

HONG KONG / JUDGMENT

HKSAR v. OKAFOR CHARLES CHUKWUEMEKA

COURT

Court of Appeal

DECIDED

29 September 2017

CASE / FILE NUMBER

CACC382/2015

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cacc 382/2015

in the high court of the

hong kong special administrative region

court of appeal

criminal appeal no 382 of 2015

(on appeal from HCCC NO 280 of 2015)

BETWEEN

HKSAR

Respondent

and

Okafor Charles Chukwuemeka

Applicant

Before: Hon Lunn VP and Macrae JA in Court

Date of Hearing: 5 September 2017

Date of Judgment: 5 September 2017

Date of Reasons for Judgment: 29 September 2017

REASONS FOR JUDGMENT

Hon Macrae JA (giving the Reasons for Judgment of the Court):

Following his plea of guilty in the magistrate's court, the applicant was committed to the High Court for sentence in respect of a single count of trafficking in 1.53 kilogrammes of a solid containing 761 grammes of cocaine, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134. On 9 October 2015, he was sentenced by Deputy Judge Stuart-Moore in the High Court ("the judge") to 14 years and 6 months' imprisonment.

On 3 November 2015, the applicant filed a Notice of application for leave to appeal against sentence ("Form XI"). Following the refusal of his application for legal aid on 22 December 2015, the applicant filed a Notice of Abandonment on 30 December 2015. His appeal was formally dismissed on the same day. However, some 10 months later, on 25 October 2016, the applicant filed an affirmation (the "1st affirmation"), seeking to treat his previous abandonment as a nullity and to reinstate his application for leave to appeal against sentence. In this 1st affirmation, the applicant alleged that officers of the Customs & Excise Department had ignored his request that enquiries be carried out in respect of information recorded on a piece of paper bearing some handwriting (the "Paper"), which was seized by Customs officers on the day of his arrest and sealed in a tamper-proof envelope, with code number V194916 and label CID/2/90/14 (B3).

On 7 August 2017, the applicant filed his 4th affirmation (the "4th affirmation") (although he titled it as his 3rd affirmation), wherein he elaborated on the circumstances under which he had allegedly come to file his Notice of Abandonment. In essence, he asserted that he had initially laboured under the misconception that he could only proceed with his appeal against sentence if he was legally represented. However, in September 2016, he was moved to another prison facility, where he came to know that he could in fact have appeared in person and presented his appeal before the Court of Appeal, even though he was not legally represented. Accordingly, on 25 October 2016, he moved to nullify the earlier abandonment of his appeal.

On 5 September 2017, we refused the applicant's application for leave to appeal against sentence and dismissed his appeal. We further made a "loss of time" order, pursuant to section 83W(1) of the Criminal Procedure Ordinance, Cap 221, that 3 months of the time during which the applicant has been in custody pending determination of this application shall not be reckoned as part of the sentence to which he is subject. We said we would give the reasons for our decision in due course. This we now do.

The prosecution case

According to the Summary of Facts admitted by the applicant, he arrived at Hong Kong International Airport as an incoming passenger from Cotonou in Benin, via Addis Ababa in Ethiopia, on 24 December 2014. He was selected for clearance by a Customs Officer at Customs Arrival Hall A of the Airport. No contraband was found during baggage examination and personal search. However, since internal concealment was suspected, the applicant was sent to North Lantau Hospital for medical examination. At about 3:50 pm on the same day, just before a rectal examination was due to take place, the applicant declared that he did not want his anus to be examined since he had 7080 pellets of "stuff" inside his stomach. The applicant was then arrested and cautioned. Upon caution, he said he had swallowed 78 pellets of cocaine. He would discharge

the dangerous drug and contact the person in Cotonou, Benin, who would then tell him what to do next. He said he did not know anyone in Hong Kong.

The applicant was later transferred to Queen Elizabeth Hospital where, over the course of some 3 days, he discharged 78 pellets of suspected cocaine.

