

HONG KONG / JUDGMENT

# HKSAR v. MOHAMMAD, SHEHZAD

## COURT

Court of First Instance

## DECIDED

7 December 2007

## CASE / FILE NUMBER

HCMA793/2007

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bjbj HCMA 793/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. HCMA 793 OF 2007 (ON APPEAL FROM TMCC 2405 OF 2007)

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BETWEEN HKSAR Respondent and MOHAMMAD, SHEHZAD Appellant

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Before: Hon Beeson J in Court Date of Hearing: 28 November 2007 Date of Judgment: 28 November 2007 Date of Reasons for Judgment: 7 December 2007

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REASONS FOR JUDGMENT

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The Appellant pleaded guilty in the Magistracy to one count of Remaining in Hong Kong without the authority of the Director of Immigration after having landed unlawfully in Hong Kong, contrary to section 38(1)(b) of the Immigration Ordinance, Cap. 115. A second charge to which the Appellant also pleaded guilty was a Breach of Deportation Order, contrary to section 43(1)(a) of the Immigration Ordinance, Cap. 115. On Charge 1, he was sentenced to 18 months imprisonment and on Charge 2, to 20 months imprisonment. 10 months of the sentence on Charge 2 was ordered to run concurrently with the sentence on Charge 1. The total sentence imposed was 28 months imprisonment. The Appellant appealed against the sentence on the ground that it was too severe. On 28 November 2007, the Appellant made submissions to this court and was advised that his appeal was dismissed and that the reasons would be handed down at a later date. Those reasons follow. The Appellant was arrested in 26 June 2007 after failing to produce proof of identity when required to do so by a police officer. Investigation showed that he had been convicted of immigration-related offences in 1995, 1996 and 2005. On 17 November 1994, a Deportation Order had been issued, prohibiting the Appellant from being in Hong Kong at any time thereafter. By entering Hong Kong in 1995 and 2005 the Appellant had already

breached the Deportation Order twice before this particular episode. In 1995, he was sentenced to 15 months imprisonment for the breach. In 2005, he was sentenced to 16 months imprisonment. His last conviction prior to the present ones was in 2005; the Appellant was released in May 2006 and committed the present offences by returning to Hong Kong in June 2007. The only mitigation for the Appellant, who was represented before the Magistrate, was his guilty plea. The Appellant's complaint on appeal was that he knew two or three Pakistanis who had been sentenced for breaches of Deportation Orders, but who had not, according to him, received such a severe sentence. He claimed he had come to Hong Kong only because his life was in danger in Pakistan. He said he had applied to the UNHCR in 1995 and also after this arrest, with a view to being permitted to stay in Hong Kong, or having his refugee status clarified or confirmed. He submitted further that people he knew who had breached deportation orders were either released or on bail. He asked that he not be sent back to Pakistan and for his sentence to be reduced as an act of mercy. He said that it was not easy to be in jail. There were very few Pakistanis there and it was difficult to be in jail in a foreign land. In mitigation the Magistrate was told the Appellant was 42 years old, he was divorced, and had been unemployed in Hong Kong. In Pakistan, he had worked as a farmer and he lived with his elderly parents, two sisters and three brothers. His counsel prayed in aid the fact he had pleaded guilty at an early opportunity and that he had frankly admitted the present offences. The reason for his sneaking into Hong Kong, as advised to the Magistrate, was because he had friends here and he wanted to have a decent living in Hong Kong. No mention was made to the Magistrate of his having had to escape from Pakistan, nor was there any mention of his application to the UNHCR. I can see no reason why, if these matters had been on his mind, he would not have told his counsel about this at the time of the sentencing, if not, at some earlier time. The Magistrate noted that the tariff for a first unlawful remaining offence was 15 months imprisonment on a plea of guilty; for a second conviction, a sentence of 18 months imprisonment could be justified. The Magistrate imposed a sentence of 18 months imprisonment on Charge 1. The breach of Deportation Order was recognised by the Magistrate as being a much more serious offence than unlawful remaining. In *HKSAR v Cortz Emily Bisoy* [2002] 2 HKLRD 762, it was decided that a sentence of 18 months imprisonment after plea for a first offence could not be criticised. Further, a sentence of 21 months imprisonment could be justified for a second breach of Deportation Order. The Magistrate noted this was the Appellant's third conviction for the offence and he considered that a sentence of 20 months imprisonment was justified. The Magistrate noted (paragraph 20 of his Statement of Findings) that on the previous occasion the Appellant had been sentenced to 15 months for unlawful remaining and 16 months for the breach of Deportation Order. 9 months of the sentence on the unlawful remaining offence had been ordered to run concurrently with that for breach of Deportation Order, which meant the Appellant served a total of 22 months. The Magistrate commented that those sentences had not had any deterrent effect and for that reason the Appellant had to expect a more severe sentence overall on this occasion. He ordered half the sentence for the breach of Deportation Order to run consecutively to the sentence of 18 months for the unlawful remaining offence and thus achieved a total of 28 months imprisonment. There is nothing excessive about either of these sentences. The Magistrate took totality into account in making the two periods of imprisonment partly concurrent and partly consecutive. For the

breach of Deportation Order, the Magistrate gave only a small increase of sentence to acknowledge that it was a third offence. Breaches of Deportation Orders are regarded as very serious by the court. To enter Hong Kong in defiance of such an order is a separate and distinct offence from illegal entry and the criminality is greater. Deterrent sentences should be imposed in each case. The Magistrate noted the guidelines, assessed the sentence and then considered totality. There is no reason for this court to interfere with what is an appropriate sentence in each case. Accordingly, this appeal was dismissed. (C-M Beeson) Judge of the Court of First Instance Ms Agnes Chan, SGC, of Department of Justice, for the Respondent The Appellant, acting in person.

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