

HONG KONG / JUDGMENT

HKSAR v. NGUYEN THI PHU

COURT

Court of Appeal

DECIDED

20 January 2012

CASE / FILE NUMBER

CACC221/2011

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bjbj CACC 54/2011, CACC 221/2011 and HCMA 360/2011 (HEARD TOGETHER) IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 54 OF 2011 (On Appeal From District Court Criminal Case No. 1354 of 2010) BETWEEN HKSAR Respondent and TRAN VIET THANH Applicant IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 221 OF 2011 (On Appeal From District Court Criminal Case No. 407 of 2011) BETWEEN HKSAR Respondent and NGUYEN THI PHU Applicant IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL MAGISTRACY APPEAL NO. 360 OF 2011 (On Appeal From STCC No. 1682 of 2011) BETWEEN HKSAR Respondent and GUAN CUIZHEN (or judgment of the Court) : AUTONUMOUT The applicants in the first two cases applied for leave to appeal against sentence imposed on them in the District Court. The appellant in the third case was convicted in the Magistracy. Her appeal to the Court of First Instance was ordered by Fung J to be referred to this Court because of his view that there was conflicting views on sentencing in the Court of First Instance. The three cases are heard together because of the common issues involved. Tran Viet Thanh (CACC 54/2011) Charge and sentence AUTONUMOUT The applicant pleaded guilty before Deputy District Judge Johnny Chan to four offences and was sentenced to a total of 36 months imprisonment. Particulars Possession of a forged identity card, contrary to section 7A(1) of the Registration of Persons Ordinance (Cap.

177) (). 12 months imprisonment. Possession of false instruments, contrary to section 75(1) of the Crimes Ordinance (Cap. 200). 8 months imprisonment (based on a starting point of 12 months reduced by one third because of the plea of guilt) to be served concurrently to the first sentence. 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⁾ (unlawfully remaining). 16 months imprisonment (based on a starting point of 24 months, reduced by one-third because of the guilty plea) of which 12 months to be served consecutively to the first and second sentences. Breach of deportation order, contrary to section 43(1)(a) of the IO. 20 months imprisonment (based on a starting point of 30 months imprisonment, reduced by one-third because of the guilty plea), 12 months of which to be served consecutively to the first, second and third sentences.

Facts

AUTONUMOUT On 7 November 2010, the Police raided a flat in Mongkok, Kowloon and found the applicant in the premises. The applicant was asked for his identity proof and he replied he did not have any. Upon a body search, the following three items were found in his trousers pocket :

- 1) one forged Hong Kong Identity Card in the name of LEI Gie-ceng;
- 2) one forged construction worker registration card in the name of LEI Gie-ceng; and
- 3) one forged construction industry safety card in the name of LEI Gie-ceng. AUTONUMOUT The applicant told the police officers that his real name was TRAN Viet Thanh and that he sneaked into Hong Kong illegally in October 2010 from Shenzhen after travelling first from Vietnam to Guangxi. He spent HK\$500 to buy the three forged documents in Shenzhen from an unknown person with a view to using them to find work in Hong Kong. AUTONUMOUT He had previously in 2007 entered Hong Kong illegally and was convicted on 19 March 2007 of two offences, namely, theft and unlawfully remaining. He was sentenced to a total of 14 months imprisonment (12 months for unlawfully remaining and two months for theft). A deportation order was made against him in 2007. He was deported on 18 January 2008. He returned to Hong Kong illegally again in 2008. On 20 June 2008 he was convicted of the offence of breach of the deportation order. He was sentenced to 18 months imprisonment. He was discharged from prison in June 2009 and deported to Vietnam on 19 June 2009. Nguyen Thi Phu (CACC 221/2011) Charge and sentence AUTONUMOUT The applicant pleaded guilty before H H Judge Casewell to three offences and was sentenced to a total of 27 months imprisonment. Particulars
 - 1) Possession of a forged identity card. 15 months imprisonment.
 - 2) Unlawfully remaining. 15 months imprisonment, to be served concurrently to the first sentence.
 - 3) Breach of deportation order. 18 months imprisonment (based on a starting point of 27 months reduced by one-third because of the plea), 12 months of which to be served consecutively to the first and second sentences.

