

HONG KONG / JUDGMENT

HKSAR v. MA HOI YAN**[2020] HKCA 828****COURT**

Court of Appeal

DECIDED

16 October 2020

CASE / FILE NUMBER

CACC62/2020

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Before: Hon Zervos JA in Court Date of Hearing: 16 October 2020 Date of Judgment: 16 October 2020

J U D G M E N T

The applicant applies for leave to appeal her sentence of 4 years and 6 months imprisonment imposed by District Court Judge Sham, following her plea of guilty to a single charge of trafficking in a dangerous drug, namely 12.6 grammes of a crystalline solid containing 12.4 grammes of methamphetamine hydrochloride (commonly known as). The applicant was sentenced on 13 May 2020 and she filed a notice for leave to appeal against her sentence on 19 May 2020, without specifying any grounds of appeal. She appears in person having had legal aid refused on 8 July 2020. On 14 October 2020, the respondent submitted to the court a letter it had received from the applicant, in which she requested that the hearing of her leave application be adjourned because she was awaiting the outcome of another application for legal aid. That application for legal aid was refused on 15 October 2020. The request for an adjournment was therefore refused. At the outset of the hearing, the applicant stated that she no longer wished to pursue her application for leave to appeal against sentence. Leave was not given to abandon her application, which was proceeded with by the court. The brief facts of the case can be stated as follows. At about 10:10 pm on 15 March 2019, the applicant was observed by a police officer behaving suspiciously in the vicinity of an exit of the Mongkok MTR station. She was stopped and searched by the police officer, who found in a plastic bag she was carrying 6 resealable plastic bags containing the Ice in question. After being arrested and cautioned, the applicant said the Ice (which she referred to as pork) was for her own consumption. She said she purchased the four bags from a friend, who gave her two other bags containing a lesser quantity of drugs given as a

free gift for the bulk purchase. She said she would consume about 1 gramme of Ice per day. The street value of the Ice was \$6,892.20. In the summary of facts, to which the applicant agreed when she pleaded guilty, it was admitted that the applicant possessed the bag of drugs for the purpose of trafficking. In sentencing the applicant, the judge accepted that a quarter of the drugs were for her own consumption, having taken into account that she had a history of drug abuse and tested positive for Ice upon her arrest. He adopted a starting point of 85 months imprisonment which he reduced by 4 months to 81 months imprisonment for the fact that some of the drugs were for her own consumption, and this was further reduced by one third to 54 months imprisonment for her guilty plea. Having reviewed the applicant's background and difficult personal circumstances which led her to abuse drugs, the judge concluded that there were no other mitigating circumstances warranting any further reduction to her sentence. She had a prior conviction for possession of a dangerous drug in November 2016, for which she was sentenced to attend a Drug Addiction Treatment Centre. The starting point of 85 months imprisonment was correctly calculated by the judge in accordance with the sentencing guidelines laid out in *HKSAR v Tam Yi Chun* [2014] 3 HKLRD 691. The applicant explained that she filed her application for leave to appeal her sentence on the basis that the judge imposed a starting point greater than the 7 years ceiling limit of the District Court, and that the discount she received for the fact that some of the drugs were for her own consumption was inadequate in the circumstances. It was explained that the sentence that was ultimately imposed on the applicant was within the jurisdictional limit of the District Court and the judge was correct to adopt a starting point higher than the ceiling limit of 7 years in the circumstances of her case. Mr Derek Wong, for the respondent, submits that the applicant received a lenient sentence and that there is no merit in her complaint that the discount she received by the judge for the fact that some of the drugs were for her own consumption was insufficient. He points out that if you subtract a quarter of the drugs from the total quantity of narcotic (12.4 grammes - 3.1 grammes = 9.3 grammes), and adopt a starting point for this quantity of narcotic in accordance with the sentencing guidelines, this will be 81 months imprisonment, which after reduction of one third for the applicant's guilty plea will result in a sentence of 54 months imprisonment. This is the sentence that the judge imposed on the applicant and he submits that it was lenient because there was no upward adjustment for her possession of 3.1 grammes of Ice for her own consumption. In other words, the applicant was only sentenced for having trafficked in three quarters of the quantity of narcotic found in her possession. Where it is shown that a significant proportion of the drugs are for the defendant's own consumption, a sentencing court should adjust the sentence to reflect the fact that not all the drugs were intended for trafficking, with an appropriate discount falling in the range of 10% to 25%. This will depend upon the particular facts and circumstances of the case, but critical factors will include the quantity of drugs claimed to be for self-consumption, the total quantity of drugs involved, and the circumstances in which the offence took place. A sentencing court will also bear in mind that possession of the dangerous drugs claimed to be for self-consumption carries a term of imprisonment, which may require enhancement if there is a latent risk that some of the drugs are accessible to or by others. See *HKSAR v Choi Chun Wo* [2018] 5 HKLRD 717, at [37]. It also needs to be appreciated that an appellate court will not interfere with a discount to a sentence given by a judge on account of self-consumption unless he has erred in principle. See

HKSAR v Chow Chun Sang [2012] 2 HKLRD 1121, at [19]. As for the discount the judge gave the applicant for self-consumption, it cannot be said that it was wrong in principle. The applicant admitted that she was trafficking in the drugs. She was found late in the evening behaving suspiciously in a public place, namely outside an exit of an MTR station, and the drugs were separately packaged in 6 resealable plastic bags. There is no cause for complaint with the sentence the judge imposed on the applicant, and accordingly her application for leave to appeal against sentence is refused. The applicant is reminded of her right to renew her application for leave to the Court of Appeal, but she is also warned of the consequences of doing so, which may include a direction for any loss of time spent in custody pending her appeal, if the Court were to come to the view that there was no justification for the renewal of her application. (Kevin Zervos) Justice of Appeal Mr Derek Wong, SPP of the Department of Justice, for the respondent The applicant appeared in person PAGE

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