

HONG KONG / JUDGMENT

HKSAR v. PHAM VAN TUAN

COURT

Court of Appeal

DECIDED

18 February 2011

CASE / FILE NUMBER

CACC272/2010

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bjbj CACC 272/2010 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL criminal APPEAL NO. 272 OF 2010 (ON APPEAL FROM DCCC no. 608 of 2010)

BETWEEN hksar Respondent and pham van tuan Appellant

Before: Hon Yeung, Hartmann JJA & Lunn J Date of Hearing: 21 January 2011 Date of Judgment: 21 January 2011 Date of Handing Down Reasons for Judgment: 18 February 2011 reasons for judgment Hon Yeung JA (giving the reasons for judgment of the Court): On 21 January 2011, we allowed the appeal against sentence by Pham Van Tuan (the appellant) and reduced his total sentence from 36 months to 29 months. We indicated that we would hand down our reasons and this we now do. The Facts The appellant, an illegal immigrant from Vietnam, was intercepted on 25 March 2010 in Shamshuipo by police officers because he was acting in a furtive manner. When asked for his document of identity, the appellant said he had smuggled into Hong Kong from Vietnam and he did not have one. The police searched him and found from his jeans pocket 0.14 g of a mixture containing heroin. The appellant admitted that he was an illegal immigrant from Vietnam in breach of a deportation order and that he had entered Hong Kong illegally from Shenzhen on 24 March 2010 by hiding under a truck. He also said the packet of heroin was purchased for \$50. Subsequent investigation confirmed that the appellant was the subject of a Deportation Order issued on 9 March 2006 and that he had been deported from Hong Kong in October 2007 and May 2009. His criminal record showed that he had been convicted of breach of a deportation order in August 2007. The Charges and Sentence On 9 July 2010, the appellant pleaded guilty before Deputy Judge G Lam in the District Court to the 1st charge of possession of a dangerous drug, the 2nd charge of unlawfully remaining in Hong Kong and the 3rd charge of breach of a deportation order. The judge pointed out that the appellant had, on three previous occasions, been convicted of unlawfully remaining in Hong Kong and sentenced to the respective terms of 10 months, 15 months and 16 months respectively, yet those sentences had not deterred him. The judge took the view that a more substantial and meaningful deterrent sentence was