Facts

AUTONUMOUT The applicant was intercepted by the Police on 19 March 2011 in Sham Shui Po. She told the Police that she entered Hong Kong unlawfully on 17 March 2011 by boat. She was looking for a job. AUTONUMOUT She had previously been unlawfully in Hong Kong and was convicted on 23 January 2010 of two offences, namely, using a forged Hong Kong Identity Card and unlawfully remaining. A deportation order was made against her on 11 August 2010. She served her sentence for the two offences committed in 2010 and was discharged from prison on 21 September 2010. Guan Cuizhen (months imprisonment.

- 2) Unlawfully remaining. 15 months imprisonment, six months of which to be served consecutively to the first sentence.

Facts

AUTONUMOUT On 12 April 2011 the Police intercepted the defendant and asked for her identity card. She produced a Hong Kong identity card which was later found to be forged. She admitted that she entered Hong Kong illegally from the Mainland on 18 January 2011. She had not used the forged identity card. Her purpose of coming to Hong Kong was to earn money. AUTONUMOUT She was previously twice convicted. In July 2008 she was convicted of the offence of breach of condition of stay of which she was given a month s suspended sentence. In May 2009, she was convicted of three offences of using forged travel document, making a false statement and breach of the suspended sentence. She was sentenced to 13 months imprisonment for these offences. Sentencing guidelines AUTONUMOUT This Court has considered the sentence for each of the following categories of cases based on a guilty plea :

- 1) Unlawfully remaining:
 - (1) 15 months imprisonment : The Queen v. So Man-king and Others [1989] 1 HKLR 144 affirming a long line of authorities of this Court beginning at least from Chan Shau-kin & Others v. The Queen CACC 934/1981 and the later case of The Queen v. Lau Chung Kwan [1987] HKLR 204 had held that a 15-month sentence was appropriate to deal with the problems associated with the influx of illegal immigration into Hong Kong. In both of these cases the defendants were illegal immigrants who used either a forged identity card or an identity card belonging to another persons.
 - (2) As recognized in So Man-king at page 145 the court should take into account, by upward adjustment, any previous unlawful entry, whether resulting in prosecution or not, and other circumstances which may aggravate the offence, such as the actual use of a forged or other person s identity card to obtain some particular benefit. Earlier at page 144, this Court discussed the sentence of using a forged identity card or using the identity card of another person It has to be acknowledged that there may be circumstances in which the use of such cards will be an aggravating feature, but in our view the authorities draw little, if any, distinction in the ordinary run of the mill cases. The substantial element in sentencing for all three offences is the unlawful presence in Hong Kong.

- (3) The three offences in this context were using another person's identity card under Regulation 12 of Registration of Persons Ordinance and the related offences of using a forged identity card and of landing or remaining unlawfully in Hong Kong : AG v. Lam Ping Chun [1989] 1 HKLR 161 at 162 which was decided seven days after So Man-king. Apart from following the 15 months imprisonment for unlawfully remaining, Lam Ping Chun further affirmed the 15 months imprisonment for an illegal immigrant using a forged identity card.
- (4) In R v. Chan Wun Sang and Tam Kam-keung (Chan and Tam) [1993] 1 HKCLR 46 this Court was concerned with the appeals of two persons who pleaded guilty to one charge of using an identity card of another person, contrary to section 7A of the RPO, and to one charge of unlawfully remaining, contrary to section 38(1)(b) of the IO. In both cases the appellants were sentenced to 18 months imprisonment on each charge, the sentences to run concurrently.
- (5) Chan used another person's identity card to open a bank account. Tam was stopped by the Police in the street and produced an identity card which belonged to another person. Both had entered Hong Kong unlawfully on a previous occasion. Chan had previously been convicted of using the identity card of another person and sentenced to 15 months imprisonment. Tam had been previously convicted of unlawfully remaining in Hong Kong and was sentenced to 9 months imprisonment.
- (6) This Court was asked to consider the following two questions given that the standard sentence for these offences is 15 months imprisonment.
- (i) Does the fact that the appellants have made a previous unlawful entry into Hong Kong; or
(ii) Do the circumstances in which they made use of another's identity card justify an increase in that sentence?
- (7) This Court answered the first question affirmatively affirming So Man-king. In respect of the second question, this Court held that the use (namely, to open a bank account) to which Chan put the identity card in his possession would justify an increase to the standard sentence, but in the case of Tam (who merely produced the identity card on being stopped) it would not. This Court dismissed the appeal.
- 2) Possession of forged identity card or an identity card belonging to another person :
- (1) Although So Man-king did not specifically address the sentence for possession of identity card which is forged or belonging to another, it is clear from the discussion that possession of the identity card carries the same criminality as the other three offences. As can be seen from the decision of this Court in HKSAR v. Wong Ping (CACC 86/2005), which will be discussed later, Chan and Tam had been relied upon by the Courts as the basis for ordering a 15-month sentence for possession of a forged identity card which could be enhanced if the offender made use of the card to obtain some particular benefit.

