

HONG KONG / JUDGMENT

HKSAR v. RAHMAN MD MOTALEB

[2022] HKCA 922**COURT**

Court of Appeal

DECIDED

6 July 2022

CASE / FILE NUMBER

CACC235/2021

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CACC 235/2021

**[2022] HKCA 922 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CRIMINAL APPEAL NO 235 OF 2022 (ON APPEAL FROM
DCCC NO 111 OF 2021)**

BETWEEN HKSAR Respondent and RAHMAN MD MOTALEB Applicant

Before: Hon M Poon JA in Court Date of Judgment: 6 July 2022

JUDGMENT

-----**Introduction**

The applicant pleaded guilty to one count of trafficking in dangerous drugs, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134 and was sentenced to 46 months' imprisonment on 6 October 2021 by HH Judge Isaac Tam ("the judge"). On 20 October 2021 the applicant filed a Notice of application for leave to appeal against his sentence. Facts admitted by the applicant The applicant, a Form 8 recognizance holder, was stopped and searched by the police at about 5:20 pm in Tsim Sha Tsui and was found to be in possession of 4 plastic bags of herbal cannabis and 7 small plastic bags of methamphetamine hydrochloride ("ice"). He admitted that he was delivering them to others. The drugs, upon analysis, were found to be 23.97 grammes of cannabis in herbal form and 4.57 grammes of a crystalline solid containing 4.49 grammes of ice. The estimated market value of all the drugs was \$7,609.50. Mitigation The applicant was aged 33 at the time of sentence and had been in Hong Kong for 10 years. He lived

on social welfare with some additional allowance sent by a brother in Bangladesh. This was the first time he transgressed the law. He expressed remorse for having committed the present offence. Reasons for sentence The judge noted that the applicant trafficked in two different types of drugs, which are disparate in terms of both quantity and potency. He adopted 3 months and 57.5 months for the herbal cannabis and ice respectively. Applying the “individual approach” and taking into account the trafficking in a cocktail of drugs as an aggravating feature, he added the two individual starting points together and reach a global starting point of 60.5 months. For the applicant’s Form 8 status, he further enhanced the starting point for 8.5 months to 69 months as the notional sentence after trial. Given the one-third discount for plea, the applicant was sentenced to 46 months’ imprisonment. Grounds of appeal against sentence The applicant did not put forward any grounds of appeal in his Form XI. By a written submission dated 9 May 2022, he advanced the following grounds: The judge erred in enhancing 8.5 months for his Form 8 status; The judge erred in taking the individual approach in sentencing the two different types of drugs by simply adding the respective starting point together, when he should have simply ignored the small amount of herbal cannabis in sentencing; The applicant also referred to various other District Court cases for comparison purpose to submit that the overall starting point was manifestly excessive: HKSAR v Biplob S M; HKSAR v Intan Dwi Nopitasari; HKSAR v Farhan Aslam; HKSAR v Haider Sheikh. By a letter dated 23 June 2022, the applicant further urged the court for a reduction in sentence based on his family circumstances in Bangladesh to enable him to go home as soon as possible. Respondent’s submission The respondent submits that whether to adopt the individual or combined approach is entirely a matter of discretion of the judge, and even if the latter approach was to be adopted, an upward adjustment of 3 months from the 57.5 months in respect of ice taking into account the presence of cocktail drugs and the 23.97 grammes of herbal cannabis cannot be criticized. Lastly, although the enhancement of 8.5 months for the applicant’s Form 8 status could be said to be on the high side, it is still within range: HKSAR v Ali Saif, HKSAR v Mohabub Zaman Mithu, HKSAR v Chaudry Mohammad Asif, HKSAR v Don Amarasinghalage Don Chandra Janaka (enhancement ranges from 6 – 9 months). In the circumstances, it is submitted that there is no merit in the present appeal against sentence. Applicant’s response to respondent’s submission In response to the cases relied on by the respondent, the applicant submits that in Chaudhry Mohammad Asif the judge did not take into account the 105 grammes of cannabis in sentencing. In that case and the case of Mohabub Zaman Mithu, enhancement of 7.5 months and 6 months were applied respectively for the applicants’ Form 8 status but both cases involved higher amounts of drugs. Lastly, he submits that the amount of drugs involved in Don Amarasinghalage Don Chandra Janaka is higher than the present case (25.91 grammes of ice) but the applicant was granted leave to appeal. Discussion This appeal raises the following issues: Whether the judge is correct to adopt 57.5 months for 4.49 grammes of ice; Whether the judge erred in adopting the individual approach and adding on 3 months for the herbal cannabis and cocktail drugs; Whether the enhancement of 8.5 months for the applicant’s Form 8 status is on the high side; Whether the overall starting point of 69 months is excessive or wrong in principle. Each of these issues is reasonably arguable and I grant leave with appeal aid certificate. (Maggie Poon) Justice of Appeal Mr Raymond Chan, PP of the Department of Justice, for the respondent The applicant acting in person

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