

HONG KONG / JUDGMENT

HKSAR v. RAMOS, MARLON P

COURT

Court of First Instance

DECIDED

19 October 2015

CASE / FILE NUMBER

HCMA449/2015

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj HCMA 449/2015 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO 449 OF 2015 (ON APPEAL FROM STCC 1980 OF 2015)

BETWEEN HKSAR Respondent and RAMOS, MARLON P Appellant

Before: Deputy High Court Judge S. D Almada Remedios in Court Date of Hearing: 21 September 2015 Date of Judgment: 19 October 2015

J U D G M E N T

The appellant was charged with one count of breach of condition of stay, contrary to section 41 of the Immigration Ordinance, Cap 115. On 30 June 2015, he was convicted on his own plea and was sentenced to a term of 12 months imprisonment. He now appeals against sentence.

Facts

The appellant lawfully entered Hong Kong on 18 December 1994 and was permitted to remain as a visitor until 1 January 1995. He however failed to leave Hong Kong after 1 January

1995. On 5 January 2015 he surrendered himself to the Immigration Department. By that time he had overstayed for 20 years. Magistrate s reasons for sentence The Principal Magistrate (the magistrate) referred to a number of cases and highlighted the serious problems posed by the prevalence of overstaying and the need for deterrence for a long period of overstaying. He considered the period of overstaying to be the principal factor in sentence. The magistrate noted that this was the longest period of overstaying experienced by the court, a court which has been designated to dispose of most of the immigration cases in the

territory. The magistrate disbelieved the appellant's reason that he overstayed in Hong Kong as his life was in danger in the Philippines because he was involved in a land dispute. He also had reservations about the claims the appellant advanced in regard to how he had managed to support himself and his family of six in the Philippines while living in Hong Kong. The magistrate found that the length of overstaying fell within the highest ban of the offence and adopted the maximum term of 2 years as the starting point. He noted that there was no good reason advanced by the appellant for his over stay. In sentencing, the magistrate adopted a starting point of 24 months, gave 8 months discount for the guilty plea and then gave a further reduction of 4 months for the appellant's surrender to the authorities. The appellant was consequently sentenced to 12 months imprisonment.

Grounds of appeal The appellant, appearing in person, submitted various grounds of appeal via a letter to the court. No complaint was made about the sentence imposed of 12 months. Essentially the main grounds of appeal was that the sentence should be further reduced to take into account time spent or time which should have been spent in administrative detention and humanitarian grounds. In this letter, he cited mainly personal circumstances pertaining to family and health. He pleaded for an early release to allow him to return home to the Philippines by Christmas 2015 as there was an immense desire for him to be present at a grand family reunion. He explained that the danger to his life has since lapsed. The land dispute was resolved in favour of his and his family and as a result he would inherit a share in the property. He would repay his family's financial support to him and his family over the last 20 years by dividing his share in the property with them. The appellant requested that his period of 18 days spent in administrative detention be deducted from his sentence as his detention was in connection with the present offence. After the appellant's surrender to the Immigration Department on 5 January 2015 he was immediately put under administrative detention until 23 January 2015 (18 days administrative detention). As he had applied for a non-refoulement claim he was released from administrative detention and put on recognizance. Apart from the 18 days of administrative detention he sought for a further period of about 6 months to be deducted from his sentence for the time he should have remained in custody from the date of his surrender until his appearance in court when he entered his plea of guilty to the charge. The appellant submitted that if he was detained continuously since his date of surrender on 5 January 2015 until 30 June 2015 he would have been in detention for 6 months. The 6 months would have been in connection with the present offence and thus a reduction should have been made. In justifying why 6 months, which notably he had not served, should be deducted from the present term the defendant claimed he had never intended to apply for a non-refoulement claim. He mistakenly made the claim as he was wrongly advised to apply for non-refoulement by an interpreter at the Immigration Department as he was told that while he was awaiting the charge to be brought against him, he could be granted bail. When he realised and understood the meaning of the non-refoulement claim he immediately withdrew his claim on 29 May 2015. As he was wrongly advised and incorrectly released from detention pending this charge he is making a merciful plea for the court to deduct 6 months from the sentence. Discussion Reduction of a further 6