- (2) In HKSAR and Li Chang Li [2004 2005] HKCLR 193, this Court dealing with the case of someone coming legally to Hong Kong and charged with possession of an identity card held that in the absence of exceptional circumstances a sentence of 12 months imprisonment should be imposed. If the offender has actually produced or used a forged identity card or identity card belonging to another in order to conceal his identity, work illegally or unlawfully further his stay in Hong Kong, then the starting point upon a plea of guilty should be 15 months imprisonment.
- 3) Concurrent or consecutive sentence
- (1) Chan and Tam adopted a concurrent sentence for using a forged identity card and unlawfully remaining.
- (2) In Wong Ping this Court was concerned with an appellant who pleaded guilty to four offences and was sentenced to a total of 65 months imprisonment, namely, Particulars 1st charge (robbery) : 40 months. 2nd charge (using an identity card relating to another person) : 6 months. 3rd charge (possession of offensive weapon) : 4 months. 4th charge (unlawfully remaining) : 15 months. The sentences were to be served consecutively.
- (3) The offences were discovered when the appellant was arrested after he produced an identity card belonging to another as proof of his identity.
- (4) This Court reduced the total sentence by six months. This was achieved by ordering the 6-month sentence on possession of identity card to run concurrently with the 15-month sentence on unlawfully remaining. This Court agreed that except where there are special circumstances the sentences for these two offences would normally be concurrent.
- 4) Breach of deportation order :
- (1) A sentence of 21 months imprisonment for a second breach of deportation order was accepted by this Court in HKSAR v. Pham Van Tuan CACC 272/2010 where the appellant had on three previous occasions been convicted of unlawfully remaining in Hong Kong sentenced to imprisonment. He was also previously sentenced to 18 months imprisonment for breach of a deportation order. The Court referred to HKSAR v. Cortez Emily Bisoy [2002] 2 HKLRD 762 where Deputy Judge McMahon (as he then was) reviewed the authorities and concluded that a sentence of 18 months imprisonment for a first breach of deportation order was appropriate.
- (2) The appellant in Pham Van Tuan pleaded guilty to three offences and were sentenced to a total of 36 months imprisonment : 1st charge (possession of a dangerous drug) : 6 months. 2nd charge (unlawfully remaining) : 20 months. 3rd charge (breach of a deportation order) : 21 months.

- (3) The District Judge ordered 10 months on the 3rd sentence to run consecutively to that of the 2nd sentence, making a total sentence of 30 months imprisonment on those two charges. The Judge further ordered the 6-month sentence on the 1st charge to run consecutively to the sentences on the 2nd and 3rd charges.
- (4) This Court held that the total sentence for the two immigration offences should be 23 months imprisonment. It ordered three months of the sentence on the breach of deportation order offence to run consecutively to the 20-month sentence for unlawfully remaining. The 6-month sentence for the drug offence was to be served consecutively, making a final sentence of 29 months on a breach of a deportation order (it being the fifth similar conviction), both sentences to be served concurrently, making a total of 28 months imprisonment. No appeal against selective sentence AUTONUMOUT In the application by Tran Viet Thanh, the notice of application stated that the sentences being appealed against are that of charges 1 and 2. Subsequent to inquiry by the Court, his lawyers stated that the application is in respect of charges 3 and 4 only. AUTONUMOUT It is clear by section 83I(2) of the Criminal Procedure Ordinance (Cap. 221), it is not possible to selectively appeal against one sentence where two or more sentences have been passed against the applicant in the same proceedings. 83I(2) Where the court, in dealing with an offender on his conviction on indictment, or in a proceeding to which section 83H(2) applies, has passed on him 2 or more sentences in the same proceeding (which expression has the same meaning in this subsection as it has for the purposes of section 83H), being sentences against which an appeal lies under section 83G or 83H, an appeal or application for leave to appeal against any one of those sentences shall be treated as an appeal or application in respect of both or all of them. AUTONUMOUT By this provision, any application or appeal in relation to one of them will activate a similar application or appeal against the others and the Court of Appeal can review all the appealable sentences whether or not this is desired by the appellant. See Taylor on Appeals (2000 Ed) paragraph 10 024 citing section 11(2) of the UK Criminal Appeal 1968. The Hong Kong and the English provisions are similarly worded except in Hong Kong under section 83I(3), the Court of Appeal may impose a sentence which is more or less severe than the original sentence while the English section 11(3) prohibits the appellant from being dealt with more severely (taking the case as a whole) than below. AUTONUMOUT Under section 119(1)(e) of the Magistrates Ordinance (Cap. 227), the judge in hearing appeal from the magistracy, may impose any sentence whether more or less severe than that awarded by the magistrate. Our view AUTONUMOUT It is clear that a sentence of 15 months imprisonment for possession of a forged identity card by an illegal immigrant is consistent with the long-established authorities. Further as apparent from Chan and Tam and Wong Ping this Court has consistently imposed a concurrent sentence for forged identity card offence and unlawfully remaining in Hong Kong in the absence of exceptional circumstances. The rationale, as stated in So Man-king, is that the substantial element in sentencing for the offences is the unlawful presence in Hong Kong. The mere production of the identity card when an illegal immigrant was intercepted was not regarded as a special feature which justifies a departure from the concurrent sentence approach. This line of

