

HONG KONG / JUDGMENT

HKSAR v. WONG TO

COURT

Court of Appeal

DECIDED

7 August 2001

CASE / FILE NUMBER

CACC508/2000

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bjbjU CACC 508/2000 in the HIGH COURT OF THE hong kong special administrative region
cOURT OF aPPEAL criminal appeal no. 508 of 2000 (on appeal from HCCC 161 of 2000)

BETWEEN HKSAR and wonG TO

Before: Hon Stuart-Moore Ag CJHC, Keith JA and Woo JA in Court Date of hearing: 1 August 2001
Date of handing down judgment: 7 August 2001

J U D G M E N T

Hon Woo JA (giving the judgment of the Court):

Introduction

At the hearing before us on 1 August 2001, there were two applications before us. The 1st defendant Wong To () applied for leave to appeal against sentence. The 2nd defendant Tang Kwok-kei () applied for leave to appeal against conviction.

2. At the commencement of the hearing, D2 informed us that he abandoned his application, which was accordingly dismissed. However, it is relevant to consider the situation of D2 when dealing with D1 s application.
3. D1 was charged with six counts to which he pleaded guilty. The counts were as follows:
Trafficking in a dangerous drug, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap. 134, in that on 9 December 1999, at the bus terminus outside Shek Ho House, Shek Wai Kok Estate, Shek Wai Kok Road, Tsuen Wan, New Territories, he unlawfully trafficked in a dangerous drug, namely, 349.46 grammes of a mixture containing 126.07 grammes of heroin hydrochloride. Trafficking in a dangerous drug, in that on 9 December

1999, at Room 533, Shek Ho House, Shek Wai Kok Estate, Shek Wai Kok Road, Tsuen Wan, he unlawfully trafficked in 3,145.23 grammes of a mixture containing 1,115.51 grammes of heroin hydrochloride. Manufacture of a dangerous drug, contrary to section 6(1)(a) and (2) of the Dangerous Drugs Ordinance, in that on or before 9 December 1999 at Ground Floor, Block 10, Green Villa, No. 100, Leung Uk Tsuen, Lam Kam Road, Kam Tin, Yuen Long, New Territories (the Green Villa premises) he unlawfully manufactured a dangerous drug, namely heroin hydrochloride. Possession of arms and ammunition without a licence, contrary to section 13(1) and (2) of the Firearms and Ammunition Ordinance, Cap. 238, in that on 9 December 1999, in the Green Villa premises, he had in his possession a quantity of arms and ammunition, namely, a 7.62 mm calibre pistol, an anti-riot pistol and 5 rounds of 7.62 mm calibre ammunition without a licence. Trafficking in a dangerous drug, in that on 9 December 1999, at the Green Villa premises, he unlawfully trafficked in 123.01 grammes of a mixture containing 44.25 grammes of heroin hydrochloride and 1.78 grammes of methaqualone. Trafficking in a dangerous drug, in that on 9 December 1999, at the Green Villa premises, he unlawfully trafficked in 29 tablets containing 13.35 grammes of methaqualone.

4. D2 was also facing Counts (3), (4), (5) and (6) above. As D1 had pleaded guilty at the commencement of the trial, Counts (3), (4), (5) and (6) above were altered in numbering to become Counts (1), (2), (3) and (4) respectively against D2. The trial of D2 took place before Deputy High Court Judge E Toh and a jury, and he was convicted. The Judge proceeded to pass sentence on both D1 and D2. The sentences
 5. The facts of the case against D2 are relatively simple. At 7.12 am on 9 December 1999, D2 was observed to be driving a private car JE 7767 which stopped outside Green Villa. A woman was with him inside the car. D2 went into the Green Villa premises and after a while emerged with a white plastic box. Police officers went up to stop D2 but he struggled. Eventually he was subdued and handcuffed. He and the four police officers who subdued him all suffered injuries from the scuffle. With keys found in D2 s pocket, the police officers got into the Green Villa premises. The premises and the car were then searched and the contents of the white plastic box examined. Among other items, the following incriminating evidence was found: A bag of white powder, being a mixture of heroin hydrochloride and methaqualone, the subject matter of Count
- (3) against D2; another packet containing 29 tablets of a total of 13.35 grammes of methaqualone, the subject matter of Count
 - (4) against D2; a plastic bag containing an anti-pollution mask used to avoid inhaling poisonous substance; bags containing caffeine, antipyrine and theophylline, which according to the Government Chemist s evidence, were additives used to lower the purity of heroin; hammers, a hydraulic jack and a mould; blenders and accessories, electric warmer, towels, electric scale, cutters and sealing machine; two firearms with five live bullets, the subject matter of Count

