

HONG KONG / JUDGMENT

HKSAR v. MOK YIU KAU

COURT

Court of Appeal

DECIDED

2 August 2007

CASE / FILE NUMBER

CACC256/2006

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bjbj iving the judgment of the Court): AUTONUMOUT On 10 February 2006 this applicant was in possession of two packets containing 580.49 grammes of a powder containing 397.64 grammes of ketamine. He pleaded guilty before Judge Mackintosh in the District Court to trafficking in that drug and was sentenced to a term of four years imprisonment. He now seeks leave to appeal against that sentence. AUTONUMOUT Guidelines for trafficking in the drug known as ecstasy were set in HKSAR v Lee Tak Kwan [1998] 2 HKC

371. Under those guidelines the starting point for the quantity found in this case, had the drug been ecstasy, would have been one of four years imprisonment. No guidelines have been set for the offence of trafficking in ketamine, although a review is now pending before the Court of Appeal as a result of which it is expected that guidelines will be set. That said, the practice has been for the courts to assume that the nature of the ketamine is much the same as ecstasy and to utilize the Lee Tak Kwan guidelines for ketamine cases. What the judge did in this case is to depart from the practice hitherto followed for ketamine and to say that because of the prevalence of ketamine trafficking, and the evidence that it induced dependence and that it was toxic, there was no logic in the utilization of the Lee Tak Kwan guidelines for ecstasy which assumed that the drug was not toxic or dependency inducing, and that the facts now surrounding ketamine and its harm to the public were such as to warrant a higher starting point than hitherto had been used. What the judge therefore did in this case was to adopt a starting point of six years imprisonment and, after according a one third discount for the plea of guilty, imposed the sentence of four years. AUTONUMOUT The point taken on appeal is a narrow one. The argument is that, even assuming the judge to have been correct in the analysis of the impact of ketamine and his conclusion as to the huge increase in recent times of its abuse, and as to its physiological and psychological harm now demonstrated by expert evidence, he ought not to have visited upon this applicant a sentence in excess of that dictated by sentencing practice prevailing at the time of the offence. To do so, it is argued, breaches that part of art. 12(1) of the Hong Kong Bill of Rights Ordinance, Cap 383 that provides that: Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. For the application of that principle, Mr Duncan SC takes us to R v Chu Chi Yat [1993] 2 HKCLR 1 in

which, at p. 4, Penlington JA said: It has been settled by this Court in *R. v. Chan Ka-wai* Crim App 530 of 1988 (unreported) that the sentence for any offence should be in accordance with the practice prevailing at the time of the commission of that offence. AUTONUMOUT The respondent's argument in reply is that the principle to which Chu Chi Yat refers is applicable only when a tariff or guideline has been set and that since none has been set for ketamine, the judge was free to depart from practice that fell short of guidelines. AUTONUMOUT On the one hand, Mr Duncan asks us to reject that narrower approach and in doing so he emphasizes the specific phrase practice prevailing used in *Chan Ka Wai* and *Chu Chi Yat*, which he says should bear its ordinary meaning and he adds that there can be no rationale for the distinction that the respondent seeks to make. Mr Leung, on the other hand, for the respondent, accepts that prior to the judgment of the District Court Judge, the practice indeed, the consistent practice in ketamine cases was to follow the Lee Tak Kwan guidelines for ecstasy. But he says that the judgments were cautious and tentative in their comparison of the effect of the drugs, so that the practice was not set in stone. AUTONUMOUT It is in the event not necessary for us to engage in an analysis of the weight of these arguments, for we are of the opinion that in the case of ketamine the distinction that the respondent seeks to draw is artificial. In practice, the approach to ketamine sentencing has been tied to guidelines and a tariff. Whether that should have been so is not to the present point. The review that is pending is in this instance itself illustrative of the strength of the practice that has prevailed in ketamine cases. The question will be whether that practice should, in effect, continue. AUTONUMOUT In *HKSAR v Chu Ching Tak* HCCC 164 of 2001, 15 October 2001, unreported, V Bokhary J noted that by the date of her judgment magistrates have been sentencing in respect of ketamine by reference to the guidelines for ecstasy, and none of such sentences had been brought by the prosecution to the Court of Appeal for a review of sentence. On the basis of data then available she took the view that ketamine was similar to, if not more dangerous than, ecstasy. She concluded that sentencing for ketamine trafficking should proceed on the basis of the sentencing guidelines laid down by the Court of Appeal in *HKSAR v Lee Tak Kwan* for ecstasy trafficking. So the matter proceeded, and it was noted by the Court of Appeal in *HKSAR v Leung Chun Fung* [2003] 2 HKLRD 282, at 285, that ketamine was generally treated as being in the same category as ecstasy. That Court adopted the tariff for ecstasy in considering the sentence for the ketamine charge although it expressly intimated that it was not finally deciding on the matter, in other words, not taking any definitive stance as to whether the practice hitherto adopted was justified. AUTONUMOUT The fact of the matter is that the courts have in practice adopted a guideline tariff. Furthermore, we are informed that in relation to the review to be heard later this year, to which we have referred, the respondent defendant in that particular case has expressly been assured that any resulting upward adjustment in the tariff for ketamine offences will not affect the sentence imposed in his case. In the circumstances, we take the view that the sentence imposed upon this applicant should be adjusted to reflect the guideline-influenced practice that prevailed at the time that he committed this offence. Accordingly, we grant the applicant leave to appeal against sentence and, treating the hearing of the application as the appeal, we allow the appeal and substitute for the term of four years imprisonment a term of

two years and eight months imprisonment, which represents a one third discount from a starting point of four years imprisonment. AUTONUMOUT None of this is to undermine the clear and compelling analysis of the District Court Judge as to the prevalence and danger of the drug in question. The result is merely to apply a principle in the context of a rather unusual historical development in sentencing for ketamine offences. (Frank Stock) Justice of Appeal (M.A. McMahon) Judge of the Court of First Instance Mr Peter Duncan, SC, instructed by Messrs Au-Yeung, Cheng, Ho & Tin, assigned by DLA for the Applicant Mr David Leung, SADPP(Ag.) of the Department of Justice 1udk 1udk &`#\$ % ^,X v?\_. J[ 6 vx@n .l^L k1B[p "E)`r c@sH <~j6 J[6 .l^L k1B[v?_. "E)` & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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