

HONG KONG / JUDGMENT

HKSAR v. TARSEM SINGH

[2022] HKCFI 2548**COURT**

Court of First Instance

DECIDED

18 August 2022

CASE / FILE NUMBER

HCMA363/2021

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bjbj HCMA 363/2021

**[2022] HKCFI 2548 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO 363 OF 2021 (ON APPEAL
FROM KTCC 314 OF 2021)**

BETWEEN HKSAR Respondent and TARSEM SINGH Appellant

Before: Hon D Almada Remedios J in Chambers Date of Judgment: 18 August 2022

J U D G M E N T

The appellant pleaded guilty to 4 charges of theft contrary to section 9 of the Theft Ordinance, Cap 210. He was sentenced by the magistrate to 10 months imprisonment on each charge with 2 months of each conviction to run concurrently making a total sentence of 34 months imprisonment (2 years 10 months). He now appeals against that sentence. The brief facts The appellant admitted the brief facts which disclosed that on four separate occasions on different dates the appellant stole from four different taxis properties valued at \$18,218, \$11,400, \$6,100, \$3,000 respectively within a period of two months from 22 December 2020 to 5 February 2021. Magistrate s consideration of sentence In the magistrate s brief reasons for sentence he pointed out the following: -

4. This is not the first time the defendant has committed theft and this is also not the first time that he has committed theft from vehicle.

5. The 4 counts of theft that the defendant has pleaded guilty to on this occasion are all serious offences because they are all thefts from vehicle and the amounts of property stolen are significant. The magistrate adopted a starting point of 15 months for each charge and reduced the sentences by one third to take into account the appellant's guilty pleas. He stated that in principle the 4 charges of theft should run entirely consecutive to each other but taking into account the principle of totality he ordered 2 months of each of the sentences in charges 2, 3 and 4 to run concurrently with the sentence in charge 1. He sentenced the appellant to a total term of imprisonment of 34 months or 2 years and 10 months imprisonment. Grounds of appeal In summary, Mr Giles Surman counsel for the appellant criticized the magistrate in failing to correctly apply the principle of totality. The principle of totality ought to have reduced the overall length of the sentences. Mr Surman submitted that the overall culpability of the appellant did not warrant the notional starting point of about 4 years 3 months imprisonment (2 years 10 months after a one-third discount) which was disproportionate, unjust and imbalanced and hence unduly crushing on the appellant. Mr Surman submitted that the magistrate erred in principle in giving undue weight to the separate charges involved and evaluating the totality of the appellant's wrong doing. Respondents submissions Mr Santo Yiu on behalf of the respondent submitted the magistrate properly took into the account, the value of the property stolen and the appellant's criminal records in order to achieve a proper starting point. Mr Yiu pointed out nowhere in the magistrate's reasons for sentence did the magistrate consider the status of the appellant as a Form 8 Recognizance holder as an aggravating factor. Mr Yiu contended that the overall sentence was not too long when consideration should be given to the fact that this was not the first time the appellant had committed these offences and the aggravating factor of the appellant's status in Hong Kong. Mr Yiu submitted that as a Form 8 holder it is necessary to inject an element of deterrence to reflect the denunciation of his conduct to protect the community. In the circumstances the overall sentence of 34 months was reasonable and appropriate. Consideration The magistrate took a starting point of 15 months imprisonment on each charge taking into account the appellant's previous similar convictions. The magistrate however did not state the starting point for each offence and nor did he set out the amount of enhancement to the starting point for the appellant's previous similar convictions. This with respect, should have been clearly expressed /nyr%RL ?e@S /nyr%RL ?e@S ould have been the starting point for the present offences. No mention was made by Mr Surman as to whether any aggravating factors were to be taken into account. Mr Yiu submits that a starting point of 12 months in this case is manifestly inadequate given the facts and aggravating factors of the appellant's repeated offending and his status as a Form 8 recognizance holder. The present four offences were not opportunist acts of theft but were calculated and deliberately targeted at taxis taking advantage of the oversight on the part of their drivers in the early hours of the day between the hours of 0140 hours and 0630 hours either when the drivers had left their taxis unattended for a short while or whilst the drivers themselves were asleep inside the taxis. I consider a starting point of 12 months imprisonment appropriate for the present offences of theft from vehicle not taking into account any aggravating factors. In relation to the appellant's previous criminal convictions

the magistrate was perfectly entitled to take them into account as an aggravating factor in order to adopt a higher notional starting point. The appellant has 4 previous convictions all related to theft. The appellant's last conviction was similarly an offence of theft from vehicle to which he was sentenced to 9 months imprisonment. Clearly, the sentences imposed on the appellant did not have an adequate deterrent effect on him and the repeated offences demonstrated a complete disregard for the law of which an enhanced sentence was necessary to protect the public from yet further repetition. In light of the appellant's persistent offending, I consider an appropriate enhancement of 3 months imprisonment for this aggravating factor. Added to the starting point of 12 months amounts to 15 months imprisonment. In the present case the magistrate did not but should have taken into account the aggravating factor of the appellant's status as a Form 8 recognisance holder. In the case of *HKSAR v Singh Gursevak* [2019] HKCA 179; CACC 139/2018, the Court of Appeal confirmed that Form 8 recognisance holders committing a criminal offence in Hong Kong is an aggravating factor. As to the amount of enhancement, the Court said the following:

