

HONG KONG / JUDGMENT

HKSAR v. LUO CHUNHONG

COURT

Court of First Instance

DECIDED

5 June 2014

CASE / FILE NUMBER

HCMA145/2014

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bjbj HCMA 145/2014 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO 145 OF 2014 (ON APPEAL FROM STCC 3867 OF 2013)

BETWEEN HKSAR Respondent and LUO CHUNHONG Appellant

Before: Deputy High Court Judge S. D Almada Remedios in Court Date of Hearing: 28 May 2014
Date of Judgment: 5 June 2014

J U D G M E N T

This is an appeal against sentence. The appellant pleaded guilty to two charges. One charge was of using a false travel document for the purpose of Part II of the Immigration Ordinance, contrary to section 42(2)(b) Cap 115 and the other charge was of Possession of a false travel document, contrary to section 42(2)(c)(i) of the Immigration Ordinance. They were respectively the 1st and 3rd charges on the charge sheet. The travel document was a false Malaysian passport. The learned Magistrate Ms Merinda Chow adopted a starting point of 18 months imprisonment on each offence and reduced the term to 12 months on account of the Appellant's plea of guilty. She ordered that 3 months imprisonment in respect of the third charge was to run consecutive to the first charge making a total of 15 months imprisonment. She went on to further reduce the sentence by 2 weeks imprisonment to allow for the Appellant's positive good character. The Appellant was sentenced to a total of 14 months and 2 weeks imprisonment.

Facts

On 7 October 2013, a male Mainlander, Dai Guangcho (Dai) produced the Appellant's Chinese permit upon his arrival at the China Ferry Terminal Control Point for clearance in Hong Kong to an immigration officer. As the photo affixed did not resemble Dai, upon enquiry, Dai then produced his own Chinese permit for inspection. Dai then handed the Appellant's Chinese permit affixed with her photo to the Appellant at the restricted area. The Appellant was then intercepted by an immigration officer. Upon enquiry the Appellant stated that the Chinese Permit affixed with her photo belonged to her. She further produced for inspection a Malaysian passport bearing her photo. This passport contained false particulars as to the Appellant's name and date of birth (the subject matter of charge 3). She admitted in a record of interview that she procured the Malaysian passport from her friend at the cost of RMB280,000. A record check revealed that the Appellant had used the false Malaysian passport to gain entry into Hong Kong on 22 September 2013 (the subject matter of charge 1). The learned Magistrate adopted a starting point of 18 months imprisonment, relying principally on the case of *HKSAR v Yim Lee Kuen* HCMA 1187/2002 wherein Deputy Judge McMahon (as he then was) after a review of authorities came to the conclusion that a starting point of 18 months was justified in the circumstances involving the production of a false two way permit holder to gain entry into Hong Kong. In a later decision in *HKSAR v Pahila* [2007] 1 HKLRD 410, McMahon J referring to his earlier decision in *Yim* pointed out that there was little logic in distinguishing levels of sentence for offences of using a false passport to enter Hong Kong contrary to s 42(2) and making a false statement to an immigration officer by way of producing a false passport contrary to s 42(1). McMahon J was of the view that sentences of 18 months after plea were justified in respect of both sorts of offences. It has long been established as can be seen in *Pahila* that for using a false passport to enter Hong Kong a sentence of 18 months after a plea of guilty would be justified. In those circumstances the starting point would be one of 27 months. Mr Bernard Yuen counsel for the Appellant did not take issue with a starting point of 18 months imprisonment for the above offences however he submitted that the learned Magistrate should have on the facts of this case adopted a lower starting point. Mr Yuen submitted that a starting point of between 6-9 months imprisonment was appropriate on both charges. He further submitted there were special circumstances such as the Appellant voluntarily producing the false passport and the false passport only being used for the convenience of travel which justified a suspended sentence. In support of his submissions he relied on the following grounds of appeal. The grounds of appeals were that:- The Appellant has a valid Chinese Permit to entitle her to lawfully enter and be present in Hong Kong, The Appellant had surrendered her false Malaysian Passport by voluntarily producing it to the immigration officer and The reasons and circumstances leading to the Appellants commission of the offences were for her convenience of travel but not for gaining lawful entry to or lawful presence in Hong Kong. Ground 1 Mr Yuen submitted that the very reason the magistrate adopted 18 months as the starting point is because it is premised on the fact that the offence of possessing or using the false travel document would procure the unlawful presence or gain unlawful entry to Hong Kong which the culprit is not entitled in the first place. He submits that is clearly distinguishable and a factor in contrast to the present case where the Appellant is entitled to enter, to be present and to

