

HONG KONG / JUDGMENT

HKSAR v. WONG TAI SHING

COURT

Court of Appeal

DECIDED

2 February 2007

CASE / FILE NUMBER

CACC259/2006

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REASONS FOR JUDGMENT

Hon Lunn J (giving the reasons of the court) AUTONUMOUT The applicant, who appears in person, sought leave to appeal against his conviction and leave to appeal out of time against his sentence. At the hearing we dismissed those applications and said that we would give our reasons for so doing in due course. We do so now. AUTONUMOUT On 19 June 2006 the applicant was convicted by Deputy Judge Anthony Kwok in the District Court in a re-trial of unlawfully trafficking in a dangerous drug, namely 55.8 grammes of a mixture containing 48.97 grammes of heroin hydrochloride, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance on 20 September 2000 and sentenced to seven years imprisonment. His application for leave to appeal against sentence was filed, two months out of time, on 21 September 2006. The prosecution case AUTONUMOUT The prosecution case was that the applicant had been stopped by police officers in the street. Then, the police party gained entrance to nearby domestic premises, after the defendant had used keys in his possession to open the lock to the door of the premises. There he was searched. In a red packet found in his underpants were two re-sealable plastic bags in which there were the dangerous drugs the subject of the charge. In the premises, was found paraphernalia for packaging and consuming dangerous drugs. Almost all of the prosecution case was encompassed in the Admitted Facts. The only witness called to give oral testimony was an exhibits officer, after which the prosecution closed its case. AUTONUMOUT Adduced into evidence through the admitted facts was an oral statement made by the applicant on his arrest after he had been cautioned inside the premises, which statement was post-recorded in the policeman's notebook (Exhibit 32). The applicant had said Ah Sir, I got so much just for self consumption only. The things inside the house have nothing to do with me. He went on to say that he was a lodger in the premises and that the things inside the premises belonged to Lai Shing. AUTONUMOUT In a written record of interview the applicant was questioned by a police officer about the discovery by the police within the premises of tinfoil cut into small pieces. The

applicant admitted that he had cut the pieces of tinfoil and had done so to use it to Chase the Dragon , asserting that he used about 7 grammes of white powder every day in so doing.

AUTONUMOUT Of significance in the admitted facts, was the fact that the street retail value of the heroin hydrochloride found in the possession of the applicant was \$24,538 on 20 September 2000. The defence case AUTONUMOUT The applicant did not give or call evidence in the defence case. Reasons for verdict AUTONUMOUT In his reasons for verdict the judge stated that the sole and central issue in the case was whether or not the prosecution could establish that the applicant was in possession of the heroin hydrochloride, stipulated in the Particulars of the charge, for the purpose of unlawful trafficking. In that context, the judge stated that there being no direct evidence of actual trafficking he examined the circumstances surrounding the arrest of the applicant to determine whether or not the requisite intent and purpose in the applicant to unlawfully traffick in the dangerous drugs could be inferred. In so doing, the judge said that he had considered the submissions made on behalf of the applicant. Amongst the argument that had been advanced the judge noted the following (see the Appeal Bundle pages 130 page 14D)

- (4) The defendant s assertion that he consumed 7 grammes a day may be out of the norm as according to The Queen v. Cheung Ping Chiu, CACC162/1993 (unreported), the average daily consumption of heroin is between 0.25 and 0. 7 of a gramme and the court is entitled to take judicial notice of that but there was no evidence from the prosecution to show how much a deep-seated addict could consume in a day and there was no evidence on what quantity would be a lethal dosage. The assertion of the defendant was thus not necessarily impossible. (6) [sic] The street value of the heroin found on the defendant was only a retail price and there was no evidence as to its wholesale price which may be significantly lower. There was no evidence that the defendant could not afford the retail price or the wholesale price which could be subdued significantly cheaper. AUTONUMOUT In rejecting the submissions made on behalf of the applicant the judge adverted to salient features in the prosecution case that strengthened the inferences to be drawn from the applicant s admitted possession of the quantity and the packaging of the dangerous drugs found upon his person, in particular : the admitted street value of the dangerous drugs; and the finding that he made that the applicant s assertion to the police that he consumed 7 grammes a day was a deliberate and material lie which strengthened the prosecution case. AUTONUMOUT The judge went on to note that there was an absence of an evidential basis to support those submissions (see the Appeal bundle page 17F-J) Having considered the daily dosage of an average heroin addict, what the defendant had said in the record of interview about his daily dosage was an out-of-court self-serving statement and I declined to attach full weight to it. On the other hand, I also declined to speculate as contended by Mr Pang as there was not a shred of evidence before me that the defendant was a deep-seated addict or that he had obtained heroin for a price which was far below the agreed street value. Grounds of appeal against conviction AUTONUMOUT Firstly, the applicant submits that the judge was wrong to reject his out-of-court claim to the police that he consumed 7 grammes of heroin per day by Chasing the Dragon . The second ground of appeal advanced by the applicant was that he had been advised by his barrister at the trial to maintain his plea of not guilty to the charge

of unlawful trafficking, not to give evidence and to rely upon counsel defending him. A consideration of the grounds of appeal AUTONUMOUT Clearly, the nub of the second ground of appeal sought to be argued by the applicant was that he had received incompetent advice from his counsel at trial in respect of the strength of the prosecution case and, most importantly, the desirability or otherwise of his availing himself of his right to give evidence. Significantly, the applicant had not given evidence in his first trial held in May