authorities is binding on this Court and on the Court of First Instance. AUTONUMOUT In HKSAR v. ly to the first, making a total of 20 months imprisonment. Deputy High Court Judge Andrew Chan allowed the appeal and reduced the total sentence to 18 months imprisonment. He ordered the first sentence to be altered to 12 months and three months of which was to be served consecutively to the second sentence of 18 months. The Judge distinguished Wong Ping and purported to apply Li Chang Li. AUTONUMOUT The Judge was of the view that this Court in Li Chang Li provided a guideline for a 12-month sentence and it explicitly stated that to remain in Hong Kong unlawfully is an offence in itself for which the offender should receive an appropriate sentence. He further observed that when a person came to Hong Kong lawfully and in possession of a forged identity card, he commits an offence. If his sentence is the same as another person who came to Hong Kong unlawfully and in possession of a forged identity card, the former may find the sentence unjust. AUTONUMOUT With respect to Judge Chan his approach was wrong and should not be followed. Li Chang Li is not concerned with the tariff of sentence for an illegal immigrant in possession of a forged identity card or with the concurrent/consecutive method of sentencing. The discussion in that case was confined to the disparity in sentences imposed in the lower courts of someone who came to Hong Kong legally and in possession of a forged identity card or an identity card belonging to another person for the purpose of using the card to seek employment in Hong Kong. AUTONUMOUT In fairness to Judge Chan, he might have been misled by the headnote of the judgment and did not have the benefit of full analysis of the case law. Properly understood, Li Chang Li simply stated that the standard sentence should be 12 months imprisonment even if the defendant is entitled to enter or remain in Hong Kong lawfully. But where the false identity card was actually used such as to gain employment when his condition of stay may prohibit employment locally, the sentence could be enhanced to 15 months. AUTONUMOUT Li Chang Li did not overrule any previous decisions that had adopted a sentence of 15 months imprisonment on an illegal immigrant in possession of a forged identity card. In our view the two lines of authorities should remain distinct. The underlining criminality of an illegal immigrant in possession of a forged identity card is his unlawful presence in Hong Kong. This is the mischief that the deterrent sentence of 15 months imprisonment is aimed at. The forged identity card must primarily be for the purpose of ensuring his illegal status in Hong Kong would not be so easily detected. If he makes use of the card for a benefit, such as seeking employment, then the 15-month sentence can be adjusted upwards. AUTONUMOUT The enhancement provides a degree of flexibility in arriving at the appropriate sentence even if the two sentences remain concurrent. Wong Ping did not state categorically that there must be concurrent sentences. Whether in a case there should be consecutive sentences must be fact specific. By giving a proper adjustment to the standard sentences, we do not envisage in a normal situation that there is a real need to use a partially consecutive sentence approach. Disposition of individual appeals Tran Viet Thanh AUTONUMOUT The sentence for the 1st charge of possession of a forged identity card is 15 months imprisonment. We would like to note that the sentence for this offence could well be enhanced to 18 months because of a previous similar conviction, but since we had enhanced the unlawfully remaining sentence

