

HONG KONG / JUDGMENT

HKSAR v. PHAM VAN HUNG

COURT

Court of Appeal

DECIDED

12 August 2011

CASE / FILE NUMBER

CACC14/2011

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bjbj artmann and Fok JJA in Court Date of Hearing and Judgment: 12 August 2011 J U D G M E N T Hon Yuen JA (giving the judgment of the Court): This is an appeal against sentence on a charge of remaining in Hong Kong without the authority of the Director of Immigration after having landed unlawfully in Hong Kong (in short, unlawful remaining) and a charge of breach of Deportation Order (in short, breach of DO). The Appellant is a Vietnamese national with no right of abode in Hong Kong. He pleaded guilty before Deputy District Judge Chainrai to both charges. He had been convicted on 5 previous occasions of similar offences. His record, prior to the present case, was as follows: Offence(s) Date of Conviction/ Deportation Sentence Unlawful remaining Deportation 7/1/2003 15/1/2004 6 mos Unlawful remaining Breach of DO Deportation 15/9/2004 15/9/2004 31/10/2005 18 mos

(18) 3 mos consec. = 21 mos Unlawful remaining Breach of DO Deportation 2/1/2006 2/1/2006 15/2/2007 15 mos

(15) 5 mos consec. = 20 mos Unlawful remaining Breach of DO Deportation 30/7/2007 30/7/2007 9/10/2008

(16) 4 mos consec. 16 mos. = 20 mos Unlawful remaining Breach of DO Deportation 25/3/2009 25/3/2009 9/6/2010 21 mos (12 mos) = 21 mos Less than 5 months after his last deportation, he was arrested by police officers performing an identity card check in Kowloon on 26 October 2010. As mentioned above, he pleaded guilty to both charges. In mitigation he told the judge that in 1998, he gave information in a case in Hong Kong against a person who was subsequently convicted. He said this person has since been released from prison, and has threatened his life unless he (the Appellant) paid him money which he was unable to do. The judge did not regard that as a mitigating factor of any weight. In her reasons for sentence,

(1) the judge referred to R v So Man King [1989] 1 HKLR 142 which held that for the unlawful remaining offence, a sentence of 15 months for a guilty plea should be used as a basic guideline;

- (2) having correctly regarded the offence of breach of DO as being more serious than that of unlawful remaining, the judge referred to HKSAR v Cortes Emily Bisoy [2002] 2 HKLRD 762 where a sentence of 18 months for a guilty plea was upheld for a first offence and it was held that 21 months could be justified for a second breach of DO offence. The judge also correctly considered that for repeat offenders, upward adjustments should be made in sentencing. The judge then imposed the following sentences:
- (1) 24 months for the unlawful remaining offence (deducting 1/3 from a starting point of 3 years, the maximum sentence for this offence) and
- (2) 28 months for the breach of DO offence (deleting 1/3 from a starting point of 3 years, the maximum sentence for this offence being 7 years). The judge then ordered 18 months of the sentence for the breach of DO offence to be served consecutively to the 24 months sentence for the unlawful remaining offence, making a total of 42 months. That meant that if the Applicant had not pleaded guilty, the total sentence would have been 63 months. About 2 weeks after the sentence was imposed, this Court (differently constituted) gave judgment in HKSAR v Pham Van Tuan CACC 272/2010. The Defendant in that case also pleaded guilty to unlawful remaining and breach of DO, and he also had a record of similar offences - 3 similar unlawful remaining offences and 1 similar breach of DO offence. The judge adopted a starting point of 30 months for unlawful remaining and a starting point of 31 months for breach of DO. Deducting 1/3 for the plea, he sentenced the Defendant to 20 months and 21 months respectively, and ordered 10 months of the breach of DO sentence to run consecutively to that of the unlawful remaining offence, making a total sentence of 30 months. There was also a possession of dangerous drugs offence which is immaterial here. Yeung JA (now Yeung V-P) giving the judgment of the court, held that the two offences were not separate and distinct. When a person subject to a Deportation Order arrives in Hong Kong, he commits both offences, and the underlying criminality was the same, namely the person's unlawful presence in Hong Kong. The Court held that the total sentence of 30 months was manifestly excessive, and that a total sentence of 23 months was adequate. This was arrived at by ordering only 3 months for the breach of DO offence to be served consecutively. In the light of Pham Van Tuan, counsel for the Respondent properly conceded that he could not oppose the present appeal. However he submitted that the present case was more serious than Pham Van Tuan as the Appellant had 5 previous convictions of unlawful remaining to Pham Van Tuan's 3, and 4 previous convictions of breach of DO to Pham Van Tuan's 1. We agree that this case is more serious than Pham Van Tuan but increases in the sentences should be considered in the light of the sentences imposed in that case. The maximum sentence of 36 months for unlawful remaining should only be imposed in the most egregious cases. We consider that the starting point for the unlawful remaining offence should be 30 months, reduced to 20 months for the plea. As for the more serious breach of DO offence, we consider the appropriate starting point to be 42 months, reduced to 28 months for the plea. Taking into account Pham Van Tuan, we consider that a total sentence of 28 months to be appropriate, both sentences to be served concurrently. The appeal is allowed, the District Judge's sentence is set aside, and there will be imposed in its

place a total sentence of 28 months. (MARIA YUEN) Justice of Appeal (M.J. HARTMANN) Justice of Appeal (JOSEPH FOK) Justice of Appeal The Appellant in person Mr Robert KY Lee, SADPP of Department of Justice, for the Respondent PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk h\3 h}eS h}eS h\3 h\3 h\3 h\3 h}eS h\3 h}eS h}eS h\3 h\3 h\3 h}eS h\3 h\3 h\3 hNO" h\3 h\3 h\3 h}eS h\3 h\3 ytNO" ytNO" gdNO" ytNO" gd}& gd}eS ytNO" hd\dUd\ h2D7 h\3 hkW4 h\3 h}eS h}eS h\3 h}eS h}eS h\3 h\3 h\3 h\3 h}eS) ytV yt3` yt3` yt3` yt3` h2D7 h2D7 h\3 hRiB yt3` yt3` gd|R h\3:E gd\3:E yt3` X<t< h\3:E h\3:E h\3:E h\3:E c\_O\_ 1udk h\3 ytNO" ytNO" ytNO" ytNO" ) !v ) ytV yt3` yt3` yt3` yt3` yt3` yt3` yt3` [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 T[XF64 E)` # R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> 9pVT H; < NbmyH jFen DJ~\$ ~x_Vf Nbmy & 6" ABC Final setup Flora-template-ABC-Final (fair)1.dot setup Microsoft Office Word Judiciary ABC Final Title Source Erica <b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{0FD50EED-C020-41CF-806F-19E2497F1CD3}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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