2005. In the judgment of a slightly differently constituted division of this court on the applicant's appeal against conviction (HKSAR v. Wong Tai Shing, CACC234/2005, unreported) Stuart-Moore VP addressed the issue of the inferences that might properly have been drawn by the judge from the evidence led by the prosecution, in particular the surrounding circumstances (paragraph 17, page We pause here to say that the judge might well have indicated that the applicant's assertion that he consumed 7 grammes (approximately a quarter of an ounce) of heroin a day was plainly an answer which she regarded as a lie designed to account for the comparatively large quantity of drugs he was carrying on arrest. As such, the judge would have been entitled to find this was a deliberate and material lie which supported the prosecution's case. She made, however, no such finding although she had rightly pointed out that the quantity in the applicant's possession represented a supply to someone who was merely a consumer of between 71 and 196 days. We are also somewhat surprised at the way the judge neutralised the importance of the street value of the drugs which we would, with respect, have thought was capable of amounting to cogent evidence in support of the allegation of trafficking. Later, in that judgment the court cited with approval the judgment of this court in *The Queen v. Cheung Ping Chiu* (unreported, CACC162/1993) and *The Queen v. Chan Kwok Kei* (unreported, CACC324/1995) in stating of judicial notice that (paragraph 20, page the judge was fully entitled (when sitting without a jury), as the applicant's legal representative at trial sensibly accepted, to find that the average consumption on the part of a consumer of heroin would be in the range of 0.25 to 0.7 of a gramme a day. AUTONUMOUT In light of the fact that in the course of the judgment of this court, which led to the quashing of the applicant's convictions in the earlier trial, this court dealt specifically with the possible inferences that could be drawn from the evidence led in the prosecution case in the absence of evidence from the defence, we are satisfied that the defendant made a fully informed decision when he determined not to give evidence at the re-trial. There is no merit in this ground of appeal. AUTONUMOUT In our judgment, the judge was entitled, as he stated he did, not to give weight to the assertion made by the applicant to the police on his arrest that he consumed 7 grammes of heroin per day, it being self-serving and not repeated on oath and subjected to cross-examination in the trial. There was no other evidence to suggest that the applicant consumed abnormally high quantities of heroin. Furthermore, he was entitled to take judicial notice of the fact that the average consumption of a heroin addict is between 0.25 and 0.7 grammes of pure heroin a day. In those circumstances, he was entitled to determine, as he did, that the applicant's assertion to the police that he consumed 7 grammes of heroin per day, i.e. 10 times the maximum average daily dosage consumed by

an addict, was untrue and a material lie.

Conclusion

AUTONUMOUT We are satisfied that there is no merit in either of the grounds of appeal against conviction upon which the applicant seeks to rely. Accordingly, at the hearing of the application for leave to appeal against conviction we dismissed the application. Reasons for sentence

AUTONUMOUT In his reasons for sentence, the judge adverted to the guidelines for sentence in cases of unlawfully trafficking in heroin, set out in the judgment of this court in *The Queen v. Lau Tak Ming* [1990] 2 HKLR

370. He noted that, given the quantity of the dangerous drug concerned, namely 48.97 grammes of heroin hydrochloride, the appropriate term of imprisonment to be imposed upon the applicant was close to eight years imprisonment, which sentence was beyond the jurisdictional limit of the District Court and that, to that extent, that the applicant had been spared the imposition of a greater sentence of imprisonment. Grounds of appeal against sentence
- AUTONUMOUT The applicant invites the court to have regard to the following facts as relevant to the sentence of seven years imprisonment imposed upon him by the judge at his trial :
- (i) he is now 62 years of age; (ii) he is in ill-health; (iii) he had become addicted to dangerous drugs following a stomach operation after which he had used heroin in order to relieve the pain in which he found himself; (iv) this was the first occasion on which he had been convicted of unlawfully trafficking in dangerous drugs; and
 - (v) he had admitted possession of the drugs are not wasted that the time of the police. The explanation for the delay in lodging the application for leave to appeal against sentence
- AUTONUMOUT In the affirmation filed by the applicant in support of his application for an extension of time in which to give notice of his appeal against sentence the applicant explains his failure to lodge the notice in time by simply asserting that he was ignorant of the appropriate procedure and acted on the bad advice of a fellow prisoner, namely that first he had to apply for leave to appeal against conviction.

Conclusion

AUTONUMOUT All of the proposed grounds of appeal against sentence are matters that were drawn to the attention of the judge in mitigation of sentence. We are satisfied that the judge was right to say that having been tried in the District Court, the applicant benefited from having received a slightly lower sentence than might have been imposed had he been tried in the Court of First Instance. There being no merit in any of the grounds of appeal against sentence sought to be relied upon by the applicant nor in his explanation for the failure to file his notice of appeal against sentence within the prescribed time limit, we dismissed the application for an extension of time to give notice of grounds of appeal against sentence. (M. Stuart Moore) Acting Chief Judge of the High Court (M.A. McMahon) Judge of the Court of First Instance (Michael Lunn) Judge of

the Court of First Instance Ms Grace Chan, SGC of Department of Justice, for the Respondent The Applicant in person PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V (#p# r p# &`#\$ 4or~ Rs~/ (Q\*<< ,DGpH ~ B; <(z& NFaF4\ B[UN` (BQ VhrLO ,7)a~D ^|r ~ B; ,7)a NFaF (BQ B[UN D\$ti \TvV UH2 & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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