called for and he adopted a starting point of 30 months. The judge also considered it necessary to impose a deterrent sentence on the 3rd charges as the appellant had been sentenced to 18 months imprisonment previously for breach of a deportation order. The judge adopted a starting point 31.5 months. The judge emphasized that it was the appellant's first conviction of a drug-related offence and that the quantity of heroin involved was small. He adopted a starting point of 9 months. The judge reduced the starting points by one-third on account of the guilty pleas and sentenced the appellant to 6 months, 20 months and 21 months imprisonment respectively for the 1st, 2nd and 3rd charges. The judge ordered 10 months on the 3rd charge to run consecutively to that of the 2nd charge, making a total sentence of 30 months on those two charges. The judge further ordered the 6-month sentence on the 1st charge to run consecutively to the sentences on the 2nd and 3rd charges, making a total sentence of 36 months imprisonment. The Appellant's Background The appellant was 26 years old, divorced and he has a 6-year-old daughter. He was a farmer from North Vietnam and had been addicted to dangerous drugs. Apart from immigration offences, the appellant also had previous convictions involving dishonesty. It was suggested that the appellant came to Hong Kong in order to earn money to support his daughter. The Appeal The appellant appealed against sentence, having been granted leave by a single judge of the Court of Appeal. He had not put forward any specified ground in his written application, other than pointing out his wish to appeal against sentence. The appellant emphasized, in his oral submission, that his daughter was starting primary school and he wanted to be released earlier so that he could return to Vietnam to look after her. The Respondent's Position Mr David Leung for the respondent, pointed out that in *HKSAR v Hau Hoi-tung* (unreported CACC 39/2002), a sentence of 21 months imprisonment was endorsed when the defendant pleaded guilty to unlawful remaining for the third time. The suggestion was that the 20-month sentence, in view of the fact that it was the appellant's 4th conviction of the same offence, was a proper sentence. Mr Leung relied on *HKSAR v Lau Bing* (unreported CACC 138/2008) in which the Court of Appeal approved a starting point of 33 months imposed on the defendant after he was convicted of the offence of unlawfully remaining for the 4th time. Mr Leung also pointed out that in *HKSAR v Cortez Emily Bisoy* [2002] 2 HKLRD 762, it was held that a sentence of 21 months imprisonment could be justified for a second breach of a deportation order. Mr Andrew Cheng (Mr Leung's predecessor), in his earlier written submission dated 4 November 2010, also referred to *HKSAR v Mohammad Shehzad* (unreported HCMA 793/2007), in which the court considered that a sentence of 21 months imprisonment after a guilty plea appropriate for a second breach of a deportation order. Mr Leung accepted that the two immigration offences arose out of the same facts, but argued that the sentences for the two offences should run consecutively, or at least partially consecutively, otherwise the service of deportation orders is rendered an empty exercise and the intention of the legislature and executive rendered nugatory, a sentiment expressed by Deputy High Court Judge McMahon (as he then was) in *HKSAR v Do Thi Hue* (unreported HCMA 873/2001). Mr Leung's position was slightly different from that of Mr Cheng who argued, in his earlier written submission, that as the two immigration offences were separate and distinct, the judge was correct to impose partially consecutive sentences. Mr Leung further argued that the drug offence, as a separate and distinct offence, should carry a consecutive sentence. Mr Leung accepted that the total sentence imposed on the appellant was heavy, but argued that it was not

manifestly excessive to justify interference by this court. Discussion The individual sentence on each of the three charges is not lenient, but cannot be described as manifestly excessive. However, we have to bear in mind the question of totality. For the two immigration offences, the total sentence of 30 months represents a starting point of 45 months imprisonment. The total sentence for the three charges of 36 months represents a starting point of 54 months, which is in our view, manifestly excessive. The two immigration offences were not separate and distinct. The position was carefully analyzed in *Do Thi Hue* (supra) and we do not find it necessary to repeat the exercise. Because of the existence of the deportation order, when the appellant entered Hong Kong illegally, he would have committed both offences of unlawfully remaining and breach of a deportation order. The underlying criminality for the two immigration offences was the same, namely the appellant's unlawful presence in Hong Kong. The offence of unlawfully remaining in Hong Kong of course would be made more serious when there was a deportation order. However such aggravating factor did not justify an additional 10 months imprisonment, particularly when the appellant was already sentenced to 20 months imprisonment for unlawfully remaining on a plea of guilty. The total sentence of 30 months imprisonment for the two immigration offences is manifestly excessive. We are satisfied that an additional sentence of 3 month, making a total sentence of 23 months imprisonment, is adequate. We therefore allowed the appeal against sentence by ordering only three months on the 3rd charge to run consecutively to the 20 months on the 2nd charge, making a total sentence of 23 months on those two charges. The 6-month sentence on the 1st charge had to run consecutively to the 23 months. The total sentence on the appellant was therefore reduced from 36 months to 29 months. (W Yeung) Justice of Appeal (M.J. Hartmann) Judge of the Court of First Instance (Michael Lunn) Judge of the Court of First Instance Mr David Leung, SADPP of the Department of Justice for the Respondent. Appellant: In Person. PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N 1udk hE[% gDE[% hH)B hqLF h=QP h=QP }kb[h6:A h6:A h6:A h6:A h6:A h6:A h6:A h6:A 1udk 4 #v 4 :V [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/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"/> 1Vt^ H; < ABC Final setup A-CACC format 2.dotx setup Microsoft Office Word Judiciary ABC Final Title Source Erica Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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