

HONG KONG / JUDGMENT

HKSAR v. NUR, JANNAH

[2022] HKCFI 3545

COURT

Court of First Instance

DECIDED

25 November 2022

CASE / FILE NUMBER

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HCMA 255/2022

[2022] HKCFI 3545

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO 255 OF 2022

(ON APPEAL FROM WKCC 1649/2022)

BETWEEN

HKSAR

Respondent

and

NUR, JANNAH

Appellant

Before: Deputy High Court Judge Woodcock in Court

Date of Hearing: 31 October 2022

Date of Judgment: 25 November 2022

J U D G M E N T

On 22 June 2022 the appellant, the 4th defendant in the case appeared before the learned Principal Magistrate, Mr Peter Law at West Kowloon magistracy under WKCC 1649/2022.

The appellant was one of 4 defendants and she pleaded guilty to one count of Breach of Condition of Stay – Overstay, contrary to section 41 of the Immigration Ordinance, Cap 115, Charge 4 and one count of Overstayer Taking Employment while being a person who, having been given permission to land in Hong Kong under section 11(1), remains in Hong Kong in breach of the time limit of stay imposed under section 11(2) in relation to permission, contrary to section 38AA(1)(c) and 38AA(2) of the Immigration Ordinance, Charge 5.

The appellant was sentenced to one-day imprisonment for charge 4 and 15 months' imprisonment for charge 5. Both sentences were ordered to run concurrently; a total of 15 months' imprisonment.

She now appeals against her sentence. In doing so she relies upon the format provided in Form 102, a Notice of Appeal to a Judge against Sentence without more. She has not filed any grounds of appeal. The general ground of her appeal is that her sentence is too severe.

Facts of the case

On 23 May 2022, the appellant was arrested inside Room A, 3rd floor, Tak Cheong Mansion, 41-47 Chuen Lung Street, Tsuen Wan, Hong Kong. Massage services were provided inside the premises. A police undercover operation was mounted and upon entry into the premises, an officer posing as a customer was offered a massage by another defendant. The appellant was located inside the premises and under caution she admitted she was a staff member there. Investigation also revealed that she was an overstayer in Hong Kong.

The appellant was an Indonesian national who had entered Hong Kong on 14 January 2019 and was permitted to stay until 23 April 2022 working as a foreign domestic helper. The summary of facts state her employment contract had been prematurely terminated on 24 May 2021 and she was only allowed to stay in Hong Kong until 23 April 2022. This would mean she overstayed one month before her arrest. However, that last date would appear to be a mistake because if she was prematurely terminated she would have had to leave within 14 days of that termination. It would appear that she has been sentenced on the basis that she overstayed one month when in reality but without confirmation for the purposes of this appeal, she overstayed for one year. No one corrected the court below.

Mitigation

The appellant was 28 years old at the time of the offence, had a clear record in Hong Kong and had come here on an employment contract as a foreign domestic helper. Mitigation put forward on her behalf included the fact that her mother was in poor health and had a heart disease. She wanted to return as soon as possible to take care of her mother. Her best mitigation was her plea at the earliest opportunity.

Reasons for sentence

Prior to 1 August 2021, the defendant would have only been charged as an overstayer. She would only have been prosecuted for a breach of condition of stay. An offence which would have attracted a short term of imprisonment or even a suspended sentence depending on how long that offender overstayed.

On 1 August 2021, section 38AA of the Immigration Ordinance was amended. Those now in breach of the new section, section 38AA(1)(c) covers offenders like the defendant who arrived in Hong Kong as a foreign domestic helper then overstayed. After overstaying, any offender taking up employment would be caught by this new section.

The Principal Magistrate took the view that the 15-month term of imprisonment laid down by the Court of Appeal in *HKSAR v Usman Butt* (2010) 5 HKLR 452 applied here to this appellant, an ex-domestic helper caught taking up employment.

That is the sentencing guideline of 15 months on a plea that is applicable to illegal immigrants, contrary to S38AA(1)(a) or those subject to a removal order or a deportation order contrary to S38AA(1)(b). The Principal Magistrate found it equally applicable to those that overstay in Hong Kong contrary to S38AA(1)(c) and take up employment.

The Principal Magistrate referred to and relied on *HKSAR v Shafia HCMA381/2019* where an ex-domestic helper caught working lost her appeal against a 15-month sentence on a plea of the same charge S38AA(1)(c).

The Principal Magistrate found no reason or justification in this appellant's case to depart from the guideline of 15 months' imprisonment. For the offence of overstaying he considered a one-day term of imprisonment sufficient to run concurrently with the 15-month sentence.