43. Of course, the amount of the enhancement will reflect the court's assessment of the seriousness of the offence and the severity of the adverse impact that the offence has on Hong Kong. Making this assessment will entail the court having regard to the nature of the offence, the circumstances of its commission, its actual impact on the victim, its potential impact on the wider Hong Kong community and finally its potential impact on Hong Kong's reputation.
44. Clearly, the more serious the impact of the crime in the adverse way required by the authorities, the greater will be the amount of the enhancement. If the enhancement is to have a deterrent effect then it will usually be at least 6 months but it can, obviously, be greater than this amount and there is no reason why it cannot be greater than 18 months. We do not wish to set an upper limit to the amount of the enhancement other than to make the obvious comments that it should not be disproportionate to the starting point and should not result in a final starting point that is excessive for the seriousness of the crime that has been committed. Finally, the sentencing court must always have regard to the totality principle in order to ensure that the sentence it imposes is a just and balanced one. In regard to the totality principle, I consider 3 months imprisonment, in the circumstances of this case, as an appropriate enhancement for the aggravating factor of the appellant's status as Form 8 recognisance holder. The notional sentence for each offence after trial taking into account the aggravating factors is therefore 18 months imprisonment. The magistrate correctly followed the approach in taking into account the principle of totality. In *HKSAR v Yeung Kwai Kuen* [2002] 3 HKLRD 91, the Court of Appeal stated in paragraph 7 that: - The correct approach is first to determine the starting point for the individual offences; then the appropriate sentence after mitigation, if any, for the individual offences; and, only then, totality. I turn now to consider the principle of totality. The essential function is to determine whether the sentence imposed by the magistrate of 2 years 10 months or 34 months was manifestly excessive or wrong in principle. As submitted by Mr Surman the notional sentence after trial would amount to 4 years and 3 months

imprisonment allowing for a one third reduction for the appellant's pleas of guilty would result in a total sentence of 2 years 10 months. The notional sentence of 4 years 3 months imprisonment is in my view on the high side even when regard is had to the aggravating factors as stated above. Taking into consideration the four separate offences which were committed within a short period of time, a total sentence of 2 years and 2 months imprisonment or 26 months imprisonment after the appellant's pleas of guilty to the four offences would be appropriate. On that basis, the notional sentence would be one of 3 years and 3 months imprisonment had the appellant being convicted after trial. In applying the above, and to reflect the reduced total sentence of 2 years and 2 months imprisonment or 26 months imprisonment. The sentence imposed is set aside and substituted as follows: 12 months imprisonment for Charges 1, 2, 3 and 4 and 4 months of charge 2 and 5 months each of charges 3 and 4 is to run consecutive to charge 1 and the remainder of the terms in each charge is to run concurrent to each other.

Conclusion

For the above reasons the appeal against sentence is allowed. The sentence of 2 years 10 months or 34 months is reduced to an overall sentence of 2 years 2 months or 26 months imprisonment. (S. D Almada Remedios) Judge of the Court of First Instance High Court Mr Santo Yiu, PP of the Department of Justice, for the respondent Mr Giles Surman, instructed by Lo, Chan & Leung, for the appellant Mr Andrew TC Mok A Form 8 recognizance holder who is causing harm to Hong Kong whilst awaiting the outcome of his immigration claim is an aggravating factor. See paragraph 28 of HKSAR v Singh Gursevak [2019] 2 HKLRD 274. 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 h-Q{ h-Q{ hZw} gd-Q{ gdq" gd3c< gd3c< h3c< h3c< h3c< h3c< h3c< h_hp gd U gd*=p gdq" gdso hc-+ h*=p h*=p hc-+ h*=p h0e` hC@} hD~: hw/m hJF% h5)" hD~: gdq" gdkL hhG8 h5)" hM~\ h70j hU Q hM~\ hN.^ hN.^ h3c< h3c< hpNH hpNH gdg1 gd3c< hN.^ 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 h3c< hN.^ :pT2d [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"/>! < B#x JZ f i\$&dm F[- 7PrJ :r?<N y)y, F[- 01)8 , -3R fkr ~\A" ^iK setup hcma.dot Fung YuenTing 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="{BF3EECD5-D3D9-4575-8DC4-E092A759C6C0}"

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