

HONG KONG / JUDGMENT

HKSAR v. OLIINYK ALLA

[2026] HKCA 192

COURT

Court of Appeal

DECIDED

4 February 2026

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CACC 276/2021, [2026] HKCA 192 On Appeal From [2022] HKCFI 57 in the high court of the hong kong special administrative region court of appeal criminal appeal no 276 of 2021 (on appeal from hccc NO 130 of 2020) BETWEEN HKSAR Respondent and Oliinyk Alla Applicant Before: Hon Macrae Acting CJHC and Zervos JA in Court Date of Hearing: 4 February 2026 Date of Judgment: 4 February 2026 J U D G M E N T Hon Macrae Acting CJHC (giving the Judgment of the Court): The applicant was found guilty after trial in the High Court before Deputy Judge Bruce (“the judge”) and a jury of one count of trafficking in a dangerous drug, namely 1,080 grammes of cocaine narcotic, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134. Sentencing was adjourned from 5 October 2021 to 24 November 2021 in order to obtain a medical report on the applicant. She was ultimately sentenced to 22 years and 4 months’ imprisonment. By a Form XI Notice filed on 13 June 2025, the applicant now seeks leave to appeal her sentence out of time. In light of the revision of the sentencing guidelines for very large quantities of heroin, cocaine and “Ice” set out in HKSAR v Huang Ruifang (No 3), which was handed down earlier last year, the respondent does not oppose the present application. The Court in HKSAR v Lam Man Tak has also recently clarified that applicants and appellants who were sentenced on or after 18 September 2018 and are still “in the system” should generally be eligible to have their sentences assessed under the new guidelines. Jurisdiction Of our own motion, we have raised a jurisdictional point concerning the Court’s power to entertain the application in the present circumstances. The matter has arisen for this reason. On 10 January 2022, the Secretary for Justice applied for leave to review the applicant’s sentence, under section 81A of the Criminal Procedure Ordinance, Cap 221 (“the Ordinance”). The Court of Appeal (which comprised three members, two of whom also sit in the present appeal) duly heard the Secretary for Justice’s application on 11 January and 16 August 2023. At the conclusion of the hearing, the Court dismissed the application and affirmed the applicant’s original sentence: see the judgment in HKSAR v Raman Kapusamy. Accordingly, we have asked ourselves this question: is this Court functus officio following an earlier decision by a Court of the same jurisdictional level in an application for review of sentence taken out by the Secretary for Justice in relation to the present applicant? Given the importance of this issue, it was considered that the matter should be dealt

with by the full Court rather than the Single Judge. Section 81B of the Ordinance is concerned with reviews of sentence by the Court of Appeal upon the application of the Secretary for Justice made under section 81A. Section 81B(1) stipulates: “(1) Upon the hearing of the application the Court of Appeal may, by order— (a) if it thinks that the sentence was not authorized by law, was wrong in principle or was manifestly excessive or manifestly inadequate, quash the sentence passed by the court and pass such other sentence (whether more or less severe) warranted in law in substitution therefor as it thinks ought to have been passed; (b) in any other case, refuse to alter the sentence.” However, there is another important section, which must be read together with section 81B, and which seems to us to govern the present position. Section 81C(2) stipulates: “(2) Nothing in section 81B shall prejudice the exercise of a right of appeal conferred on a convicted person by this or any other Ordinance, but the Court of Appeal may hear together an application for the review of a sentence and an appeal by the respondent under this Part against the sentence.” In our judgment, section 81C(2) provides a clear answer to the question we have posed ourselves. Although the subject-matter of the previous application for review (in which the present applicant was the respondent) and the current application for leave to appeal by the applicant is essentially the same, namely, the applicant’s sentence of 22 years and 4 months’ imprisonment, the matter before us is not just the first time she has sought leave to appeal against her sentence, but the application is made on a very different basis, which could not have arisen when she was last before the Court as a respondent in 2023 and 2024. At that time, the revised guidelines in *Huang Ruifang* (No 3) had not been published and the applicable guidelines were those set out in *HKSAR v Abdallah*. The revised guidelines in *Huang Ruifang* (No 3) were only published on 5 March 2025, which prompted the applicant’s Form XI Notice in June 2025. We should say that Mr Lau, for the respondent, has agreed with the view we have formed as to jurisdiction. In these circumstances, we are satisfied that not only is the applicant entitled to apply for leave to appeal against her original sentence, but we have jurisdiction to entertain her application out of time, subject to the relevant provisions and principles concerning such applications. The facts of the case The applicant was the holder of a Ukrainian passport. On 16 July 2019, at 3:28 pm, she arrived at Hong Kong International Airport on a flight from Addis Ababa, Ethiopia. She was intercepted by a Customs officer at the ‘Nothing to Declare channel’, at which time she had with her a check-in suitcase, a hand-carry suitcase and a hand-carry backpack. After enquiry, the Customs officer cut open the lining of the black suitcase and discovered 1,467 grammes of a solid containing 1,080 grammes of cocaine narcotic, the subject-matter of the indictment, with an estimated street value of HK\$2,083,140. By unanimous verdict, the jury found the applicant guilty of trafficking in a dangerous drug in the quantity set out in the indictment. Sentencing The judge (and, subsequently, the Court upon review) had regard to the previous sentencing guidelines set out in *Abdallah* for between 600 and 1,200 grammes of narcotic, which suggested a starting point of between 20 and 23 years’ imprisonment. Regarding the applicant as a courier, he adopted an arithmetical starting point of 22 years and 4 months’ imprisonment in respect of the trafficking in 1,080 grammes of the narcotic. The judge correctly identified the international element of smuggling the dangerous drugs over the border into Hong Kong as an aggravating factor and indicated that he would have adopted an enhancement of sentence for this feature of close to 18 months’ imprisonment. However, he was

