

HONG KONG / JUDGMENT

HKSAR v. MUHAMMAD, YAMIN BUTT

COURT

Court of First Instance

DECIDED

12 March 2009

CASE / FILE NUMBER

HCMA105/2009

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bjbj HCMA105/2009 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 105 OF 2009 (ON APPEAL FROM STCC 6240 OF 2008)

BETWEEN HKSAR Respondent and MUHAMMAD, YAMIN BUTT Appellant

Before : Hon Saw J in Court Date of Hearing : 12 March 2009 Date of Judgment : 12 March 2009

J U D G M E N T

AUTONUMOUT On 26 November 2008 the appellant, a Pakistani national, pleaded guilty to two charges : 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; and using an identity card relating to another person contrary to section 7A(1A) of the Registration of Persons Ordinance, Cap. 177. AUTONUMOUT The magistrate Mr T.S. Jenkins sentenced him to 13 months and 1 week s imprisonment on the unlawfully remaining charge and 15 months imprisonment on the using another person s identity card charge. AUTONUMOUT The sentences were ordered to be served concurrently. This is the appellant s appeal against his sentence on the 2nd charge. AUTONUMOUT The magistrate s reasons for sentence and the admitted facts reveal that the appellant had entered Hong Kong illegally on 15 September 2006. He was first intercepted by the police on 5 March 2007. AUTONUMOUT Following his illegal entry and subsequent arrest the appellant lodged a claim seeking asylum. That claim has yet to be determined. AUTONUMOUT Subsequent to his arrest in March 2007 the appellant had been released on an Immigration Department recognizance. That was his status on 4 September 2008 when he was again arrested working at a warehouse in Kwai Chung. Further enquiries at that time revealed that he had secured that employment in August 2008 using an

identity card belonging to another. As a consequence he was prosecuted for the above offences. AUTONUMOUT When sentencing the appellant for the illegally remaining charge the magistrate gave to him credit for the period that he was in custody after his original arrest on 5 March 2007 and his release on recognizance on 28 April 2007. Hence he imposed a sentence of 13 months and 1 week s imprisonment as opposed the normal 15 months. No issue is taken by the appellant with this sentence. AUTONUMOUT Insofar as the sentence imposed for the charge of using an identity card belonging to another the magistrate sentenced in accordance with the established guidelines. He referred to HKSAR v. Li Chang Li, HCMA935/2004, a decision of the Court of Appeal which recommended that where a defendant used the identity card of another, to obtain some benefit, a term of imprisonment of 15 months on a plea of guilty was appropriate. The appellant s main complaint in respect of this sentence is that others arrested at the same time as he and also charged with the same offence were sentenced to terms of 12 months imprisonment by another magistrate on another day. AUTONUMOUT As the magistrate rightfully observed in his written reasons for sentence, that is not in the circumstances a matter of significance unless it is established that the sentence that he imposed was incorrect. The magistrate indicated that he was not aware of the circumstances of the co-accused and nor am I. Had another magistrate on another occasion imposed sentences which were lenient on the appellant s co-accused, that is undoubtedly directly referable to their circumstances and the matters that were put before that particular magistrate. AUTONUMOUT The appellant in his grounds of appeal complains that he has not been given credit for the time spent in custody prior to his release on recognizance. As I have indicated the credit for that period in custody was given by the magistrate when he was sentenced for the illegally remaining charge. AUTONUMOUT have been assisted by the helpful written submissions of Ms Chiu on behalf of the respondent. She points out by reference to a number of authorities, including Li Chang Li (supra), HKSAR v. Dou Yu Ping, HCMA1104/2005 and HKAR v. Ke Yu Qiong, HCMA620/2006 that sentences after a plea of guilty of 15 months or more are normally considered appropriate for those who commit this offence in circumstances similar to the appellant

- s. I accept the thrust of her submissions and the force of those authorities. The appeal against sentence is therefore dismissed. AUTONUMOUT have, in the course of the proceedings, been advised by Ms Chiu that as a consequence of the decision of Wright J given on 2 March 2009 in HCAL150/2008, an issue has arisen which the Department of Justice is addressing with regard to those who have been charged with an offence of illegally remaining in Hong Kong who at the time of their prosecution were released on an Immigration Department recognizance. It is not necessary for the purpose of this judgment to go into that matter beyond saying this am advised that those who have been convicted of illegally remaining in Hong Kong, who have been released on an Immigration Department recognizance may consider an appeal against their conviction out of time notwithstanding that they had pleaded guilty. This is the course the Department of Justice proposes to adopt pending a decision whether or not to appeal the decision of Wright J. AUTONUMOUT In those circumstances I have advised this appellant that in the fullness of time he may wish to take advantage of that opportunity and to that end should obtain assistance from the relevant

authorities. (Darryl Saw) Judge of the Court of First Instance, High Court Ms Samantha Chiu, PP of the Department of Justice, for the Respondent The Appellant in person, present PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$ & 6" ABC.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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