

HONG KONG / JUDGMENT

HKSAR v. RWAKIBALE AHEEBWA PETER**[2018] HKCA 920**

COURT

Court of Appeal

DECIDED

4 December 2018

CASE / FILE NUMBER

CACC171/2017

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bjbj CACC 171/2017

[2018] HKCA 920 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CRIMINAL APPEAL NO 171 OF 2017 (ON APPEAL FROM
HCCC NO 110 OF 2016)

BETWEEN HKSAR Respondent and RWAKIBALE Aheebwa Peter Applicant

Before: Hon McWalters and Zervos JJA in Court Date of Hearing: 4 December 2018 Date of
Judgment: 4 December 2018

J U D G M E N T

Hon Zervos JA (giving the Judgment of the Court): The applicant applies for leave to appeal against his sentence of 14 years and 8 months imprisonment imposed on him by Anthea Pang J on 19 May 2017, following his conviction on his own plea to trafficking in a dangerous drug, namely 1.36 kilogrammes of a mixture containing 727 grammes of heroin hydrochloride. The appeal against sentence On 8 June 2017, the applicant filed a notice of application for leave to appeal against sentence, Form XI, in which he complains that the sentence imposed on him was manifestly unfair and excessive and that the judge was wrong to apply the sentencing guideline cases of HKSAR v Lau Tak Ming [1990] HKLR 370 and HKSAR v Abdallah [2009] 2 HKLR 437. He also complains about the legitimacy of such guideline cases and the lack of consideration of his personal circumstances and future prospects of rehabilitation by the judge when she sentenced him. The hearing of this application was initially fixed to take place on 15 November 2017 but by letter dated 10 October 2017 the applicant wrote to the court, requesting that it be adjourned

because he was not physically or mentally well. There were further letters to the court in which the applicant mentioned his efforts in obtaining legal assistance and requested more time to prepare his case. The brief facts giving rise to the offence can be stated as follows. On 14 September 2015, the applicant was detained for clearance when he arrived at the Shenzhen Bay Control Point in a private vehicle, prior to leaving Hong Kong. In the vehicle, were the driver and six passengers, of which the applicant was one. A routine inspection of the vehicle was conducted and the applicant was selected for a personal search. He was found to be wearing six pairs of underpants and after removal of the fourth, there was a black plastic bag containing three more layers of plastic bags. Inside the plastic bags were 82 packets containing a total of 727 grammes of heroin narcotic with a retail value of about \$1.07 million. After he was arrested and cautioned, the applicant admitted that he had received the package at Hong Kong International airport from the brother of to deliver for which he would receive US \$2500 as a reward. He said that he suspected that it was not a good thing. In a subsequent video recorded interview, he said that he was passing through Hong Kong on his way to Guangzhou to do some textile business; that he had been given the package after he had passed both Immigration and Customs at the airport by the brother of; that he was told to make sure that the police did not get him and to place the package on his body, which he did by placing it between pairs of underpants; that he was told he would be paid when he handed the package over, and although he thought it was good money, he was not clear on the amount; and that this was the first time that he had done such a thing. In the agreed summary of facts, it was stated that the applicant admitted and accepted that he was trafficking in the seized drugs. The applicant's mitigation The applicant is a national from Uganda and was 41 years old at the time of sentence. He is married with four daughters. He attained lower secondary school education and was a businessman in his home country prior to the offence. It was submitted in mitigation that he had led a responsible life before the present offence and that out of stupidity he got involved as a courier of the drugs. It was noted that he deeply regretted his involvement in the offence and that he was actively participating in Father John Wotherspoon's anti-drug campaign and in the religious program available in prison. The applicant's sentence The judge in sentencing the applicant applied the guidelines for trafficking in heroin as set out in Lau Tak Ming and Abdallah and adopted a starting point of 20 years and 6 months imprisonment. No criticism can be levelled against the judge for the starting point that she adopted as it is strictly in accordance with the sentencing guidelines. The judge then enhanced the sentence by 1 year and 6 months imprisonment for the international element as reflected by the applicant exporting the drugs from Hong Kong to mainland China. This was also in accordance with the sentencing guidelines and cannot be criticised. See HKSAR v Chung Ping Kun, CACC 85/2014, 2 July 2014, unreported. This brought the final starting point to 22 years imprisonment which the judge reduced by one third for the applicant's guilty plea to 14 years and 8 months imprisonment. The judge noted the applicant's personal circumstances, and the difficulties that his family and young children would face as a consequence of him having to serve a long term of imprisonment. However, she explained that this was not a mitigating factor which would entitle him to a further reduction to his sentence because of the seriousness of the offence. She was correct to do so. The judge also noted that the applicant had assisted in Father Wotherspoon's anti-drug campaign but took the view that this

