

HONG KONG / JUDGMENT

HKSAR v. TSE MING KWAN

[2023] HKCA 1022

COURT

Court of Appeal

DECIDED

31 August 2023

CASE / FILE NUMBER

CACC71/2023

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CACC 71/2023 [2023] HKCA 1022

On appeal from [2023] HKCFI 1132

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO 71 OF 2023

(ON APPEAL FROM HCCC NO 150 OF 2022)

HKSAR

Respondent

v

Tse Ming-kwan

Applicant

Before: Hon Zervos JA in Court

Date of Hearing: 31 August 2023

Date of Judgment: 31 August 2023

J U D G M E N T

Introduction

In the early stage of the present proceedings, the applicant pleaded guilty to one charge of trafficking in a dangerous drug on 3 February 2021, namely 7214.95 grammes of a solid containing 4823.45 grammes of ketamine (Count 1), and one charge of conspiracy to traffic in a dangerous drug between 20 January and 2 February 2021, namely ketamine (Count 2). On 30 March 2023, Toh J (the judge) sentenced the applicant to 12 years and 7 months' imprisonment on Count 1, and 6 years' imprisonment on Count 2 with one year of the sentence in Count 2 to run consecutively to the sentence in Count 1, resulting in a total sentence of 13 years and 7 months' imprisonment.

On 13 April 2023, the applicant applied for leave to appeal his sentence. Mr H Y Wong, for the applicant, advances a sole ground of appeal against sentence. It is complained that the judge erred in not ordering the sentence in Count 2 to run wholly concurrent with the sentence in Count 1. Without contending that the final sentence was either manifestly excessive or wrong in principle, it is argued that Count 1 is "part and parcel" of Count 2 and it is alleged that the judge overlooked material facts and misapplied the totality principle.

For the reasons that follow, I am of the view that the ground of appeal is not reasonably arguable.

The agreed facts

On 3 February 2021, police officers conducted an anti-narcotics operation in the Park Yoho Genova complex in Yuen Long. The officers saw the applicant walking out of the ground floor lobby of Tower 15B. The officers intercepted the applicant and found on his person were one tissue wrapping a transparent resealable plastic bag containing dangerous drugs, a bunch of keys and three mobile telephones with Sim cards; and in the rucksack that he was carrying a red plastic bag with one transparent resealable plastic bag containing dangerous drugs, a rental agreement and three receipts, and an electronic scale. He was arrested and cautioned, and in response he said he helped a person to transport dangerous drugs as he wanted to repay money.

The applicant was escorted to the flat he occupied and rented, Flat E on the 11th Floor of Tower 15B (the flat). Pursuant to a search warrant, the officers gained entry to the flat using keys in the applicant's possession. They found inside a wardrobe in the flat seven food containers concealed within one carton box, five transparent resealable plastic bags, a metal bowl, a metal sieve and a plastic bowl, all containing dangerous drugs. They also found paraphernalia for repackaging dangerous drugs. After further arrest and caution, the applicant responded that he helped a person to transport dangerous drugs as he wanted to repay money and that the dangerous drugs in the wardrobe "he was yet to take them out".

The dangerous drugs found on the applicant's person and in the flat constituted the total quantity of drugs as particularised in Count 1. It was agreed that the street value of the ketamine was approximately \$4,292,895 in February 2021.

In a subsequent video recorded interview under caution, the applicant admitted that a person called “Ah Ming” had contacted him on “Instagram” in December 2020 offering him quick money. He said he had lost his job and needed to repay credit card debts of over \$50,000 and so he agreed to follow Ah Ming’s instructions in return for a reward. His subsequent communications with Ah Ming primarily occurred over “WhatsApp” and “Signal” and he never met Ah Ming in person. In late December, he received \$3,000 from Ah Ming to buy a mobile telephone for his work.

On 19 January 2021, the applicant received instructions to collect three carton boxes, containing twenty four packs of dangerous drugs, from a warehouse at Kwai Chung Container Terminal 1. He collected the boxes and took them to his home in Long Ping.

The applicant was instructed to purchase cling wrap film and repack the dangerous drugs in the three boxes into different quantities of 250 grammes, 10 grammes or 5 grammes, which he was to deliver to persons as instructed by Ah Ming. He knew the items were dangerous drugs, but did not know the type of drug. He could not recall the number of deliveries and their locations.

