated to the Mainland. In the course of that, she arrived at the border where she was arrested in respect of the instant offences. Appellate courts have repeatedly emphasised the necessity for multiple charges to be dealt with simultaneously. There are instances, however, where through no fault of the prosecution this does not eventuate. The magistrate obviously thought that this was such a case for he said, after an explanation from the prosecutor from the Immigration Department: "The immigration department did not know that you had been prosecuted by the police and they are not at fault for only charging you now in relation to the earlier use ". The magistrate went on to say "I see no reason why a 15 month sentence is not the appropriate sentence on Charge 1 (sic). However I will reduce its slightly on this basis: that I will sentence as though I were sentencing you at the time that you faced your other charges. If that had happened I would have had to consider totality. I consider the overall sentence should have been one of 24 months. You in fact only served 10 months last year, so I will make it 14 for this offence. 14 months for Charge 1(sic); three months for Charge 2 (sic), concurrent" This was an appropriate approach to adopt and one about which the appellant can hardly be heard to complain. As a matter of principle it is correct. Miss Monica Chow, who appears to the appellant in these proceedings but not below, submits that an overall sentence of 24 months imprisonment on pleas of guilty, had all the charges been heard together, suggests an overall starting point of 36 months imprisonment and further suggests that such an overall starting point is manifestly excessive. In matters where a tariff sentence has been laid down based upon a plea of guilty it is somewhat artificial to extrapolate a starting point. In such matters a sentencer does not go through the mechanics of assuming a starting point and then reducing it: he or she simply imposes the tariff sentence For the first offence of using a forged identity card the magistrate would have been entitled to impose a sentence of 15 months imprisonment on a plea of guilty. It is trite that a court is entitled to take a higher starting point in respect of a second identical offence. In immigration matters persons who offend for a second time are frequently, if not invariably, sentenced to a period of 18 months imprisonment on a plea

of guilty: such a sentence, in my judgement, would have been appropriate in matters such as this. Had the appellant been sentenced on two separate occasions in respect of two offences committed some time apart she would have served an aggregate 33 months imprisonment in respect of the offences of using a forged identity card. In the instant matter the appellant was sentenced in respect of the earlier offence subsequent to, and thus upon a different occasion, being sentenced for the latter offence. The offences were committed within some nine months of one another. The magistrate correctly perceived the need, in these circumstances, to have had regard to the principle of totality. He determined that the appropriate overall sentence, after the appellant's pleas of guilty, would be one of 24 months imprisonment had she been sentenced for both offences on the same occasion. That was an entirely appropriate sentence. The magistrate then went on to allow a deduction of the full 10 months imprisonment imposed in Eastern Magistracy although only eight months of that related to the offence of using a forged identity card. It is self-evident that this was an approach which, from the appellant's point of view, not only was fair but also favoured her. Such other matters in mitigation as were placed before the magistrate resulted in no further reduction in sentence. They are before me too. They relate to unsubstantiated reports of intervening mental illness on the part of her ex-husband who has been caring for a mentally handicapped teenage child of their marriage. Apart from the error in regard to which sentence applies to which offence, the quantum of each sentence was correct. It is necessary to rectify the error. Consequently the appeal is allowed to the extent that on Charge 1 the sentence of 14 months imprisonment is reduced to one of three months imprisonment and on Charge 2 the sentence of three months imprisonment is increased to 14 months imprisonment, the sentences to be served concurrently. (A R WRIGHT) Judge of the Court of First Instance High Court Henry Hung, Government Counsel of the Department of Justice, for the HKSAR Miss Monica Chow, instructed by M/s K M Cheung & Co on the instructions of the Director of Legal Aid. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk i\$&8 EnS< [<e? EnS< [<e? HCMA.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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