

HONG KONG / JUDGMENT

HKSAR v. OUKARCHT, ABDELLAH

[2026] HKCFI 2287

COURT

Court of First Instance

DECIDED

24 April 2026

CASE / FILE NUMBER

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HCMA 112/2025

[2026] HKCFI 2287

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO 112 OF 2025

(ON APPEAL FROM FLCC 2113 OF 2024)

BETWEEN

HKSAR

Respondent

and

OUKARCHT, ABDELLAH

Appellant

Before: Deputy High Court Judge Lily Wong in Court

Date of Hearing: 13 February 2026

Date of Judgment: 24 April 2026

J U D G M E N T

Background

The Appellant pleaded not guilty to the offence of “possession of a dangerous drug”, namely 0.01gramme of a solid containing cocaine. He was represented by a duty lawyer. On 27 February 2025, the Appellant was convicted after trial of the said offence. On 13 March 2025, he was sentenced to 5 months’ imprisonment.

On 19 March 2025, the Appellant filed Notice of Appeal To A Judge Against Sentence in Form 102.

On 8 April 2025, the Appellant applied to the Court of First Instance for bail pending sentence. The prosecution opposed such an application. The Appellant was refused bail.

Facts

At around 7:14 pm on 6 October, 2024, the Appellant was intercepted by the Customs Officer when he arrived in Hong Kong via the Lok Ma Chau Control Point Passenger Arrival Hall. He was stopped and searched. A Customs Officer found a plastic tube containing 0.01g of a solid containing cocaine in the left pocket of the Appellant’s shorts. The Appellant was immediately arrested. Under caution, the Appellant stated that the plastic tube was given to him by a male whom he met in a pub in Shenzhen 2 to 3 days ago. He thought the plastic tube contained cocaine and did not consume it.

At trial, the Appellant claimed that he wanted to throw away the drug but had forgotten its presence. Such a claim was rejected by the magistrate. The magistrate found that the Appellant intended to possess the drug and imported it from the Mainland into Hong Kong.

Mitigation

In mitigation, it was submitted that the Appellant aged 42 is of Morocco origin. He married to a Hong Kong resident in 2018 and worked as a trading merchandizer. He has a clear record in Hong Kong.

Reasons for Sentence

The magistrate called for a Drug Addiction Treatment Centre (“DATC”) report stating that the Appellant was not a drug dependent, and therefore DATC was not suitable for him. Having noted from the said report that the Appellant abused cannabis in the 1990s and cocaine in 2022, the magistrate said:

“10. Although this is the first criminal conviction of the defendant, this is not the first time he came across cocaine. Risk of reoffending is not low at all. A deterrent sentence is necessary.”

11. Furthermore, this case is technically a case of trafficking as the defendant imported the drug from another jurisdiction. The defendant has not been charged with trafficking only because of the established practice of the court to treat these cases as simple possession, even if a charge of Trafficking in Dangerous Drug is proceeded. However, the fact that the defendant imported the drug from another jurisdiction is an aggravating factor that the court must take into account. Immediate custodial sentence is the only suitable option.”

The magistrate then referred to two authorities submitted by the defence counsel: HKSAR v Tang Kin Chung Harry (hereinafter referred to as Harry Tang), HCMA 79/2018, and HKSAR v Tran Qui Ann-Sandra, HCMA 955/2009 (unreported) (hereinafter referred to as Tran). Having distinguished the present case from the Harry Tang and the Tran cases, the magistrate said he was sure that neither a fine nor a suspended sentence was suitable. He continued to say:

“16. The normal starting point for simple possession of dangerous drug is in the range of 12 to 18 months’ imprisonment. However, the court would always adopt a lower starting point when the quantity of dangerous drug is trivial.

17. Having considered the facts of this case, especially the trivial narcotic content, the clear record of the defendant, the Drug Addiction Treatment Report and everything advanced on behalf of the defendant by the learned counsel, I adopt a starting point of 4 months’ imprisonment.
18. Owing to the aforesaid aggravating factor, I enhance the sentence by 1 month to 5 months’ imprisonment. The defendant pleaded not guilty. There is no justification for any reduction.”

