

HONG KONG / JUDGMENT

HKSAR v. TAMANG GOPAL PRASAD

COURT

Court of First Instance

DECIDED

20 December 2007

CASE / FILE NUMBER

HCMA938/2007

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bjbj HCMA938/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 938 OF 2007 (ON APPEAL FROM KCCC 4342 OF 2007)

BETWEEN HKSAR Respondent and TAMANG GOPAL PRASAD Appellant

Before: Deputy High Court Judge Geiser in Court Date of Hearing: 20 December 2007 Date of Judgment: 20 December 2007

J U D G M E N T

On 5 September 2007, the Appellant was convicted by a magistrate sitting at Kowloon City Magistracy of two charges of wounding contrary to section 19 of the Offences Against the Person Ordinance, Cap. 212, Laws of Hong Kong. He was sentenced to 10 months imprisonment in respect of each charge, which was ordered to run concurrently. In addition, the learned magistrate activated the outstanding balance of a 4-month suspended sentence of imprisonment, which the Appellant received on 7 March of 2007, in respect of a charge of criminal intimidation. That balance came to 2 months imprisonment and the learned magistrate ordered it to run consecutively to the term of 10 months imprisonment. As I understand it, no issue is taken by counsel for the Appellant on the concurrent sentences of 10 months imprisonment in respect of the wounding charge. It is simply suggested that the learned magistrate had no power to activate the unactivated part of the earlier suspended sentence, that is, the period of 2 months imprisonment. The relevant enabling legislation can be found in section 109C of the Criminal Procedure Ordinance, Cap. 221, Laws of Hong Kong, and states:

- (1) if an offender is convicted of an offence punishable with imprisonment committed during the operational period of a suspended sentence, the court shall consider his case and deal with him by one of the following methods:
- (a) the court may order that the suspended sentence shall take effect with the original term unaltered;
 - (b) it may order that the sentence shall take effect with the substitution of a greater or lesser term for the original term;
 - (c) it may by order vary the original order under section 109B(1) by substituting for the period specified therein a period expiring not later than 3 years from the date of the variation; or
 - (d) it may make no order with respect to the suspended sentence, and a court shall make an order under paragraph (a) of this subsection, unless the court is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence, and where it is of that opinion, the court shall state its reasons. In the present case, the history of the matter is that on 7 March 2007, the first court imposed on the Appellant a sentence of 4 months imprisonment suspended for two years in respect of a conviction for criminal intimidation. The Appellant subsequently appeared before the second court on 27 April 2007, and was sentenced to 14 days imprisonment in respect of a charge of common assault. That court activated two months of the 4 months suspended term and made it consecutive to the term of 14 days imprisonment. It is under these circumstances that the learned magistrate appeared to take the view that two months of the original suspended sentence was available for activation. In my judgment, the learned magistrate had no power to activate the unactivated part of the original suspended sentence. This is because a simple reading of the legislation that I have referred to above indicates that the second court, when it activated two months of the 4 months suspended term, was operating under section 109C(1)(b) and ordered that the sentence shall take effect by the substitution of the term of 4 months imprisonment to 2 months imprisonment. This does not mean that there is 2 months imprisonment left unactivated, so to speak, because the court has quite simply substituted the term of 4 months imprisonment to one of 2 months imprisonment. There is nothing left to be activated. The sentence has been fully dealt with. I am fortified in my view that this must be a correct construction of the legislation because I accept counsel for the Appellant's submission that section 109C(2) assumes that if the original term is varied, the suspended sentence is one which shall take effect. In addition, I also accept Mr Loughran's submission that if magistrates did have the jurisdiction to activate unactivated parts of suspended sentences of imprisonment, this would have the inevitable effect of being cumbersome and unwieldy in the administration of justice and would lack the finality in the exercise of the sentencing of defendants. In my judgment, the substitution of a term of 2 months imprisonment for the original term of 4 months, pursuant to section 109C(1)(b) by the magistrate in the second court was intended to be a single exercise of discretion, resulting in the final disposal of the suspended sentence. Accordingly, the appeal against sentence is

allowed to the extent only that the learned magistrate had no power to purport to activate two months of the earlier suspended sentence. The sentence of 12 months imprisonment imposed by the magistrate, therefore, is varied to one of 10 months imprisonment. Deputy High Court Judge Geiser Representations: Mr David Leung, Senior Government Counsel of the Department of Justice, for the Respondent Mr Eric Frederick Curlewis, instructed by Messrs Jimmie K S Wong & Partners, for the Appellant PAGE - PAGE - CRT35/20.12.2007/GTT HCMA938/2007/Judgment 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 & `#\$ bZ < =RM/L\$t\ [g\k [g\k =RM/ Normal.dot setup Microsoft Word 9.0 judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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