months from sentence the appellant should have remained in detention but was not. Whether the appellant's non-refoulement claim was rightly or mistakenly made is irrelevant to this appeal. It is admitted by the appellant that such a claim was made. It is also clear from the appellant's submission that he knew and understood that he was making a non-refoulement claim and upon making the claim he would not be detained. The appellant's submission that a reduction of a term of 6 months be deducted from the sentence as he should have been detained for that period is wholly unrealistic and fanciful. This ground is without merit, no deduction can be given for a period that the appellant has not spent in detention. Reduction of 18 days from the sentence for time spent by the appellant in administrative custody. The appellant seeks for the 18 days spent in administrative detention to be deducted from his term of imprisonment. In my previous judgment of *HKSAR v Khan Aftab* HCMA 34/2015, 2 March 2015, I dealt with the power to deduct a period spent in detention from a sentence under s67A(1A) of the Criminal Procedure Ordinance and the court's discretion to reduce time spent in custody if not under s67A(1A). In the recent judgment of *HKSAR v Eftakhar Beg* HCMA 262/2015 Zervos J gave further detailed consideration to the court's inherent discretion and its powers granted under s67A(1A) to deduct time spent by a defendant in custody and administrative detention. In reference to s67A(1A) at paragraph 31 he stated :- It appears the Magistrate may not have relied upon subsection 67A(1A) to reduce the sentence she imposed by 58 days. Under this subsection, a sentence of imprisonment imposed by a court can be reduced by the period during which a person was in custody in connection with the offence immediately prior to his first appearance in court. This specifically includes a period in custody under Part VII of the Immigration Ordinance. There are the dual requirements under this section on which a court needs to be satisfied before it can reduce a sentence by a period in custody. First, that the period in custody was in connection with the offence on which the defendant was sentenced, and secondly, that the period in custody was immediately prior to his first appearance in court for such offence. This highlights the need to satisfy both nexus and proximity of the period in custody with the sentence to be imposed in relation to the offence that the court is then concerned with. In the present case it appears that the appellant satisfies the first requirement, it is arguable if he has satisfied the second requirement in that his period in detention was some 4 months prior to his first appearance in court for such an offence and thus was not immediately prior to. As mentioned in *Khan Aftab* the courts have a discretion and it is not automatic, to give credit to time spent in custody by a defendant. The issue in the present case is if I should nevertheless exercise my discretion and deduct the period of administrative deduction see *Eftakhar Beg*. In the present case the prosecution has accepted that the appellant surrendered to the Immigration Department on the basis that he had over-stayed. He was detained for 18 days as a result. I am of the view that as his detention was in connection with the present offence, I should exercise my discretion such that the 18 days spent in administrative detention be reduced from the custodial sentence imposed to address any injustice or unfairness to the defendant. Whether the appellant was supported by his family whilst overstaying in Hong Kong The magistrate had great reservations about the

appellant remaining in Hong Kong without financially contributing to his 5 children and wife in the Philippines during his 20 years in Hong Kong. In his letter at this hearing he claimed that his siblings have been supporting him and his family financially for the last 20 years. The appellant remained in Hong Kong between the ages of 39-59. Those years cover some of the prime working years of one's life. I am not persuaded by his unsupported claim that he and his family were financially supported by his siblings and parents. There is no tariff for overstaying offences. The sentence on each case turns on its own facts and circumstances. The maximum sentence is a fine at level 5 to imprisonment for 2 years. In considering sentence the magistrate referred to the following cases and said 4. The prevalence of overstaying has become a social concern as it posed serious problems for Hong Kong in terms of financial resources, security and many other factors : HKSAR v. Gu Jin Gei HKMA 195/02. And deterrent sentence for overstaying for a long period is appropriate: HKSAR v. Chan Chun Mui HKMA 1194/98. Authorities show that the period of overstaying constitutes a principal factor in sentence : 6 months imprisonment after plea for overstaying 4 years, R. v. Tseung Sau Tao HCMA 955/92; 8 months imprisonment followed a guilty plea for a 5-year overstay, Gu Jin Gei, see supra; 8 months imprisonment after plea for overstaying 10 years, HKSAR v. Pantilanan Marivita Rosete MA383/2010. Mr David Chan ADPP for the respondent referred to the case of HKSAR v Labena Abitona HCMA 466/2012. The period of overstaying was 13 years. The applicant was sentenced to a term of 10 months imprisonment after a plea of guilty. Tong J in dismissing the appeal said

4. In considering the sentence, the magistrate stated that the maximum sentence for such offence was 2 years imprisonment and he referred to Macrae's judgment in HKSAR v Ping Yu, Josie Eblogen, HCMA634/2011 stating that: It has been made clear by the Court of Appeal in HKSAR v Tiongson Patricia Manalad, CACC268/2001 that there is no tariff for these offences. Sentences can range from a fine to 2 years imprisonment in appropriate cases. The principal considerations are the length of the period of overstay and whether any employment has been undertaken during such period... [own emphasis] The principal consideration was the length of the appellant's period of overstay and whether he had undertaken employment. Was the magistrate justified in taking the maximum term as the starting point The experienced magistrate noted that the length of overstay was the longest that he had encountered in his sitting and that sentence should be at the upper end of the spectrum. In view of the length of the appellant's overstay he adopted the maximum term of 2 years imprisonment as the starting point. The maximum sentence of an offence is summarised in Cross and Cheung. The gravity of a crime is to be gauged, at least in part, by the penalty prescribed for it. In R v Wong On-lin [1995] 1 HKC 659, 661 Barnett J said that : - The seriousness of the offence is reflected in the maximum sentence which the court may pass In HKSAR v A male known as Boma Amoso [2012] 1 HKC 504, 513 Stock VP said : - The first factor to which any sentencing court should in this context have regard is the maximum penalty available. The maximum penalty is in general reserved for the most serious offence of its type: Attorney General v Cheung Kai-man, Dominic [1987] 4 HKLR 788, 793. The maximum penalty is deployed in the most truly exceptional cases, which are so serious that

