

HONG KONG / JUDGMENT

HKSAR v. SOMPHAN KOTCHAPHAN

COURT

Court of First Instance

DECIDED

17 August 2007

CASE / FILE NUMBER

HCMA441/2007

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bjbj HCMA441/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 441 OF 2007 (ON APPEAL FROM ESCC 5323 OF 2006)

BETWEEN HKSAR Respondent and SOMPHAN KOTCHAPHAN Appellant

Before : Hon Nguyen J in Court Date of Hearing : 10 August 2007 Date of Judgment : 17 August 2007

J U D G M E N T

AUTONUMOUT On 28 March 2007 the appellant pleaded guilty before Mr Joseph To sitting in Eastern Magistrates Court to two offences : trafficking in a dangerous drug; and

- (2) possession of equipment fit and intended for the inhalation of dangerous drug. She was sentenced to 33 months imprisonment on the 1st charge and two months on the 2nd charge, to be served concurrently. She now appeals against the sentence imposed on the 1st charge. AUTONUMOUT The particulars of the 1st charge alleged that she trafficked in dangerous drugs namely 3.49 grammes of a mixture containing 2.14 grammes of heroin hydrochloride, 3.2 grammes of crystalline solid containing 3.18 grammes of methamphetamine hydrochloride and 16.51 grammes of cannabis, in herbal form. AUTONUMOUT In respect of the ice, the magistrate adopted a starting point of 42 months imprisonment. In respect of the heroin and the cannabis, the magistrate adopted a starting point of 12 months imprisonment. Adding the two starting points together, the magistrate arrived at a global starting point of 54 months. The magistrate was aware that that starting point was well in excess of the jurisdictional limit of magistrates but relying on the case of HKSAR v. Lui Cho Hung, CACC216/2000, the magistrate was of the view that he was entitled to adopt a starting

point in excess of his jurisdictional limit. AUTONUMOUT Allowing the appellant a one-third discount for her plea of guilty, the magistrate reduced the sentence to one of 36 months. Recognising that 36 months was the maximum penalty that he could have imposed, and giving the appellant credit for her plea of guilty, the magistrate reduced the sentence by a further three months thereby bringing it to 33 months imprisonment. Ground of appeal AUTONUMOUT Miss Lee appearing for the appellant relies on section 4(3) of the Dangerous Drugs Ordinance, Cap. 134 (the Ordinance) which states that any person who contravenes the provision prohibiting trafficking in a dangerous drug shall be liable on summary conviction to a fine of \$500,000 and to imprisonment for three years. AUTONUMOUT Three years is the maximum penalty provided for this offence by the legislature. In my view, the magistrate was in error to have adopted a starting point of 54 months which was well in excess of the maximum penalty provided by the Ordinance. As Miss Lee for the appellant submitted in Court, if the starting point of 54 months was permissible in law, does it mean that if the appellant had pleaded not guilty and was convicted after trial (thereby taking away any reasons for a discount) she would have been sentenced to 54 months imprisonment? Quite clearly, such a sentence would be unsustainable as it will be in excess of the magistrate s jurisdictional limit. AUTONUMOUT The magistrate relied on the case of Lui Cho Hung (supra) to adopt a starting point in excess of the maximum penalty provided. In my view that case is not an authority for the proposition mentioned. That case dealt with the point of whether a district judge could have adopted a starting point in excess of 7 years which is the jurisdictional limit of the District Court. In that case the judge had adopted a starting point of 9 years for one set of charges and 7 years for another set of charges when the respective maximum penalties were 14 years and 10 years. The Court of Appeal dismissed the appeal against sentence and adopted what was said by that court in HKSAR v. Li Yan (1998) 4 HKC 12 where Mortimer VP said, inter alia :

- (1) On any one occasion the District Court may not impose a greater sentence than seven years imprisonment.
- (2) In order to assess the correct sentence, it is permissible for the judge to adopt as a starting point, a total sentence of more than seven years if the offence or offences warrant such a sentence, but he may not impose a sentence of more than seven years.
- (3) If the sentences are imposed after plea, the starting point may be more than seven years, but if the sentence after discount is seven years or more, the full seven years should not be imposed as this deprives the accused of any benefit for his plea of guilty.
- (4) Therefore, in cases which merit a sentence of seven years or more after discount for plea, a further discount should be given. AUTONUMOUT In the instant case, in my view, the magistrate should have adopted a starting point not in excess of three years imprisonment. Since the magistrate was of the view that the appropriate starting point was 54 months, I will substitute that starting point with 36 months imprisonment. The 36 months will be reduced by one third on account of the appellant s plea of guilty, thereby reducing the sentence to one of two years imprisonment. Therefore the appeal against sentence is allowed and the

sentence of 33 months is set aside and substituted by one of two years imprisonment. AUTONUMOUT might just add that if in future the prosecution is of the view that, because of the jurisdictional limit of magistrates courts and because of the maximum of three years provided by section 4 of the Dangerous Drugs Ordinance, the sentence which may be imposed may be too low, then consideration can be given to transferring the case to the District Court. AUTONUMOUT The prosecution in their reply relies on the case of HKSAR v. Wong Kwok Hung, HCMA919/2006 where for a similar charge a magistrate had used a starting point of four years imprisonment and then discounted it by a third for the plea of guilty thereby reducing it to 32 months. The magistrate then, in order to give a meaningful discount, reduced it by another two months to 30 months imprisonment. AUTONUMOUT In that case, the appeal against sentence was dismissed by Deputy Judge Poon who in her short judgment did not appear to have considered the point involved in this appeal namely : can a magistrate adopt a starting point in excess of the maximum penalty provided for that particular offence by the Ordinance in question. Deputy Judge Poon quoted the cases of Lui Cho Hung and Li Yan mentioned above (among others) as authorities for the proposition that the starting point of four years imprisonment was permissible provided that the ultimate sentence was less than the jurisdictional limit of three years imprisonment. (Peter Nguyen) Judge of the Court of First Instance, High Court Mr Winston Chan, SGC of the Department of Justice, for HKSAR Miss Alice Lee, assigned by the Director of Legal Aid, for the Appellant PAGE - PAGE A B C D E F G H 1udk 1udk &`#\$ P" (# P" (# & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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