On 25 December 2014, a record of interview was taken from the applicant. Under caution, he asserted that he had been recruited by a person called “Onyema” in a bar in Cotonou, Benin. He subsequently agreed to deliver the “stuff” to Hong Kong for a reward of US\$6,000. “Onyema” told him that, upon his arrival in Hong Kong, he would call the applicant and tell him what to do with it. The applicant swallowed the “stuff” in a hotel room in Cotonou on 22 December 2014. At the same time, he was handed an airline ticket for Hong Kong.

The applicant did not himself know the contact number of “Onyema”. He further explained that he did not know whether he would meet anyone in Hong Kong.

The suspected cocaine in question was later confirmed by a government chemist to be 1.53 kilogrammes of a solid containing 761 grammes of cocaine. The estimated street value of the dangerous drugs at the time of seizure was HK\$1,464,210.

Mitigation

The applicant was 50 years of age at the time of his sentence. He was originally from Nigeria. He was married and had five children, aged between 2 and 16. Counsel for the applicant at the sentencing hearing, informed the court that the applicant was the sole provider for his family.

Counsel explained that the reason the applicant had decided to commit the offence was because he was experiencing financial problems after raising funds for the medical treatment of his younger sister. At the time, an old friend called “Francis” offered him a reward of US\$6,000 in order to deliver dangerous drugs to Hong Kong. It was said that the applicant did not receive any advance payment and his younger sister had passed away after his arrest. The children were no longer in school and the family had been evicted from their apartment because they had no money to pay for the rent.

It was submitted that the applicant was a poor and illiterate man, who had been prevailed upon whilst in financial straits to take a desperate risk. He himself was unaware of the actual quantity of the drug involved.

Reasons for sentence

Having considered the quantity of narcotic involved and the mitigation put forward, the judge considered the appropriate starting point to be 20 years and 9 months’ imprisonment, in accordance with guidelines set out in HKSAR v Abdallah. He further enhanced the starting point by 1 year for the international element involved in bringing the drugs across the border into Hong Kong before discounting the notional sentence after trial by one-third for the applicant’s guilty plea. There being no basis for any further reduction, the applicant received a final

sentence of 14 years and 6 months' imprisonment.

Grounds of appeal against sentence

The applicant has filed three sets of homemade Grounds of Appeal, dated 19 October 2016, 6 March 2017 and 24 April 2017 respectively. In his "Revised Grounds of Appeal (Sentence)" dated 6 March 2017, he stated that his initial Grounds of Appeal of 19 October 2016 were superseded.

In the applicant's two latest sets of Grounds of Appeal, the applicant claimed that his sentence should be further reduced because he had provided information to Customs & Excise Department. However, the Customs & Excise Department had failed to follow up his information and make arrests of others involved in the case.

In the applicant's 1st affirmation, he asserted that he had brought the Customs & Excise Department's inaction to the attention of his then solicitors and counsel, but they had "failed to take note of this and did not pursue this". The applicant made further allegations against the Customs & Excise Department as well as the Legal Aid Department in his 2nd affirmation dated 26 June 2017 (the "2nd affirmation"), and in his 3rd affirmation dated 18 July 2017 (the "3rd affirmation"). The Customs & Excise Department were accused of redacting crucial information from the original copy of the Paper, as well as a note seized from another defendant, one Onuoha Ferdinand Chetam ("Onuoha"). The Legal Aid Department, on the other hand, stood accused of collusion with the Customs & Excise Department and/or the Department of Justice.

Respondent's submissions

Mr Ira Lui, on behalf of the respondent, submitted, firstly, that in determining whether or not the applicant's act of abandonment can be treated as a nullity, this Court must be satisfied that the abandonment was not the result of a deliberate and informed decision on the applicant's part. He argued that, as a matter of common sense in most cases, a person signing an important legal document that would deprive him of the right of appeal would be taken to be aware of what he is doing and to understand the consequences of signing such a document. There was nothing to suggest that such considerations did not apply to the applicant, where the document, which was voluntarily obtained and signed by him on 30 December 2015, made it abundantly clear that he was "abandon(ing) all further proceedings in regard to the appeal".