it is difficult to imagine a yet more serious example of the offence R v Pinto [2006] 2 Cr App R (S) 579,583. In HKSAR v Tran Van Ha HCMA 1000/2002 unreported, it was said that when the maximum sentence is low, it will more readily be that the facts of a particularly bad case are regarded as warranting the maximum statutory sentence. The experienced magistrate found that the length of over staying was the longest he had seen. 20 years of overstaying is exceptionally long on any interpretation in relation to a period of overstaying. It is difficult to accept the reason advanced by the appellant for his overstaying and highly inconceivable that for that extensive time he did not take up any employment here. In the circumstances of the present case the magistrate was correct to consider that that the case fell within the highest band of the offence. He was justified in adopting the maximum sentence of 24 months as the starting point. Reduction for the appellant's surrender In considering an appropriate reduction for the appellant's surrender Mr Chan for the respondent referred to the case of HKSAR v Ping-AY, Josie Eblogen HCMA 634/2011 Macrae J (as he then was) said :- I am doubtful whether surrendering to the authorities should have quite the impact on sentence which it might have with other criminal offences. After all, unless an overstayer does surrender, he or she cannot lawfully leave the territory and will inevitably be picked up at an Immigration check point when trying to return home. In HKSAR v Yeung Sam Yuen HCMA 596/2011, P Li DHCJ (as he then was) expressed reservation on the magistrate's approach of giving a reduction of 2 months imprisonment for surrendering to the authorities. Citing HKSAR v Yuen Kwok Kee CACC336/2005 as an example, the learned deputy judge said that where the surrender was not entirely self-initiated but induced by a lack of choice, it may not amount to a good reason for reducing the sentence. In that case, the appellant had overstayed in Hong Kong by 11 years and 10 months in order to look after her two grandchildren. In observing that but for the appellant's voluntary surrender, the case may never have come before the court, the learned deputy judge exercised his discretion and reduced the sentence by 1 month for the surrender. In HKSAR v Tagulao Marcelita A HCMA 528/2002, the period of overstaying was 8 years and 3 months. In reducing the 8 months imprisonment to 6 months, the court gave a discount of 2 months imprisonment to the appellant for surrendering to the Immigration Service. The appellant surrendered as he had the intention to return home to the Philippines. Although the usual discount for the guilty plea of one-third was properly given, the further reduction of 4 months for the appellant's surrender to the Immigration Department was in my view generous. His plea on humanitarian grounds to be released earlier so that he could return home to celebrate Christmas with his family and to attend the annual gatherings for the birthdays and wedding anniversary of his parents is unmeritorious and are not factors to further reduce his sentence. The appellant's ill-health as a result of high blood pressure and hyper-tension is being treated by the correctional facilities and they will continue to provide care and treatment to the appellant. They too are not grounds for further reducing his term of imprisonment.

Conclusion

Although I am of the view that 18 days of his administrative detention should be deducted, I make no deduction of this time as the magistrate was overly generous in his reduction for the appellant's surrender and it shall be subsumed in the 4 months given for his surrender. I am satisfied that in the circumstances of the present case, the sentence was appropriate and the appeal against sentence is dismissed. (S. D Almada Remedios) Deputy High Court Judge Mr David Chan, ADPP, of the Department of Justice, for the respondent The appellant appeared in person Mr Andrew MA Paragraph 40 At paragraph 4 of the Reasons for Sentence At paragraph 4 Sentencing in Hong Kong p.314 At paragraph 9 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 O P Q R S T U V 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 O P Q R S T U V h~Q0 h~Q0 h7Qw h7%% gddig h CN h CN h\{Y h '3 h5'@ h3>' gdU hC|\$ hC|\$ hC|\$ hv0> h3>' h3>' h3>' h3>' h3>' hBe[[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"/>> ,wC= GEKD ysC[,wC= ysC[setup hcma.dot Judiciary Microsoft Office Word Judiciary Hong Kong Title <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="{B58FFD75-8400-4C72-B050-B0DF5387C37B}" 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

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=105762

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-ramos-marlon-p-2015>

Prepared on 28 October 2026 · Esheria