

HONG KONG / JUDGMENT

HKSAR v. TANVEER HUSSAIN

COURT

Court of First Instance

DECIDED

23 November 2012

CASE / FILE NUMBER

HCMA660/2012

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bjbj HCMA 660/2012 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 660 OF 2012 (ON APPEAL FROM STCC 4181/2010)

BETWEEN HKSAR Respondent and TANVEER HUSSAIN Appellant

Before: Hon Fung J in Court Date of Hearing: 6 & 21 November 2012 Date of Judgment: 21 November 2012 Date of Reasons for Judgment: 23 November 2012

J U D G M E N T

The Appellant Tanveer Hussain pleaded guilty before the Magistrate and was sentenced to 9 months imprisonment. He now appeals against the sentence. I allowed the appeal at the hearing and now give my reasons. The Facts The Appellant sneaked into Hong Kong illegally in February 2007. In August 2007, he surrendered to the police. He then filed a claim against torture. He was released by the Immigration Department on his own recognizance. From the time of his surrender up to sentence, he has been detained by the Immigration for a total of 100 days. Magistrate s Reasons The Magistrate referred to the tariff sentence for illegally remaining of 15 months upon plea. He reduced it by 3 months for surrender to authority, and further 3 months for the period the Appellant was detained by the Immigration. Grounds of Appeal The Appellant submitted that he would be entitled to a 1/3 remission for good conduct in prison. Hence, the reduction for the detention by the Immigration should be adjusted upwards by 1/3. Additional Facts Between the Appellant s surrender in 2007 up to now, the Appellant has been arrested and imprisoned on 2 occasions. In October 2008, the Appellant was sentenced to 15 months imprisonment for using an identity card relating to another person. He was not charged with illegally remaining then under the prosecution policy to

withhold such charge pending the outcome of torture claim. In September 2011, the Appellant was sentenced to 2 years imprisonment for robbery. In May 2012, the torture claim was refused. The petition against the refusal and was dismissed in September 2012. A week later, the Appellant was brought to court for the illegal remaining charge, and was sentenced to 9 months imprisonment as mentioned. Discussion Under s 67A of Criminal Procedure Ordinance (Cap. 221):

- (1) The length of any sentence of imprisonment imposed on a person by a court shall be treated as reduced by any period during which he was in custody by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to the sentence or the offence for which it was passed, or with any proceedings from which those proceedings arose; (1A) The length of any sentence of imprisonment imposed on a person by a court shall also be treated as reduced by any period during which he was, immediately prior to his first appearance in court in connection with any proceeding relating to the offence for which the sentence of imprisonment was imposed, in custody- of the police, Customs and Excise Department or Independent Commission Against Corruption in connection with that offence; or under Part VII of the Immigration Ordinance (Cap
- 115) in connection with that offence. Section 67A(1) is only applicable to committal to custody under a court order, but not to administrated detention by the Immigration. Ms Lo, for the Respondent, confirmed that none of the 100 days concerned herein related to custody under a court order. Section 67A(1A) applies to detention under Part VII of the Immigration Ordinance, but Ms Lo confirmed that none of the 100 days related to a period immediately prior to any remand in respect of the present illegally remaining charge. Hence, s 67A(1A) is also not engaged. The Magistrate gave a 3 months discount in respect of the Immigration detention, he did not take into account any 1/3 remission for good conduct in prison. In my view, the Magistrate was correct because: The reckoning of time under s 67A of Cap 221 will not take into account remission for good conduct in prison; The Court shall not take into account event subsequent to sentencing; Under rule 69 of the Prison Rule (Cap 234A), the 1/3 remission is subject to conduct in prison, and that is a matter for the prison authority and not the Court. Ms Lo conceded that had the Magistrate been informed of the previous using of a false identity card charge, the totality principle would have been relevant. Ms Lo provided the court with cases where the charge of illegal remaining and using an identity card without an agreement of the person had been dealt with on the same location, and the trend is that the total sentence would be one of 18 months (see for example: In HKSAR v Tran Viet-thah [2012] 1 HKLRD 903). Since the Appellant had already been sentenced to 15 months imprisonment for the using of a false identity card offence on an earlier occasion, in consideration of the totality principle, there would be about another 3 months left for the illegal remaining charge, and that would have been reduced by the detention by the Immigration. The Magistrate gave a substantial discount for surrender. There are authorities sanctioning substantial discount for surrender in Immigration cases, but those cases related to surrender, charge, imprisonment and subsequent repatriation. In this case, the Appellant surrendered and filed a torture claim which was subsequently dismissed, so the extent of

discount should be distinguishable from a simple surrender case.

Conclusion

In the circumstances, I allowed the appeal and substitute the sentence with one enabling the immediate release of the Appellant. I thank Ms Lo for her helpful submissions. (B. Fung) Judge of the Court of First Instance High Court Miss Rosa Lo, Public Prosecutor, for the Respondent The Appellant, in person 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 hORH gd~K hQF h(" h{" h{d3 h] U har& h(" gd}G gdK\$ gd]" gd:H gd~K h8e+ h8e+ h xc hoZ} hD~| h83x gd(" gdCb gd(" gd(" hxAk h*9Y h^tT h"\$R h(" h1+` [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 :T'ZaG 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"/> i\$&` G user HCMA.dot LAM Siu-kei, Kitty 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="{64B87C3F-D321-48FD-8541-02472CB06E13}" 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

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Prepared on 27 October 2026 · Esheria