The applicant asked Ah Ming for money to rent a flat as he did not want to do this illegal trade in his family home. He received \$52,000 from an unknown male, which he used to rent the flat at Park Yoho. On 29 January 2021, he moved the three carton boxes of dangerous drugs from his home to the flat.

The applicant explained that he was rewarded \$1,000 each time he worked for Ah Ming, and on 3 February 2021, he received \$9,000 into his bank account for his previous work. On that day, he had put bags of dangerous drugs in his pockets to deliver to a person. These were the dangerous drugs that were later found by the police officers after he was apprehended.

The sentence

In her sentencing remarks, the judge set out the facts of the case and the applicant’s background and mitigation. At the time of the offence, the applicant was 22 years of age, and worked part-time jobs. He completed a post-secondary diploma course in 2018 and previously had no criminal record.

As for Count 1, the judge bore in mind that the total quantity of ketamine narcotic was 4,823.45 grammes. She referred to the sentencing guidelines in *SJ v Hii Siew Cheng* [2009] 1 HKLRD 1, where a sentence of 14 years’ imprisonment and upwards is recommended for a defendant convicted for trafficking in over 1,000 grammes of ketamine. She also referred to *HKSAR v Sin Chung Kin* [2013] 1 HKLRD 627, where a sentence of 22 years’ imprisonment was considered not manifestly excessive for an offence of trafficking in 5.12 kilogrammes of ketamine. She therefore adopted a starting point of 21 years’ imprisonment.

After considering the applicant’s guilty plea and other matters, the judge accepted defence counsel’s submission that the applicant was entitled to a 40% discount for Count 1. She therefore reduced the sentence to 12 years and 7 months’ imprisonment.

As for Count 2, the judge considered that the facts comprising the charge only arose from the applicant “coming clean to the police about his involvement”, and that “he gave full details about his involvement in the conspiracy”. She therefore adopted a starting point of 9 years’ imprisonment. This was discounted by one third for the applicant’s guilty plea to 6 years’ imprisonment. The question arose whether the judge should have given the applicant a 40% discount for his guilty plea and the other matters, as she did for Count 1, which would have resulted in a sentence of 5 years and 5 months’ imprisonment.

The ground of appeal

The applicant contends that the judge misapplied the totality principle, overlooked the facts of the case, and as a result, should have arrived at a reduced final sentence. Mr Wong essentially rehearses the points in mitigation placed before the judge by submitting that the conspiracy offence in Count 2 was volunteered by the applicant in his video recorded interview, and that the drugs in Count 1 were “part and parcel” of that conspiracy.

Mr Wong points out that the subject matter of Count 1 came from the same three boxes the applicant collected under Count 2, and hence the two charges arose out of the same set of facts: *Attorney General v Lee Ching Kwong*, unrep., CAAR 5/1987, 29 May 1987. The principle he relies on provides that concurrent sentences may be imposed for multiple offences arising from one transaction or course of criminal conduct. This is generally referred to as the “one transaction rule”. He submits that the judge should have ordered the sentence of Count 2 be served concurrently with that of Count 1.

During oral submissions and after a query from the Court, Mr Wong added as an additional ground of appeal that the judge erred in giving the applicant a one third discount to the sentence on Count 2 instead of a 40% discount for the applicant’s guilty plea and other matters. As previously noted, the judge adopted a starting point of 9 years’ imprisonment on Count 2, which she reduced by one third to 6 years’ imprisonment, which would have been 5 years and 5 months’ imprisonment on a 40% discount. He argues that the consecutive term of one year should have been correspondingly reduced by 40% to 7 months.

Mr Wong’s submission ignores that the 40% discount incorporates the one third discount for a guilty plea, and the logical extension of his argument is that the applicant was entitled to receive a 6.6% discount, which would have resulted in a reduction of 0.8 of a month.

