

HONG KONG / JUDGMENT

HKSAR v. MOHAMMAD, ASLAM

[2026] HKCFI 2317

COURT

Court of First Instance

DECIDED

13 May 2026

CASE / FILE NUMBER

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HCMA 432/2025

[2026] HKCFI 2317

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO 432 OF 2025

(ON APPEAL FROM STCC 3554 OF 2025)

BETWEEN

HKSAR

Respondent

and

MOHAMMAD, ASLAM

Appellant

Before: Deputy High Court Judge Lily Wong in Court

Date of Hearing: 21 April 2026

Date of Judgment: 13 May 2026

J U D G M E N T

Introduction

The Appellant pleaded guilty to an offence of “establishing or joining in any business while being a person in respect of whom a removal order is in force”, contrary to sections 38AA(1)(b) and 38AA(2) of the Immigration Ordinance, Cap.115, Laws of Hong Kong. He was sentenced to 15 months’ imprisonment on 17 November 2025.

On the same day, the Appellant also pleaded guilty before the magistrate to a summons for hawking without a licence, contrary to sections 83B(1), 83B(3) and 150 of the Public Health and Municipal Services Ordinance, Cap. 132. He was fined HK\$200.

The Appellant appeals against the sentence of 15 months’ imprisonment imposed for the offence of section 38AA only. He was legally represented in the court below but on appeal, he was acting in person.

Facts

In the evening of 16 December 2023, officers of the Food and Environmental Hygiene Department saw the Appellant display various items including a skateboard, a tea set, 18 shoes, 5 hair dryers, 5 plastic boxes and a bundle of plastic bags on the road surface at the junction of Kweilin Street and Tai Nan Street in Sham Shui Po. Several customers were surrounding the Appellant who sold a pair of shoes to a customer.

The officers asked the Appellant if he had a valid hawker licence. The Appellant gave a negative response. It was subsequently revealed that the Appellant was an immigration recognizance form holder in Hong Kong. The case was then referred to the Immigration Department for further investigation.

Record check revealed that the Appellant was arrested by the police on 29 May 2007 for illegal remaining in Hong Kong. He was released on recognizance on 19 July 2007. On 12 July 2016 and 6 September 2016, a removal order was issued against him and served on him respectively. Such removal order remained in force against the Appellant on 16 December 2023. The Appellant was not permitted to establish any business in Hong Kong.

Appellant’s background & mitigation

The Appellant has 2 previous convictions prior to the commission of the present offence: unlawful remaining for which he was sentenced in 2009; and fighting in a public place for which he was fined in July 2025.

The only mitigation advanced was that the Appellant wanted to go back to his country as soon as possible.

Sentence

In sentencing the magistrate said:

“ 8. The usual sentence for this type of offence after guilty plea is 15 months’ imprisonment: HKSAR v Usman Butt & Another [2010] 5 HKLRD 452.

9. Other than the defendant’s guilty plea, there was no other valid mitigating factor justifying further reduction in sentence. I therefore sentenced the defendant to 15 months’ imprisonment.”

Grounds of Appeal

On 1 December 2025, the Appellant filed Notice of appeal to a judge against sentence (Form 102). In his letter of 17 December 2025, the Appellant stated that his grounds of appeal were that he had been detained in the Castle Peak Bay Immigration Centre (“CIC”) for 81 days from 22 June 2025 to 10 September 2025 and sought to have this period deducted from his sentence. He also stated that his wife in Pakistan is in poor health. He therefore wished to return to his country as soon as possible to care for her.

At the appeal hearing, the Appellant submitted a written submission dated 21 April 2026 reiterating his previous grounds of appeal, along with medical certificates proving his wife’s poor health.

The Respondent’s Reply

The Respondent submitted that the magistrate correctly applied the authority of Usman Butt as stated above, where the Court of Appeal held that an appropriate sentence for the present offence upon a guilty plea would be 15 months’ imprisonment for a first-time offender.

The Appellant contented that the period of detention from 22 June 2025 to 10 September 2025 related to the present offence and should be deducted from his sentence.

According to the records of the Immigration Department, the Appellant failed to report recognizance since 15 April 2025. He was re-arrested by the police on 22 June 2025 and transferred to CIC. He remained in CIC until being charged with the present offence on 5 September 2025 and his first appearance at the Shatin Magistracy took place on 10 September 2025. Accordingly, the detention from 22 June 2025 to 10 September 2025 was administrative, (administrative detention), arising from immigration proceedings, and unrelated to the present offence.

The Respondent referred to section 67A of the Criminal Procedure Ordinance, Cap. 221 (“CPO”). Section 67A governs the computation of sentences of imprisonment. If a defendant has been sentenced to imprisonment, the court will impose the appropriate sentence and then leave it to the prison authority to reduce the sentence to reflect an earlier detention, provided that they fall within the ambit of section 67A.