Furthermore, in his 1st affirmation, as well as in his Grounds of Appeal dated 6 March 2017, the applicant asserted that upon the refusal of legal aid in December 2015, he had 'lost all hope of pursuing this appeal', since he was 'under the mistaken belief that one could not appear in person in the Court of Appeal and had to be legally represented'. He reiterated the same assertions in his 4th affirmation, adding that when he 'first got to Lai Chi Kok Reception Centre, [he] was told that everybody facing a criminal charge had to be legally represented'. In this regard, the respondent submitted that there was no evidence to show that the applicant's alleged "mistaken belief" was caused by any advice given by any officer of the Correctional Services Department, or anyone in a proper position to render such advice. It was neither reasonable nor credible that the applicant

should unreservedly believe what an unidentified person had said.

The respondent further pointed out that there was nothing in the applicant's original Form XI or in any other document suggesting that an applicant could not pursue an appeal without legal aid or legal representation. Since he had been in the prison system for over a year by the time he filed his Notice of Abandonment, it was simply incredible that during that time he had not become aware of the undoubted, and frequently employed, right of a convicted person to represent himself at his appeal.

In addition, the delay between the applicant's Notice of Abandonment of 30 December 2015 and his subsequent application to treat the same as a nullity of 25 October 2016 was inordinate and inexcusable. Such delay strongly suggested that the applicant had simply changed his mind about the merits of his appeal. That he entertained such second thoughts were revealed by the repeated references in his affirmations and submissions to the first instance decision in *HKSAR v Paes Martino Alessander*, where a judge at first instance granted a 40% discount for the defendant's guilty plea and his "apparent cooperation and assistance to the authorities". Mr Lui contended that the rather generous discount granted in that case had evidently been instrumental in prompting the applicant to resurrect his appeal.

In the circumstances, the respondent argued that the applicant must have been fully cognisant of the nature and effect of the Notice of Abandonment and must have clearly intended to abandon all proceedings relating to his appeal. Accordingly, his application to treat the Notice of Abandonment as a nullity should be refused.

Regarding the merits of the applicant's application for leave to appeal against sentence, Mr Lui submitted that the starting point adopted by the judge was entirely appropriate and in line with the guidelines set out in *Abdallah*. However, he pointed out that the enhancement of the starting point for the international element should have been 18 months' imprisonment under the guidelines in *HKSAR v Chung Ping Kun*, rather than the 12 months which the sentencing judge adopted. Since the *Chung Ping Kung* guidelines were handed down on 2 July 2014, almost six months before the commission of the present offence and more than 15 months before he was sentenced, the applicant was very fortunate that the starting point adopted by the judge was not enhanced by 18 months. The judge duly reduced the sentence by one-third to reflect the applicant's guilty plea and there was no other mitigating factor available which could further reduce the starting point.

In respect of the applicant's contention that he should be entitled to a reduction of sentence because he has offered useful information to the Customs & Excise Department, which information has been deliberately ignored by Inspector Tse, the respondent argued that such an allegation is wholly unsubstantiated. In his response to this contention, Mr Lui submitted that:

(a)

The allegation of culpable inaction by Inspector Tse was specifically rebutted by way of an affirmation from the Inspector, dated 5 July 2017. Simply put, the applicant had never offered the Customs & Excise Department any useful information at all;

(b)

The contention that the applicant had supplied the Customs & Excise Department with useful information was contradicted by the contents of the applicant's initial statement under caution, as well as his subsequent record of interview, both of which were signed by the applicant;

(c)