and since both sentences are to be served concurrently, we had not enhanced it in the present case. AUTONUMOUT In view of the previous similar offence committed by the appellant, the sentence for unlawfully remaining (3rd charge) should be 18 months imprisonment which is to be served concurrently to the 1st charge. AUTONUMOUT The eight-month sentence for the 2nd charge is correct. However, as this offence is different in nature from charges 1 and 3, we ordered two months to be served consecutively to the other charges. AUTONUMOUT In view of a previous breach of a deportation order, the 20 months imprisonment is correct. Five months of which should be served consecutively to charges 1, 2 and 3. The total sentence is 25 months imprisonment. Accordingly the application was allowed which was treated as the appeal proper and the sentences were changed as indicated. Nguyen Thi Phu AUTONUMOUT The 15-month sentence for the possession of forged identity card remains the same. The 15-month sentence for unlawfully remaining was substituted by a sentence of 18 months imprisonment to take into account previous convictions. Both sentences are to be served concurrently. Our comment on enhancement under paragraph 24 of this judgment is also applicable. AUTONUMOUT In respect of the breach of a deportation order, the sentence for this offence is 20 months imprisonment, four months of which are to be served consecutively to the 1st and 2nd charges. AUTONUMOUT The total sentence is 22 months imprisonment. Accordingly the application was allowed which was treated as the appeal proper and the sentences were changed as indicated. Guan Cuizhen AUTONUMOUT The sentence for the possession of a forged identity card charge should be 15 months imprisonment. AUTONUMOUT The sentence for the unlawfully remaining charge should be 18 months imprisonment in view of the previous convictions. AUTONUMOUT Both sentences are to be served concurrently, making a total of 18 months imprisonment. The appeal was accordingly allowed. Appreciation AUTONUMOUT We would like to express our appreciation to Mr. Simon Tam, counsel for the respondent for his comprehensive review and in depth analysis of the authorities which we find to be most helpful. (Peter Cheung) (C. Chu) (Judianna Barnes) Justice of Appeal Justice of Appeal Judge of the Court of First Instance Mr. Simon Tam, SADPP e~w~e gd@r gd@r gd@r gd@r gd@r gd@r gd@r gd@r gd@r gd@r vpvj (#p# (#p# {rg{r^ (#p# (#p# (#p# (#p# (#p# gd@N mYEEYE (#p# (#p# (#p# (#p# (#p# (#p# (#p# (#p# gd@N (#p# gd@N }seXN (#p# (#p# (#p# gd@N (#p# gd@N (#p# obSb hgAf gd@N gd8X gd8X gd,R& {qkqd[UN h{#= h{#= h{#= h{#= h`%R h{#= re[M h,R& h`%R h,R& h`%R h`%R h{#= h{#= h,R& h,R& h`%R h,R& h`%R gd{#= gd,R& h,R& h{#= gd}w^ gdgAf gd,R& gd,R& h,R& h{#= h{#= h{#= h}w^ h}w^ h}w^ gdgAf gd} w^ gd3" gd3" h{,N gdWS gd,R& h}w^ heVd hgAf gd@r q[qg] gd@r gd@r of Department of Justice for the Respondent Mr. Kwok King Hin Douglas, instructed by Messrs Tang, Wong & Cheung, assigned by Director of Legal Aid, for the Applicant in CACC 54/2011 Applicant in CACC 221/2011, in person, present Mr. Kwan Tong Lee, instructed by Messrs. Woo, Kwan, Lee & Lo, assigned by Director of Legal Aid, for the Appellant in HCMA 360/2011 PAGE - A B C D E F G H I J K L M N O P Q 1udk r p# r p# gdXm zkzkzkb[1udk gdXm 8 #v 8 :V 8 #v 8 :V 8 #v 8 :V 8 #v 8 :V 8 yt 8 #v 8 :V 8 yt 8 #v 8 :V 8 yt 8 #v 8 :V 8 yt 8 #v 8 :V 8 yt 8 #v 8 :V 8 yt [Content_Types].xml Iw], \$yi] _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I'n 3Vq%'#q x}r :TZaG I u3 L+M2 e\O* \$*c?)6-r IqbJ#x ,AGm

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Prepared on 26 October 2026 · Esheria