Grounds of appeal

The appellant appeared in person and did not file perfected grounds of appeal. During the hearing, she reiterated the fact that her mother was seriously ill with a heart disease and she had deteriorated upon hearing of the appellant's arrest and incarceration. She is throwing herself upon the mercy of this Court and asking for a reduction in her sentence. Essentially, the complaint of the applicant is wholly nonlegal in nature and she cannot, and does not seek to identify any error in the reasons for sentence.

The respondent's reply

I have to commend Mr Daryanani for the conscientious effort put into his reply to this appeal. I don't intend to repeat his reply and submissions but he has set out the facts of HKSAR v Safia HCMA 381/2019 for my perusal. The appellant in that appeal was a foreign domestic helper who had her contract prematurely terminated but did not depart as required by the law. She did surrender herself to the Immigration Department after overstaying for a period of time and was released on recognizance. The Immigration Department issued a removal order against her. After that removal order was issued she was discovered months later working illegally in a restaurant. She had used the identity card she legally received as a domestic helper to obtain employment. Those are the facts behind that case and 15 months' sentence. Clearly, a case somewhat more serious than the facts in this case.

The respondent highlights the fact that the latest additions to section 38AA, that is S38AA(1)(c) and (d) were passed and became law on 1 August 2021. That is 11 years after HKSAR v Usman Butt was decided.

Moreover, he does include in his submissions the Legislative Council Brief which added offences to that section, section 38AA with its justifications for the new offences. A reading of that Legislative Council Brief at tab 5 of his submissions clearly indicates that those and other amendments were to be introduced "to improve the screening procedure for non-refoulement claims and introducing enhanced measures in respect of law enforcement, removal and attention."

A reading of the "Justifications" section, the "Key Amendment Proposals" section and the last section, "Other Matters", indicate the concerns of the Legislative Council leading to this Immigration (Amendment) Bill 2020. This was in light of the increasing numbers of non-refoulement claimants in Hong Kong.

The Brief does include the reason behind the additional offences in the amended Section 38AA. It is amended so that "overstaying visitors who take any employment will also be liable to be prosecuted under that provision and subject to the same penalty levels as illegal immigrants taking any employment." The same penalty levels which also applied to those subject to a removal or deportation order and take up employment.

In the Legislative Council Brief, there is no specific mention or statistics of foreign domestic helpers overstaying in Hong Kong and contributing to a large number of illegal workers.

The Respondent submits that the appellant's appeal against sentence should be dismissed as clearly the guidelines of Usman Butt should and would apply to the appellant. The term of 15 months' imprisonment for charge 5 is justified and not excessive.

Discussion

The subsections of 38AA(1) of which there are 4, (a) to (d), refer to different offenders or offenders who have made their way to Hong Kong both legally but overstay and illegally who then take up employment, whether paid or unpaid, or establish or join in any business.

Leaving aside the question of whether those that offend under the new section, section 38AA(1)(c) will receive the same sentence as is normally imposed on S38AA(1)(a) and (b), that is 15 months' imprisonment after a plea, the fact is, guidelines are not strait jackets.

Even in *R v So Man King* (1989) 1 HKLR 142, the Court of Appeal reiterated that there are situations where a sentencing court can adjust, lower, enhance or depart from the 15-month guideline applicable to illegal immigrants working in Hong Kong. For example, strong humanitarian considerations should be taken into account. The Court of Appeal did refrain from giving detailed guidelines on how and when that sentence of 15 months' imprisonment may be adjusted.

I am also mindful of the fact that in May 2021 when the appellant lost her job here as a foreign domestic helper we were living through a pandemic; living through times of high anxiety, fear, uncertainty and restrictions for the good of public health. At that time, travel between countries was difficult and very expensive. The defendant has indicated she had no money at that time to leave as required. I do not doubt that statement.

It is on this basis that I will allow this appeal. Not on the basis that the principle magistrates sentence was excessive but on the basis that the offence under charge 5 was relatively new, guidelines are not strait jackets and at the time of these offences we were living in exceptional circumstances. Some compassion can be applied to particular individual cases and situations if appropriate.

I will reduce the sentence of 15 months' imprisonment of Charge 5 by 5 months and substitute her sentence with a 10-month term of imprisonment. I will not interfere with the sentence of Charge 4 or the order that the sentences of Charges 4 and 5 be served concurrently. The appellant will now serve a total of 10 months' imprisonment.

(Amanda Woodcock)

Deputy High Court Judge

Mr Prakash Lachmandas Daryanani, Senior Public Prosecutor of Department of Justice, for the Respondent

The appellant appeared in person

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