The gist of the contents of both statement under caution and record of interview were duly reflected in the Summary of Facts. In particular, the fact that the applicant did not have any contact details of "Onyema" and did not know anyone in Hong Kong was specifically admitted by the applicant. Had the applicant actually offered useful information to Inspector Tse, the applicant would not have agreed to the Summary of Facts in its current form;

(d)

The fact that the applicant's legal representatives had failed to seek a reduction of sentence on account of his assistance to the authorities would not have prevented the applicant from making such a claim in his hand-written letter to the Judge;

(e)

The original of the Paper has not been tampered with and bears no Hong Kong telephone number. This demolished the foundation of all of the applicant's allegations; and

(f)

As to the applicant's suggestion, in his Grounds of Appeal dated 24 April 2017, that the note seized from Onuoha containing similar drug-related information had also been tampered with by Customs Officers, this was refuted by Inspector Tse's affirmation and the actual piece of paper seized from Onuoha, which was annexed to his affirmation. In due course, Onuoha had launched an unsuccessful appeal against sentence in August 2016. At no stage, during any proceedings, was there any suggestion that Onuoha's note had been ignored by the authorities, or tampered with.

Finally, Mr Lui concluded his submissions by contending that the applicant has made a wholly unmeritorious nullity application and, in pursuit of his application, had made unsubstantiated allegations against practically every party that has dealt with him in these proceedings and in the court below. In so doing, he has inundated the Court and the respondent with a plethora of submissions and material which are at best misleading or irrelevant, at worst untrue. Mr Lui argued that the applicant's conduct in this appeal should be strongly deprecated and his application for leave to treat his Notice of Abandonment as a nullity accordingly dismissed.

Discussion

It is clear to us that at no stage during mitigation and up to the time that the applicant was sentenced was there any hint of the applicant providing any credible assistance at all to the Customs & Excise Department or any other law enforcement agency. All that he had done was, as was recorded in his record of interview, to give the name of the man in Benin who had allegedly inveigled him into committing the offence, and subsequently assisted him in swallowing the drugs and providing him with an air ticket. Nothing beyond the name of this same person was given in mitigation by the applicant's experienced criminal advocate, who would have realised the significance for sentencing purposes of his client providing credible assistance or information to the authorities if he was in possession of it. Nor, significantly, was anything suggesting the possibility of giving such information to the authorities mentioned in the applicant's own handwritten letter to the judge prior to sentence.

In due course, on 3 November 2015, the applicant appealed and made an application for legal aid. That was refused by the Director of Legal Aid on the merits on 22 December 2015, shortly after which, on 30 December 2015, he abandoned his appeal. It is worth observing that the form by which the applicant abandoned his application for leave to appeal against sentence was signed by the applicant and witnessed by a Senior Superintendent of the Correctional Services Department. On the form itself is a clear statement of the effect of an abandonment and the consequence that the Court has no inherent jurisdiction to permit the appeal to be reopened and that only in exceptional circumstances, where the Court is satisfied that the abandonment was not the result of a deliberate and informed decision, will the Court treat the abandonment as a nullity.

As the Court in *HKSAR v Borges Moraes Rosana* observed of a similar application to treat an abandonment as a nullity, at para 29:

"Her abandonment followed a refusal by the Director of Legal Aid to grant her legal aid to appeal her sentence. This decision by the Director, being a merits based decision, was a signal to the applicant that the Director was of the view that her application for leave to appeal her sentence was lacking in merit."

In this case, following the abandonment of his appeal, the applicant waited 10 months before applying to this Court to treat his abandonment as a nullity. We find it inconceivable that he would have abandoned his application for leave to appeal and then taken so long to resuscitate it under the mistaken apprehension that he would not be able to present his appeal in person without legal representation. The experience of this Court is that all applicants are acutely aware of the results of the appeals of their fellow prisoners and will be very much alive to the fact that most of them appeared unrepresented before this Court. Accordingly, we do not accept this as any reason for the applicant either abandoning his appeal or waiting so long to resuscitate it.