While section 67A(1) concerns judicial detention, section 67A(1A) relates to administrative detention. Section 67A(1A) provides:

“The length of any sentence of imprisonment imposed on a person by a court shall also be treated as reduced by any period during which he was, immediately prior to his first appearance in court in connection with any proceeding relating to the offence for which the sentence of imprisonment was imposed in custody –

- (a) of the police, Customs and Excise Department or Independent Commission Against Corruption in connection with that offence; or
- (b) under Part VII of the Immigration Ordinance (Cap. 115) in connection with that offence.”

[Emphasis added]

In other words, under section 67A(1A) of CPO, a period of administrative detention is only deductible from a person’s sentence for an offence if it was served immediately prior to his first appearance in any proceedings relating to that offence, and if that period of detention was in connection with that offence.

As previously submitted, the period of detention from 22 June 2025 to 10 September 2025 arose from immigration proceedings. It did not relate to the present offence. As such, it should not be deducted from the present sentence.

The only issue is whether the court should exercise its discretion to take such administrative detention into account to reduce the term of imprisonment imposed. In *HKSAR v Iqbal Zahid and another* [2018] 2 HKLRD 832, the court declined to reduce the sentence on the basis of the appellant’s administrative detention.

The Respondent submitted that there were no exceptional circumstances leading to the exercise of this discretion in this case. The Appellant’s administrative detention should not be taken into account, and the sentence of 15 months’ imprisonment was properly imposed by the magistrate.

Regarding the health condition of the Appellant’s wife, the Respondent noticed discrepancies in the name and age across two sets of medical certificates. As a result, the authenticity of the documents cannot be ascertained. In any event, it does not warrant a further reduction of sentence.

Consideration

In *HKSAR v Hui Lai Ki* [2024] HKCFA 7, the Court of Final Appeal held that magistracy appeals are conducted by way of rehearing on the evidence presented to the trial court. On such hearing, if the judge comes to a different view on the evidence before the court, that itself is an error which justifies appellate intervention. On appeal against sentence, this court has to look at the facts, mitigation and the relevant authorities for consideration.

It is noted the magistrate was not informed by the prosecutor or the duty lawyer who represented the Appellant in the court below of any period of administrative detention of the Appellant. The Brief Facts to which the Appellant admitted did not mention the said period of detention. It explained why the magistrate did not deal with this point in his reasons for sentence.

In *HKSAR v Eftakhar Beg* HCMA 262/2015, Zervos J (as he then was) when he considered section 67A(1A) of the CPO said this:

“31. ...There are the dual requirements under this section on which a court needs to be satisfied before it can reduce a sentence by a period in custody. First, that the period in custody was in connection with the offence on which the defendant was sentenced, and secondly, that the period in custody was immediately prior to his first appearance in court for such offence. This highlights the need to satisfy both nexus and proximity of the period in custody with the sentence to be imposed in relation to the offence that the court is then concerned with.”

As submitted by the Respondent, the Appellant failed to report recognizance since 15 April 2025. He was re-arrested by the police on 22 June 2025 and transferred to CIC for detention. The period of administrative detention was from 22 June 2025 to 10 September 2025. The present offence happened on 16 December 2023. It would appear that the detention of 81 days had no connection with the present offence. As such, no deduction could be made under section 67(1A).

In *Iqbal Zahid, D’Almada Remedios J* said:

“31. It is well settled that a court has a discretion to give credit to time spent by a defendant in custody which would not otherwise be regarded or reduced under the provisions of section 67A. It is however a discretion and not automatic....”

In *Eftakhar Beg, Zervos J* (as he then was) also said this:

“38. ...a court has a wide discretion when exercising its sentencing jurisdiction and may in appropriate circumstances address any issue of unfairness or injustice when determining a just and appropriate sentence in a particular case. However, a sentencing court’s discretion must be exercised judicially and upon correct principles.”

[Emphasis added]

The issue that I have to consider is whether I should exercise my discretion to take the 81 days into account to reduce the sentence. On this, I agree with the Respondent that there were no circumstances justifying the exercise of my discretion to further reduce a sentence which was properly imposed on the Appellant.

This ground fails.

The Appellant asserted that his wife is not in good health. He wants to go back to Pakistan to take care of her.

In *HKSAR v Feng Chun Han* HCMA 1049/2001, Counsel for the appellant referred to the personal circumstances of the appellant. The court said:

“11. ...He has an aged mother, who is 80 in the Mainland, is apparently or has not been in good health. That in my view does not operate as a strong humanitarian consideration for the court to reduce the sentence.”

Likewise, I do not consider that there exist strong humanitarian grounds justifying a reduction in sentence.

This ground fails.

The sentence imposed by the magistrate was neither manifestly excessive nor wrong in principle. In the circumstances, I dismiss the Appellant's appeal against sentence.

(Lily Wong)

Deputy High Court Judge

Ms Hon Wan Sin Olivia, PP of the Department of Justice, for the Respondent

The Appellant, acting in person

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