

HONG KONG / JUDGMENT

# HKSAR v. LUNG PO CHAK AND ANOTHER

## COURT

Court of Appeal

## DECIDED

4 December 2007

## CASE / FILE NUMBER

CACC418/2007

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bjbj Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court): The applicants (D1 and D2) were charged with aiding and abetting an attempt to land in Hong Kong without permission, contrary to section 89 of the Criminal Procedure Ordinance, Cap. 221, section 38(1) (a) of the Immigration Ordinance, Cap. 115 and section 159G of the Crimes Ordinance, Cap. 200. Having pleaded guilty before Judge Browne in the District Court on 3 August 2007, they were each sentenced to 3 years and 4 months imprisonment. Mr Zervos SC, on the respondent s behalf, has brought to our attention that, following the imposition of sentence in this case, it was realised by the Department of Justice that the magistrate had no power to transfer the case to the District Court as the offence was only triable summarily and no indictable offence had been transferred with it (see: section 88(1) of the Magistrates Ordinance, Cap. 227, and HKSAR v Tang Siu-kwong and Anor [2000] 2 HKC 313 at 317). An approach was then made to the Legal Aid Department to alert them to the situation as a result of which the applicants have now each served a notice out of time for leave to appeal against conviction. Section 14A of the Criminal Procedure Ordinance contains the following provisions which are relevant to the circumstances which have arisen:

- (1) Where any provision in any Ordinance creates, or results in the creation of, an offence, the offence shall be triable summarily only, unless- (a)
  - (b) the words upon indictment or on indictment appear; or
- (2) Where any provision in any Ordinance creates, or results in the creation of, an offence and- (a)
  - (b) subject to subsection (4), the words upon indictment or on indictment appear, the offence shall be triable only upon indictment.
- (4) Where any provision in any Ordinance creates, or results in the creation of, an offence and the offence is declared to be triable either summarily or upon indictment or to be punishable on summary conviction or on indictment, the offence shall be triable either on indictment or summarily. Here, the substantive offence of landing (and remaining) in Hong Kong without permission, is an offence which is contrary to section 38(1)(a) of the Immigration Ordinance. This provides as follows:

- (1) Subject to subsection (2), a person who-
- (a) being a person who by virtue of section 7 may not land in Hong Kong without the permission of an immigration officer or immigration assistant, lands in Hong Kong without such permission; shall be guilty of an offence and shall be liable on conviction to a fine at level 4 and to imprisonment for 3 years. It is apparent that as the words upon indictment or on indictment do not appear in the wording of the offence itself or in the sentencing provisions for it, this offence is triable only in summary proceedings. Equally, an attempt to commit this offence is only triable summarily. As such, we accept that a mistake, responsibly brought to our attention by the prosecuting authority, occurred when the magistrate transferred this case to the District Court as there was no jurisdiction enabling this to be done. Curiously, it seems that not only did prosecuting and defence counsel in the court below fail to notice this but they also missed the fact that the maximum sentence for this offence had been exceeded. Accordingly, notwithstanding the pleas of guilty entered by D1 and D2 in the District Court, the proceedings amounted to a nullity (see: HKSAR v Tang Siu-kwong and Anor). We shall grant leave out of time to both D1 and D2. Treating the hearing as the appeal in each case, we allow these appeals and quash the conviction of D1 and of D2 on this charge. This case is now listed for a morning hearing at Tuen Mun Magistrates Court (TMCC 1159/2007) on 6 December 2007. For the avoidance of any doubt, D1 and D2 will be remanded in custody pending this hearing. (Geoffrey Ma) Chief Judge, High Court (M. Stuart-Moore) macrobutton nomacro Vice-President (M.A. McMahon) Judge of the Court of First Instance Mr Kevin P Zervos, SC, Ag DDPP, and Mr David Leung, SGC, of the Department of Justice, for the Respondent. Mr David Tolliday-Wright, assigned by Director of Legal Aid, for the 1st and 2nd macrobutton nomacro Applicant PAGE - 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 1udk 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 i\$&`G Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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