

HONG KONG / JUDGMENT

HKSAR v. MUDASSAR MUHAMMAD

[2018] HKCA 61**COURT**

Court of Appeal

DECIDED

30 January 2018

CASE / FILE NUMBER

CACC256/2017

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CACC 256/2017

**[2018] HKCA 61 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL CRIMINAL APPEAL NO. 256 OF 2017 (ON APPEAL FROM DCCC NO.
365 OF 2017)**

BETWEEN HKSAR Respondent and Mudassar Muhammad Applicant

Before : Hon Lunn VP in Court Date of Hearing : 30 January 2018 Date of Judgment : 30 January 2018 J U D G M E N T The applicant, who appears in person having been refused the grant of legal aid, seeks leave to appeal against sentence of 3 years and 10 months' imprisonment imposed on him on 31 July 2017 by Deputy District Judge M. Chow on his conviction following his plea of guilty to a charge of trafficking unlawfully on 6 February 2017 in 22.55 grammes of cocaine, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap. 134. The applicant is a Form 8 Recognizance holder. The facts At around 20:00 hours on 6 February 2017, police officers saw the applicant acting suspiciously on the rear staircase of a building at 19A, Cameron Road, Tsim Sha Tsui. The applicant was intercepted after he had used a key to open the metal gate and was using a key to open the wooden door to premises at Room C, on the 4th floor of the building. In a search of the premises police officers found six transparent resealable plastic bags containing powder, which on analysis was found to be 22.55 grammes of cocaine. It had an estimated street value of \$152,789. In subsequent video recorded interviews conducted under caution the applicant admitted that he entered Hong Kong by boat from the Mainland on 24 December 2015. Since he had nowhere to stay a friend had given him the keys to the premises in which he had stayed for the previous two weeks. The applicant accepted that he had trafficked unlawfully in the dangerous drugs found in the premises. Reasons for sentence In sentencing the applicant, the judge noted that he was a 24yearold single man, all of whose family members lived in Pakistan. Having adverted to the guidelines for sentence articulated in the judgment of this

Court in *HKSAR v Lau Tak Ming & Others*, the judge stipulated a starting point for sentence of 5 years and 9 months' imprisonment. Affording the applicant a discount of one-third from the starting point for his plea of guilty, the judge sentenced the applicant to 3 years and 10 months' imprisonment. Grounds of appeal against sentence In Form XI, by which the applicant gave notice of his application for leave to appeal against sentence, no grounds of appeal were articulated. Today, at the oral hearing the applicant said that he had no submissions to make in support of his application. Respondent's submissions For the respondent, Mr Andrew Li submitted the sentence imposed on the applicant was neither wrong in principle nor manifestly excessive. He submitted that the starting point stipulated by the judge was two months less than that identified by an arithmetic approach to sentence. Furthermore, he invited the Court to note that the commission of the offence of unlawfully trafficking in dangerous drugs by the applicant at a time when he was permitted to remain at liberty in Hong Kong as a Form 8 Recognizance holder was an aggravating factor in the commission of the offence which ought to have been reflected in an enhancement of sentence. A consideration of the submissions Although the judge had been informed by Ms Patricia E Alva, counsel for the prosecution, that she and Ms Lau Yi Mei, who represented the applicant, calculated that the appropriate starting point for sentence was 5 years and 11 months' imprisonment, which sentence Mr Li has confirmed is the sentence arrived at by an arithmetic calculation of sentence, the judge gave no reasons for adopting a sentence that was two months lower. Further, although it had been stipulated in the Summary of Facts and confirmed in oral mitigation by counsel that at the time of the commission of the offence the applicant was a Form 8 Recognizance holder, in sentencing the applicant the judge did not even advert to that fact as a factor in aggravation in the commission of the offence. This Court has said repeatedly that the commission of offences, by those permitted to remain at liberty in Hong Kong as a Form 8 Recognizance holder, which affect the community at large and which has the effect of tarnishing the city's reputation for security and order is a factor in aggravation of the commission of the offence. Unlawful trafficking in dangerous drugs is such an offence. The judge ought to have enhanced the starting point taken for sentence to reflect that aggravating factor.

Conclusion

Clearly, in all the circumstances, it is not reasonably arguable that the sentence imposed on the applicant was wrong in principle and manifestly excessive. Rather, it was unduly lenient. Accordingly, the application for leave to appeal against sentence is refused. The applicant is advised that he has the right to renew his application for leave to appeal against sentence to the Full Court but is informed that if he does so, and the Full Court determines that the renewal is without justification the Full Court may order that some of the time that the applicant has spent in custody pending the determination of his application shall not be reckoned as part of his sentence. In addition, the applicant is advised that, pursuant to section 83 I (3) of the Criminal Procedure Ordinance, Cap. 221, the Full Court has the power, to quash the sentence imposed on the applicant and in its place impose such sentence "as it thinks appropriate for the case (whether more or less severe)". Perspicaciously, the applicant acknowledged that he was aware of

that power in the short statement he made in Form XI. (Michael Lunn) Vice President Mr Andrew Li, SPP, of the Department of Justice, for the respondent. The applicant appeared in person.

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Prepared on 26 October 2026 · Esheria