was a reflection of his genuine remorse and therefore an element that was subsumed in the one third discount for his guilty plea. On this point, we are of the view that the judge had erred. The basis of appeal Prior to the hearing, the applicant filed with the Court under cover of letter dated 1 November 2018, an affirmation of the same date, consisting of 11 pages, in which he makes detailed submissions in relation to his sentence, attaching a document dated 19 May 2017 entitled Court Plea , consisting of 17 pages, and another document dated 1 July 2018 entitled Apology , consisting of 2 pages. During the applicant s mitigation, it was indicated through his counsel that he wished to address the judge directly. He was told that if he wished to do so, he should put his comments in writing and submit them to the judge. He thereupon terminated the services of his counsel and proceeded to act in person. He then addressed the judge who reminded him on several occasions to keep his comments to matters relative to his mitigation that were supplemental to what had already been put by his counsel. He now complains that he was not given the opportunity to present to the judge the matters that he lists in the document entitled Court Plea . In this document, he presents a prolix and meandering discourse on the drug trade and the sentencing regime of drug traffickers in Hong Kong, in order to show that it operates unfairly on a person like himself, who because of his desperate personal circumstances agreed to act as a drug courier. He discusses in detail the circumstances of his arrest and what he has gone through since then. He talks of the impact that this case has had on him, and more particularly, on his wife and children. He pleads for a lenient sentence, and for the Court to show him mercy. The document entitled Apology is addressed to the Chief Executive. In this document, he acknowledges his wrongdoing which he explains he committed because of the dire social and economic circumstances of his home country. He describes his previous good character and personal circumstances, and the impact that his imprisonment will have on his family. He apologises for having broken the law and being immoral, and that had he known of the severe levels of punishment for this crime, it would have resolutely repelled him from getting involved. He declares his commitment to dissuading others from following his path and becoming involved in the drug trade. He expresses his deep regret for what he had done and asks for mercy. The personal circumstances of the applicant that led him to commit this crime and the consequences of it are very tragic, but we regret to say that this is not the first time we have heard them, and no doubt it will not be the last. The sentencing guidelines for drug trafficking have stressed that the gravity of the crime is such that it may result in otherwise mitigating factors having little, if any, weight. It was explained by this Court in Abdallah at paragraph 32 that because of the grievousness of the offence, a description that is born of the recognition of the dreadful misery caused to victims and their families and the serious harm to society generally , meaningful mitigation, apart from a plea of guilty, is rarely available. The Court went on to emphasise: the message must consistently be delivered, even to the vulnerable such as the relatively young and those who say they need money whether for themselves and for the benefit of family members who are ill, that the vast majority of vulnerable people do not succumb to pressure and do not resolve their problems by engaging in this illicit and dreadful trade. In HKSAR v Daresa Mariam Guma, CACC 155/2012, 5 October 2012, unreported, McWalters JA explained that it is a notorious fact that persons from an impoverished background in underdeveloped countries are frequently employed by drug traffickers as drug couriers and drug mules to transport drugs from one

country to another, and regrettably, the persons most readily tempted by this kind of crime are persons who come from desperate circumstances and so are more likely to be willing to assume the risks attendant upon international drug trafficking. He went on to emphasise that it is for this very reason that the courts will not be swayed by the plight of the trafficker. The applicant complains about the sentencing guidelines for drug trafficking and their application to his case. The sentencing guidelines for drug trafficking were recently challenged in relation to their application to drug mules and drug couriers in *HKSAR v Kilima Abubakar Abbas*, CACC 143/2016, 18 September 2018, unreported, [2018] HKCA