As pointed out by Mr Marcus Lee, for the respondent, the criminality involved in this case was extremely serious and the applicant played a major role in the distribution and selling of the dangerous drugs. On 19 January 2021, the applicant collected three boxes of dangerous drugs, which each contained 24 packs. On 20 January 2021, he started repacking and delivering the dangerous drugs to different persons and by the time he was apprehended by the police, on 3 February 2021, only 7 packs of dangerous drugs were left in the flat. He also had on him a quantity of drugs that he was about to deliver to a person. Mr Lee submits that this needs to be taken into account in the overall assessment of the sentence imposed on the applicant.

The term of a sentence imposed on an offence will normally provide a yardstick in determining if any of that sentence should be concurrent or consecutive to a sentence for another offence. The difference in the sentence on Count 2 had the judge given a 40% discount was a sentence of 5 years and 5 months' imprisonment instead of 6 years' imprisonment. In assessing the additional culpability and criminality reflected in Count 2, this difference would have had little or no bearing on appropriate consecutive element of the sentences for the two offences. This is particularly true given Mr Wong's submission that the judge's error should have been translated into a reduction of 0.8 of a month to the consecutive element of one year.

I will now address the question as to whether the sentence on Count 2 should have been wholly concurrent with the sentence on Count 1. It does not automatically follow that the sentences for different offences arising from the same set of facts should be concurrent. This Court in *HKSAR v Ngai Yiu Chung* [2011] 5 HKLRD 690, and more recently in *HKSAR v Mohammed Tofael Ahmed* [2020] HKCA 33, explained that whether multiple sentences ought to be concurrent or consecutive is determined by the application of the principle of totality of criminality. The Court in *Mohammed Tofael Ahmed* summarised the applicable principles of totality with the following pertinent to the present case:

The sentencing court's decision of ordering concurrence depends on the facts and circumstances of each case and by the mode and number of charges proffered;

The one transaction rule developed to prevent double punishment is not to be rigidly applied and is only a practical working rule;

The key issue for the sentencing court whether to order concurrence is to ensure that, regardless of the number of charges proffered for offences committed in a single episode, the ultimate overall sentence reflects the true overall culpability;

When assessing the overall culpability, the focus should be whether an offence adds to the culpability or criminality of another offence, and whether one sentence comprehends and reflects the criminality of the other offence; and

The extent of the consecutive sentence, wholly or partially, depends on a totality assessment of the conduct as a whole, sensitive to the individual circumstances of the case and the offender, as well as relevant mitigating factors.

The judge cannot be faulted in her reasoning for ordering one year of the term of imprisonment on Count 2 to run consecutive to the term of imprisonment on Count 1. Considering the three boxes of drugs purported to be collected by the applicant before his repackaging, and the remuneration he received, the applicant was well advanced in carrying out the conspiracy when the remainder of the drugs, constituting the quantity of drugs in Count 1, was discovered. The submission that the drugs under Count 1 were "part and parcel" with the drugs in Count 2 fails to reflect the added culpability of the conspiracy to traffic an amount of drugs several times greater than the remaining quantity seized by the police.

After considering all circumstances of the present case, including the fact that the conspiracy was only revealed by the applicant's cooperation, the judge properly considered the overall criminality of the applicant's complete course of criminal conduct. She properly noted the size of the operation and the ease of applying and receiving monetary resources for the execution of the conspiracy. She correctly concluded that the sentence under Count 2 would not comprehend and reflect the additional culpability under Count 1.

A sentencing court when passing sentence for multiple offences must ensure that the overall sentence does not produce a total sentence that is excessive for the overall offending. The consecutive term of one year was appropriate because it properly reflected the overall criminality of the applicant's culpability.

There is no reasonably arguable ground for disturbing the judge's sentencing discretion.

Conclusion

The additional one year to the term of imprisonment on Count 1 reflects the overall culpability of the offences committed by the applicant and his application for leave to appeal his sentence is therefore refused.

The applicant is reminded of his right to renew his application for leave to appeal against sentence to the Court of Appeal, but he is also informed of the consequences of doing so, which may include a further direction for any loss of time spent in custody pending his appeal, if the Court were to come to the view that there was no justification for the renewal of his application.

(Kevin Zervos)

Justice of Appeal

Mr Marcus Lee, SPP, of Department of Justice, for the respondent

Mr Wong Hay Yiu, instructed by Legal Aid Department, assigned by Director of Legal Aid, for the applicant

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