

HONG KONG / JUDGMENT

HKSAR v. LI, XIUZHEN

COURT

Court of First Instance

DECIDED

1 March 2007

CASE / FILE NUMBER

HCMA1238/2006

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bjbj Appellant

Before: Deputy High Court Judge Line in Court Date of Hearing: 1 March 2007 Date of Judgment:
1 March 2007

J U D G M E N T

1. This is an appeal against a sentence of 15 months' imprisonment imposed for an offence of obtaining a pecuniary advantage by deception. The appellant is a 35-year-old woman who was visiting Hong Kong on a visitor's permit. However, she was married to a permanent Hong Kong resident. They have two children - a girl aged 10 and a boy aged 4. The boy was born in Hong Kong so he has the right to live here and he lived here with his father. The girl was not born here, though she is here now on a visitor's permit.
2. What led to the prosecution for the offence was that the appellant took a job in breach of her condition of stay and, in order to obtain it, she produced an identity card. She said that she had found it in the street. I doubt that was true. But, whatever, something was shown which gave rise to the operative deception. The magistrate looked at the mischief involved and decided it was basically the same as the mischief that is described in the case of Lee Chang Li and imposed the 15-month sentence on a plea of guilty.
3. Mr Ross arrives here today seeking to say that the guideline in Lee Chang Li should not apply to this set of facts and, anyway, guidelines should not have been promulgated by the Court of Appeal and the whole business of giving out guidelines is beyond their power. He relies on cases in courts in Australia.

4. However, I do not have to decide those matters. It is very sad that whilst this lady has been in custody, her 35-year-old husband suddenly dropped dead. I have an affidavit from his brother that tells me so. He walked into the kitchen, perfectly hale and healthy one moment, and fell to the ground and died. That occurred on 31 January this year. Today is 1st March and the appellant has been in custody since 17 November of 2006. The sudden death of a spouse who was otherwise in good health is a terrible thing to endure and a very understandable desire for a mother in these circumstances to be with her children is obvious. This is a case, in my judgment, which does engage the idea of exceptional humanitarian grounds and, accordingly, I am going to allow the appeal against sentence and order her immediate release.
5. This is not a case with a direct victim and the step I take will not, in any way, undermine the policy of protecting jobs in Hong Kong and the immigration policies which lie behind the 15-month sentence. No one is to take the result of this case as in any way being any indication that this court thinks that the original sentence was wrong.
6. I have not heard argument about the application of the guideline but I can indicate that Mr Ross would have had an uphill task in persuading me that the mischief was not similiar. The mischief of obtaining employment by deception is not limited just to obtaining the wages, in my view, and I might just add this - because I know it brings a smile to his face - I have indicated to him already that it would not have just been an uphill task to try to persuade me to say that the Court of Appeal in Hong Kong cannot issue guidelines. It would not have been an uphill task; it would have been a vertical one.
7. For those reasons given, I allow the appeal and order such sentence that allows for immediate release. (P Line) Deputy High Court Judge Miss Sally Yam, Senior Government Counsel, of the Department of Justice, for the Respondent Mr Phillip Ross, instructed by the Director of Legal Aid, for the Appellant PAGE - PAGE CRT33/1.3.2007/MMcG HCMA1238/2006/Reasons for Judgment 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 A B C D E F G H I J K L M N O P Q R S T U V &`#\$ JUDGE.DOT setup Microsoft Word 9.0 judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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