602. The Court in that case concluded that no foundation had been laid, or no case had been made out, to follow the developments in other common law jurisdictions where the role of the offender would be a factor to be taken into consideration when sentencing for the equivalent offence of trafficking in a dangerous drug. The sentencing guidelines for trafficking in heroin were correctly applied in the applicant's case and there is no substance to this complaint. The applicant also complains about the enhancement to his sentence for the international element. He argues that this is tantamount to punishing him twice for the same offence. We disagree. It is a recognised aggravation to the offence that should be afforded an appropriate level of enhancement to the sentence. See *Abdallah* at paragraph 42. The applicant's participation in Father Wotherspoon's campaign. In the judgment of the majority in *Kilima*, Macrae VP acknowledged the benefit to the public interest of the participation of defendants in Father Wotherspoon's anti-drug campaign and the sentencing court's discretion to make a token discount for it. He said:
91. This court, comprising both of my two colleagues on this appeal, has already twice said that post-sentence participation in Father Wotherspoon's campaign is a matter best left to the Executive. I consider that is right for the reasons they have given and that this court should adhere to its earlier decisions on this matter. Nevertheless, I would still permit sentencing judges a discretion to allow a token discount for this factor. Although such contributions to Father Wotherspoon campaign do not amount to either positive good character nor are they readily borne of remorse, it seems to me that it may still be in the public interest to encourage a prisoner's efforts in this regard. That assessment must be in the absolute discretion of the court, an exercise with which this court will not lightly interfere, but I cannot for myself envisage any circumstances which might warrant a deduction of more than 3 months for this factor. The judge in the present case was wrong to take the view that participation by a defendant in Father Wotherspoon's anti-drug campaign was a matter that reflected his or her genuine remorse, and was therefore subsumed in the one third discount that would normally be given to a defendant for having acknowledged his or her wrongdoing by pleading guilty. It was open to the judge to either leave the matter to the Executive to later resolve or exercise her sentencing discretion by making a token discount to the applicant's sentence, if any. Mr Jones Tsui, for the respondent, argues that the judge was entitled not to exercise her sentencing discretion to give a further discount for the applicant's participation in Father Wotherspoon's anti-drug campaign. He referred to *HKSAR v Araque Escobar Brigida Maria*, CACC 364/2018 [2018] HKCA 658 where this Court upheld a sentencing judge's

decision to leave it for the applicant to take up with the Executive at an appropriate time his participation in Father Wotherspoon s anti-drug campaign and his provision of information. This case was not apposite to the present case for the judge in this instance disallowed any deduction to the applicant s sentence that might otherwise have been available to him. It is clear that the judge was satisfied that the applicant had actively participated in Father Wotherspoon s anti-drug campaign which had been supported by a letter from Father Wotherspoon who confirmed the applicant s contribution to his anti-drug campaign, and by copies of images of websites where the applicant had placed a letter from himself, warning others of the perils of being involved in drug trafficking. We asked the applicant if he wished us to deal with this matter or leave it for him to take up with the Executive. He requested that we deal with it. We are satisfied that the applicant is entitled to a token discount, as suggested by Macrae VP in Kilima, of 3 months to his sentence.

Conclusion

For the reasons that we have given, we grant him leave to appeal against his sentence, and treating the leave application as the hearing of his appeal, we reduce his sentence by 3 months to 14 years and 5 months imprisonment. (Ian McWalters) (Kevin Zervos) Justice of Appeal Justice of Appeal Mr Jones Tsui, SPP of the Department of Justice, for the respondent The applicant appears in person The other judgment of the majority was delivered by Lunn VP who, at paragraph 65 of his judgment, said that participation in Father Wotherspoon s compaign is to be regarded as conduct of a good or meritorious nature after the commission of the offence. Certainly it is to be encouraged. 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 gdi< gdIe gd) gd) gd_j hRQ8 haG9 hw{v {w{s{o{w{owok h0*W h0*W hPW. h0*W gdCF gdj\$ gd'@ gdCF hKxQ hNzd hPW. h?I h iS h/I h/I h/I h/I gd@? gdf% gdf(: gdCF ht5(ht5(hf.N hf.N hf.N hwnY gdXv gd@? ~unj [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O} Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /EE\} 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"/> #lGF"lG setup hca.dot Windows User Microsoft Office Word Judiciary Hong Kong Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><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="{A874AA6A-3FA7-486D-91DE-C45DACD049BE}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/

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