Ground of Appeal

In the appeal hearing, the Appellant was represented by Mr Connelly. The only ground of appeal is simply that the sentence of 5 months’ imprisonment was manifestly excessive. In gist, Mr Connelly emphasized that rehabilitation, not deterrence, should be the focus of the sentencing exercise in this case.

In his written submissions, Mr Connelly first submitted that the circumstances of the offenders in Harry Tang and Tran were very similar to the present case, and therefore the Appellant should not have received different treatment. He also referred to HKSAR v Ruiz Valencia Julian Andres, HCMA 26/2012 in which the appellant with good character, pleaded guilty to possession of 0.07g of cocaine. McWalters J (as he then was) said: “simple possession of dangerous drugs is also an offence where the court looks towards the rehabilitation of the offender”. His Lordship set aside the original term of imprisonment and substituted it with a fine of HK\$30,000 because he did “However nor do I wish to deprive him of the opportunity for a sentence which is geared more towards rehabilitation than punishment and so I believe the only option is to impose upon him the payment of a substantial fine” .

Mr Connelly submitted that the Appellant's background and history, as stated in the DATC report, gave no indication of him being a hardcore criminal or drug user. Given that the Appellant had been drug free since 2022 and during the bail period, the magistrate erred in finding that the risk of re-offending was not low and that a deterrent sentence was necessary.

Besides, it was contented that the Appellant's admission in the DATC report of prior drug use was improperly considered by the magistrate during sentencing. If such admissions were used against offenders, they would be discouraged from disclosing their background to the probation officers for fear of losing any prospect of a rehabilitative sentence.

Mr Connelly said the Appellant had served his term of imprisonment. The present appeal is far from academic to the Appellant and his wife. The couple was informed by the Immigration Department which is now considering deportation proceedings against the Appellant following his conviction for the present offence. Although this court is not concerned with how the Immigration Department will exercise its discretion, it is understood that the length of the imprisonment for any criminal offence is a key factor for the consideration of the Immigration Department.

The Respondent's submissions

The Respondent submitted that 5 months' imprisonment is not an excessive sentence, let alone manifestly so. In *HKSAR v Wan Sheung Sum* [2000] 1 HKLRD 405, the court had clearly articulated that a starting point sentence of 12 to 18 months' imprisonment would be an appropriate sentence for a bona fide user who is convicted of simple possession of heroin or ice. The starting point is subsequently increased or enhanced to take account of the latent risk factor (see also: *HKSAR v Mok Cho Tik* [2001] 1 HKC 251).

The Respondent said the magistrate had considered the Appellant's clear record and the trivial quantity of drugs in adjusting the starting point downwards to that of 4 months' imprisonment, such an adjustment was clearly in line with the approach stated in *Mok Cho Tik*. Besides, there was an international element here i.e. the Appellant brought the drug into Hong Kong. The sentence imposed in this case compared to that of other cases was neither wrong in principle nor manifestly excessive.

Consideration

In the Court of Final Appeal case *HKSAR v Hui Lai Ki* [2024] HKCFA 7, it was held that the Magistracy Appeal is conducted by way of rehearing on the evidence before the trial court. On such rehearing, if the judge comes to a different view on the evidence before the Court, that itself is an error which justifies appellate intervention to reverse the decision of the magistrate. On appeal against sentence, this court must look at the relevant facts, mitigation, and relevant authorities for consideration.

It is noted that the authority HKSAR v Muhammad Waqas [2019] 4 HLRD 323 (date of judgment: 22 August 2019) (hereinafter referred to as Waqas) was not referred to both in the court below and at the appeal hearing.