particularly concerned that the applicant had recently undergone a hysterectomy as a result of being diagnosed whilst in custody with cancer of the uterus. Accordingly, he declined to increase the sentence and effectively offset any enhancement he would otherwise have considered by reducing the sentence by the same period for her medical condition. In the result, the sentence remained at 22 years and 4 months' imprisonment. Secretary for Justice v Oliinyk Alla In the earlier review application, the main contention of the Secretary for Justice was that the judge had failed to enhance the applicant's sentence for the aggravating feature of the international element, or to spell out the discount to be given for her medical condition, which, it was submitted, should not have been so great as to offset the appropriate enhancement for the international element. The Secretary for Justice accordingly sought to argue that the sentence was wrong in principle and manifestly inadequate. In dismissing the Secretary for Justice's application, the Court held: "80. Nevertheless, we think the judge was generous in the outcome, although the discretion in sentence was his to exercise within proper boundaries. However, we are now confronted with the position as it is today, the respondent having undergone major surgery, for which we understand she is still receiving follow up treatment. Whilst the respondent's sentence could have been greater, we are not disposed to alter the sentence now, almost 5 years after her arrest. We are particularly conscious of the fact that the prosecution's stance during mitigation, when specifically asked to state its position by the judge, was that it was 'neutral' as to whether the judge could take the respondent's medical condition and her associated anxiety into account in sentence. 81. The simplest course for us in the circumstances was to dismiss the application, notwithstanding that we found the deputy judge's sentence to be lenient. Accordingly, the respondent's sentence will remain at 22 years and 4 months' imprisonment." In the application before us today, neither party seeks to revive any of the former arguments raised and resolved in the application for review, or make any submissions in relation to the second, third, fourth, fifth or sixth steps in the approach to sentencing set out in HKSAR v Herry Jane Yusuph. Instead, this application is concerned solely with the first step in identifying the relevant guideline band applicable to the quantity of dangerous drug concerned. The applicant's submission The applicant acts in person before us and seeks a reduction in sentence in accordance with the revised sentencing guidelines issued by the Court in Huang Ruifang (No 3), contending that she has never appealed against her sentence before and is still, therefore, "in the system", even though her application may be out of time. The respondent's submission Mr Lau acknowledges that the revised sentencing guidelines should apply to the applicant who was sentenced on or after 18 September 2018. As to the delay in lodging the present application for more than 3 years, Mr Lau also accepts that such delay is excusable in the circumstances we have detailed, and that an extension of time within which to appeal may properly be granted. We are grateful to Mr Lau for his sensible and realistic submissions. Discussion We are not disposed to revisit the question of whether the original sentence passed by the judge was or was not a lenient one. We have already said that it was, according to the guidelines prevailing at the time of the original sentence, but we nevertheless decided to uphold the judge's discretion to do as he did, given the applicant's state of health at the time he passed that sentence. We shall proceed, therefore, on the basis that the applicant has never appealed against her sentence, that she is entitled to do so out of time with leave of the Court and that she has a good reason for not having

done so earlier, given that the respondent sought to review her sentence under section 81A of the Ordinance; which application ultimately failed in that the sentence was not disturbed. It is also clear that the sentence from which the appeal now lies was passed on 24 November 2021, after the cut-off date of 18 September 2018 decided in Lam Man Tak and that, by granting her leave to appeal out of time for the reasons we have given, she is currently still “in the system” and eligible to have her sentence reconsidered by this Court. We shall approach sentence on the basis accepted by the judge, and subsequently by the Court of Appeal at the application for review, that in the exceptional circumstances of the applicant’s health condition, her role and culpability as an international courier should not take the sentence beyond its arithmetical starting point. The arithmetical starting point in respect of 1,080 grammes of cocaine narcotic would, under the revised guidelines applicable to the applicant’s case, now warrant a sentence of 18 years and 3 months’ imprisonment. For these reasons, we grant the application for leave to appeal out of time, allow the appeal and substitute for the original sentence of 22 years and 4 months’ imprisonment, a term of 18 years and 3 months’ imprisonment. (Andrew Macrae) Acting Chief Judge of the High Court (Kevin Zervos) Justice of Appeal Mr Derek Lau SADPP, of the Department of Justice, for the Respondent The Applicant appeared in person

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