Nor do we accept the allegation that there has been a deliberate decision by the Customs & Excise Department not to follow up on information given by the applicant. We are satisfied that there never was any credible information to follow up. We tend to agree with Mr Lui that, judging by the repeated references in his various affirmations and submissions to the sentencing remarks of the judge in *Paes Martinho Alessandro*, the applicant has evidently changed his mind about his

decision not to appeal in the wake of that decision and is seeking to derive a similar benefit to the defendant in that case. In our judgment, there is no comparison with the circumstances in Paes Martinho Alessandro and, in any event, we do not consider, with respect, that the judge at first instance was correct to give the defendant in that case a 40% discount for the reasons that he gave. Reliance ought not to be placed on this sentencing decision again, either in this Court or in the lower courts.

In our judgment, the applicant failed to show that his mind did not go with his act of abandonment. Accordingly, we refused his application to treat his abandonment as a nullity.

Loss of time

In HKSAR v Mbachu Charles Sunday, we sounded a stern warning to applicants who seek to set aside the abandonment of their appeals without any valid basis whatsoever:

“29.

Appeal courts are not to be toyed with in this fashion. Time limits are prescribed by law so that appeals can be dealt with expeditiously in a timely, efficient manner. Accordingly, applications for leave to treat earlier abandonments of appeals against conviction or sentence are highly exceptional. The circumstances of this case come nowhere near fulfilling any of the criteria necessary for treating the abandonment of such an application as a nullity. Furthermore, as these Courts have said time and again, unfortunate personal circumstances are not any reason to disturb an otherwise proper sentence for serious offences. Armed robbery is an extremely serious offence in the annals of criminal sentencing in Hong Kong.

30.

We have given serious thought to whether we should order loss of time in this matter, notwithstanding that the sentence was a lengthy one. We have reluctantly decided not to do so, but we take this opportunity now to sound a clear warning to others who are disposed to try and resuscitate appeals they have abandoned years after the event without any reason at all, let alone a good one, that this Court has the power under section 83W Criminal Procedure Ordinance, Cap 221 and will use it in appropriate cases to direct that the time, or part of the time, during which an appellant has been in custody pending the determination of his appeal may not be reckoned as part of the term of any sentence to which he is subject.”

This warning was reiterated a few months later by the Court in HKSAR v Chim Choi Lan. Both of these decisions pre-dated the applicant’s 1st affirmation.

On the question of this Court’s jurisdiction to order “loss of time” in such cases, we note that the Court of Final Appeal in HKSAR v Wong Lin Hung determined that, on a purposive construction of section 83W of the Criminal Procedure Ordinance, loss of time could be ordered in respect of an applicant for an extension of time. Prefacing its remarks by saying that “Common sense has a place in interpretation”, the Court went on to hold:

“... there is no conceivable policy reason why an applicant for an extension of time should not be covered by s. 83W. We do not believe the absence of an explicit inclusion in the definition of appellant was an oversight. Rather, we believe the drafters and all those who were responsible for the enactments, in England as well as in Hong Kong, thought it went without saying that the word appellant in s. 83W includes a person who appeals or applies for leave to appeal within time as well as one who applies out of time.”

The Court also observed that the statutory provisions in England in respect of loss of time, namely section 29 of the Criminal Appeal Act 1968, are identical to section 83W of the Criminal Procedure Ordinance in Hong Kong.

In *R v Jamil Ahmed*, the Court of Appeal of England and Wales was similarly dealing with an application to treat an abandonment, in that case of an appeal against conviction, as a nullity. The Court held, at para’s 1011:

“The current application, which consists only of a letter from his solicitor, contends that he was advised by Mr. Taylor-Camara that the accounts of his former counsel and solicitors were likely to be preferred to his, and that if he renewed his application he could end up losing time already served, and that as he was representing himself that was more likely to happen. A firm of solicitors was apparently also contacted. They gave advice in very similar terms, adding only that the court did not approve of appellants representing themselves.