The appellant in the Waqas case pleaded guilty to a total of 10 charges including a number of traffic offences and an offence of possession of a dangerous drug (charge 10), namely 0.89g of a powder containing traces of cocaine. On charge 10, he was sentenced to 8 months' imprisonment reduced for plea from a starting point of 12 months' imprisonment. On appeal, the original sentence on charge 10 was substituted with a sentence of 1 month's imprisonment. The Court of Appeal said:

“58. This brings us to Charge 10 which is of concern to us as there is present the complicating factor of the practice implemented by the DPP of not requiring the Government Chemist to quantify the amount of narcotic in a substance when the quantity of the suspected dangerous drug did not exceed one gramme. Hence, in the present case the particulars of dangerous drug are limited to no more than the weight of the substance in which the narcotic is contained.

59. There are two consequences of this practice. The first is that a sentencing court will not know the quantity of the narcotic and so cannot use the quantity of narcotic, as opposed to the quantity of the mixture, as a factor to which it can have regard in determining the appropriate sentence. The second is that the sentencing court will not know whether the dangerous drug being possessed by the offender is capable of providing the user of it with a narcotic effect or is just a useless substance. We know from the evidence of Professor Tang that when the quantity of cocaine drops to lower than 10 milligrammes the user will not derive any narcotic effect from it.
60. These consequences do not sit well with the leading case on sentencing for possession of a dangerous drug, namely the Court of Appeal's judgment in HKSAR v Mok Cho Tik. This judgment was handed down on 7 February 2001, a year after the change in the DPP's practice of not obtaining a Government Chemist's certificate specifying the quantity of narcotic in seizures below one gramme.

...

72. In our view, in the absence of the judicial officer being able to make such a finding, the offender would have to be sentenced on the basis that he possessed the particularized quantity of a dangerous drug but that the quantity of narcotic was 'insufficient to be measured or used'. In this situation the court would have to look to any circumstances surrounding the commission of the offence in order to assess the culpability of the offender.
73. The only guidance this court can give in respect of sentencing an offender at this low end of the culpability range is to make the obvious point that the lower the level of culpability the less harsh the sentence will be. Clearly, a less harsh sentence would be a very short custodial sentence or, more likely, a non-custodial sentence. The sentence would have a much greater focus on rehabilitation than punishment. By a very short custodial sentence we have in

mind one that is measured more in days to weeks than months and which exposes the offender to the effect of ‘the clang of the prison gates’ without inhibiting his ultimate rehabilitation.”

I drew both Mr Connelly and Mr Tan’s attention to the Waqas case and invited them to make submissions. Mr Connelly then submitted that the sentencing principles of Waqas applied in this case, and the very small quantity of drug involved here was a useless substance. The Respondent emphasized that the Appellant brought the drug into Hong Kong. Despite the small quantity, the latent risk still existed.

The authorities relied upon by Mr Connelly and Mr Tan in the appeal hearing were pre-Waqas cases. Clearly, the Waqas sentencing principles apply in the present case as the narcotic content of the drug involved here is trivial (less than 1g). It is a pity that the magistrate’s attention was not drawn to the Waqas case, which might have helped prevent the situation arose at the trial.

If the magistrate had considered it, he would not have imposed a 5-month sentence on the Appellant. He might have imposed a fine or a suspended sentence on the Appellant. The magistrate erred in imposing a sentence which is manifestly excessive.

To all intents and purposes, this appeal is now academic in the sense that the Appellant has completed his prison term. To impose a fine would be an extra punishment; although according to Waqas a very short term of imprisonment or a fine might have been appropriate at trial, this has now been superseded by events. I do not consider that a suspended sentence of imprisonment of whatever length would be in the public interest.

This is a wholly exceptional case and this judgment is not intended to set any sort of precedent for the future. However, in all the circumstances including the time already served and the fact that the quantity of drug involved is de minimis, I consider the appeal should be allowed. In the interests of justice, I consider an absolute discharge is appropriate and I so order.

Although Mr Connelly raised several other points in submissions, in light of my conclusion, it is not necessary for me to consider further.

The appeal is allowed. The original sentence (5 months) is set aside and substituted with an order of absolute discharge.

(Lily Wong)

Deputy High Court Judge

Mr Tan Xiao Yi Ivan, PP of Department of Justice, for the Respondent

Mr Connelly, Robert James, instructed by Choy Yung & Co., for the Appellant

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