stay in Hong Kong on the 2 occasions of Charge 1 and Charge 3 by virtue of her valid Chinese Permit. He argues in the present case, the Appellant could have lawfully entered Hong Kong by her Chinese Permit and upon use of it she was entitled to be here lawfully. Therefore the deterrent effect against unlawful entry is simply not applicable to her. Thus Mr Yuen submits a starting point of 18 months should not have been adopted and a lower starting point of 6-9 months would be appropriate. The Appellant had gained entry to Hong Kong with a false passport. The fact that she was able to gain lawful entry into Hong Kong if she had used her Chinese two way permit does not diminish the seriousness of the offence nor is it a factor of special circumstance that warrants a reduction of the starting point or suspension of the sentence of imprisonment. The offence of using a false travel document is a serious matter. The Appellant used the false passport representing herself to be someone she was not. She gained entry into Hong Kong on a false pretense. She was deceiving the immigration officer as to her true identity. She had entered Hong Kong unlawfully in using the false passport and deliberately concealed her identity. The fact that the Appellant had a valid Chinese two-way permit to enter Hong Kong lawfully and chose not to do so and instead did so on a false passport may in my judgment be considered an aggravating factor calling for enhancement rather than a reduction from the starting point imposed. Ground 2 Turning to the ground of the Appellant voluntarily surrendering her false passport to the immigration officer. Mr Yuen submitted that had the Appellant not produced the false passport there might be a real chance or likelihood that the Malaysian passport may not have been discovered at all and hence the offences would not have come to light. Credit should therefore be given to the Appellant for her initiative in surrendering the false passport to the immigration officer. The circumstances of the Appellant surrendering the Malaysian passport are noteworthy. The Appellant's two-way permit was in the possession of Dai, he had produced it to the immigration officer at the counter. Only upon the immigration officer informing Dai that it was not his that he then gave the Chinese permit to the Appellant. Upon enquiry by the immigration officer the Appellant stated that the two-way permit was hers, the Appellant then produced her false passport. The magistrate had correctly observed that had Dai cleared immigration with his own Chinese permit without producing the Appellant's Chinese permit, the Appellant would have been at the counter without her two-way permit, she would inevitably have had to use her false Malaysian passport to present to the immigration officer for entry into Hong Kong. From the facts it can be seen that the Appellant found herself in a predicament when enquiry was made of her and as a result she produced her Malaysian passport to the immigration officer. These facts differ from a genuine case of surrender of a false passport. This may arise when a person upon arrival in Hong Kong voluntarily approaches an immigration officer at the immigration counter and surrenders their false passport or makes a report about their false passport immediately upon arrival. The Appellant's production of the passport was as a result of finding herself in a quandary. These circumstances do not warrant any reduction or suspension of a sentence of imprisonment. Ground 3 The Appellant's argument that the false passport was used for convenience of travel is flawed. There was on the facts of this case no conceivable convenience whatsoever in the use of the false Malaysian passport to enter Hong Kong, by using it the Appellant was unlawfully in Hong Kong. In contrast the convenience of travel was in the Chinese permit which entitled her to enter and stay in Hong Kong lawfully. On

the authorities cited, a starting point of 27 months would not have been inappropriate. The starting point of 18 months imprisonment imposed upon the Appellant was therefore not manifestly excessive. The appeal is dismissed. The sentences are confirmed. (S. D Almada Remedios) Deputy High Court Judge Mr Prakash L Daryanani, of the Department of Justice, for the respondent Mr Bernard Yuen Counsel instructed by Ivan Tang & Co, Solicitors, for the appellant

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