We have no evidence from the applicant in the form of a sworn declaration or affidavit. Even if one took the letter at face value, the advice given was to the effect that an applicant pursuing an application, despite a refusal from the single judge and without his grounds being supported by counsel’s or solicitor’s advice, ran the risk of his losing remission if he failed. We do not consider that was bad advice, but, even if it were, this application has adduced no evidence about the applicant’s state of mind when he abandoned his appeal and it follows that we have no evidential basis upon which to conclude that the Medway test is satisfied. Accordingly, we refuse leave to withdraw the notice of abandonment.” (Emphasis supplied)

We cite this case to illustrate that in England and Wales, as in Hong Kong, a “loss of time” order can properly be made, in appropriate circumstances, where an unsuccessful and wholly unmeritorious application to treat an earlier abandonment as a nullity is made. As with an applicant seeking an extension of time, we see no reason why an applicant seeking to treat an earlier abandonment of his appeal as a nullity should not be an “appellant” for the purposes of section 83W of the Criminal Procedure Ordinance.

In our judgment, there was no merit whatsoever to this application, which was clearly prompted by a change of mind some 10 months after a perfectly correct assessment of the merits of this appeal was communicated to the applicant by the Director of Legal Aid, leading to the applicant abandoning his appeal. Notwithstanding affidavit evidence and other material from Inspector Tse dealing with the applicant’s claims that he had provided assistance to the authorities which they had deliberately ignored, the applicant has persisted with his claims, accusing the Customs & Excise Department, the Department of Justice, the Legal Aid Department and his own counsel

at trial of neglect and/or collusion in failing to inform either the sentencing court or this Court of the assistance he has allegedly rendered. Indeed, he has even gone so far as to accuse the Customs & Excise Department of deliberately doctoring original evidence, so as to excise something from the Paper found in his possession on the day of his arrest. We should say that we have carefully examined the original Paper, still in its original tamper-proof envelope with the same reference number and labelling, and found no evidence whatsoever to support the applicant's allegation.

We cannot conceive that any competent counsel appearing before the Court of First Instance would fail to inform a sentencing judge that his client has provided assistance to the authorities, if, indeed, there was such material in his possession. As we have said, the applicant was represented at his sentence by an experienced criminal advocate. Nor was there any hint of such assistance in the letter written in the applicant's own hand, which was produced to the judge in mitigation. Furthermore, if the applicant had provided any useful information to the authorities, it is inconceivable that he would have admitted a Summary of Facts in which it was recorded that he did not have the contact details of "Onyema", and did not know anyone in Hong Kong.

We have no hesitation in rejecting the applicant's assertions of assistance allegedly provided to the authorities, nor do we accept that there was any negligence or collusion on anyone's part in failing to have such assistance placed before the sentencing court. Clearly, this whole spurious exercise of applying to treat the earlier abandonment of his appeal as a nullity has been an after-thought, no doubt excited by the sentencing reasons given by the judge in Paes Martinho Alessander.

In our view, this was an egregious example of what the Court in Mbachu Charles Sunday described as "toying" with the appeal process. In the result, two judges of this Court have been required to delve in detail into the applicant's very serious allegations, only to find them wholly untrue. In that process, we have had to examine original exhibits, study copious letters and submissions from the applicant, peruse evidence and material supplied by Inspector Tse and review proceedings in the court below. In doing so, the hearing before this Court took the best part of one whole day.

It was for these reasons that we felt it appropriate to order that 3 months of the time during which the applicant has been in custody pending the determination of this application shall not be reckoned as part of the term of the sentence to which he is otherwise subject. Accordingly, we refused the application to treat the applicant's earlier abandonment of his appeal as a nullity, and made a "loss of time" order of 3 months' imprisonment.

(Michael Lunn)

Vice President

(Andrew Macrae)

Justice of Appeal

Mr Ira Lui SPP, of the Department of Justice, for the Respondent

The Applicant appeared in person

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