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- (2) against D2; and a tenancy agreement relating to the Green Villa premises in which D2 signed as the tenant.
6. Save for the last two items, all the various items of tools and paraphernalia had traces of heroin on them. Swab tests from the walls of a bedroom inside the Green Villa premises showed that the room was generally contaminated with heroin, methaqualone and morphine. These pieces of evidence made it clear and unequivocal that manufacturing of heroin was carried out in the Green Villa premises, the subject of Count (1) against D2, which was the same as Count (3) against D1.
7. For his plea to the six counts against him, D1 admitted a summary of facts dated 15 September 2000. In this lengthy summary of facts, he admitted that in the morning of 9 December 1999, the heroin hydrochloride, the subject of Count
- (1) against him, was found by the police inside the waistband that he was wearing when he was outside his Shek Ho House home in Tsuen Wan. He also admitted that the drugs found later in his Shek Ho House home, the subject of Count
- (2) against him, were his. He told the police that he and D2 rented the Green Villa premises in Yuen Long and he knew that the purpose of the various implements was for the manufacturing drugs and the Green Villa premises had been engaged in the manufacture of dangerous drugs. That related to Count (4) against him. He told the police that the drugs referred to in Counts (1) and (2) were taken out by him the night before from the Green Villa premises and that it was he who asked D2 to deliver the white plastic box to a man called Fai Fu, relating to Counts
- (5) and (6) against him. He also admitted that he was in knowing possession of the arms and ammunition, which formed the basis of Count
- (4) against him.
8. At D2's trial, D1 testified that it was he who allowed Fai Fu to store the drugs and equipment in the Green Villa premises and it was he who asked D2 for a favour to bring the white plastic box to Fai Fu on the day in question. He said that D2 did not have any part in any of these illegal matters. Obviously, the jury did not believe D1 when finding D2 guilty of the four counts relating to the Green Villa premises.
9. The Judge passed the following sentences on D1 and D2: For Count
- (1) against D1 alone, relating to trafficking in 349.46 grammes of a mixture containing 126.07 grammes of heroin hydrochloride, she adopted a starting point of 9 years imprisonment and taking into account the plea of guilty, she reduced it by one-third and passed a sentence of 6 years imprisonment on D1. For Count

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- (2) against D1 alone, relating to trafficking in 3,145.23 grammes of a mixture containing 1,115.51 grammes of heroin hydrochloride, she adopted a starting point of 21 years imprisonment and reduced it to 14 years because of D1's plea. For Count
 - (3) against D1, which was Count
 - (1) against D2, ie manufacturing of heroin hydrochloride at the Green Villa premises, she adopted a starting point of 21 years and passed that sentence on D2. She reduced the starting point to 14 years for D1 because of his plea. For Count
 - (4) against D1, which was Count
 - (2) against D2, the possession of arms and ammunition, she adopted a starting point of 8 years for D2, and reduced it to 5 years and 4 months for D1. For Count
 - (5) against D1, which was Count
 - (3) against D2, the trafficking in 123.01 grammes of a mixture containing 44.25 grammes of heroin hydrochloride and 1.78 grammes of methaqualone, she adopted a starting point of 7 years imprisonment and imposed that on D2, and she reduced it to 5 years and 2 months imprisonment for D1. For Count
 - (6) against D1, which was Count
 - (4) against D2, trafficking in 29 tablets containing 13.35 grammes of methaqualone, she gave D2 one month's imprisonment and D1 two weeks imprisonment.
 10. In respect of D1, the Judge ordered that he would go to prison for 6 years for Count (1). Out of the 14 years for Count (2), 6 years were made consecutive to the sentence for Count (1), and the remaining years were made concurrent. In respect of the 14 years for Count (3), 10 years were consecutive and 4 years concurrent. In respect of the 5 years and 4 months for Count (4), the Judge ordered 2 years consecutive and 3 years and 4 months concurrent. In respect of Count (5), 1 year of the 5 years and 2 months sentence was made consecutive and the remaining 4 years and 2 months concurrent. In respect of Count (6), the 2 weeks sentence was made concurrent. In the result, a total of 25 years imprisonment was passed on D1, consisting of the following years of imprisonment which were made consecutive:
Count
 - (1) 6 years, Count
 - (2) 6 years, Count
 - (3) 10 years, Count
 - (4) 2 years and Count

- (5) 1 year. On the other hand, the Judge, by making the sentences for the four counts on which D2 was found guilty partly concurrent and partly consecutive, imposed a total of 25 years imprisonment on D2. D1 s ground of appeal
11. By the amended grounds of appeal against sentence settled by Mr Paul Dinan, counsel for D1 before us, a number of grounds of appeal are raised. The complaint is mainly that the sentences passed on D1 were excessive in the circumstances, in that the Judge did not give sufficient consideration to the totality principle and the fact that the drugs offences arose out of the same basic facts and course of action. It is further pointed out that in passing a sentence of 5 years and 2 months for Count (5), a total one-third discount from the starting point of 7 years adopted by the Judge was not given.
12. Although it is true that there appears to have been an arithmetical error because two-thirds of 7 years comes to 4 years and 8 months and not 5 years and 2 months, what we feel important are rather the approach to sentencing where multiple offences are involved and the principles relating to the totality of sentences and of allowing a one-third discount for those who have pleaded guilty. The proper approach and the totality principle
13. Mr Dinan has drawn our attention to the judgment of this Court, differently constituted, in *HKSAR v Wong Lou Tak* [1998] 2 HKC 607, which was in Chinese. The relevant part of the judgment is at p 610F-G, which the editors have substantially translated in para (2) of the summarised holdings, as follows: We take the view that if a defendant committed a series of similar offences at different times, in different places and under different circumstances, the judge should determine the sentence flexibly. Generally speaking, the judge should first consider the most serious or more serious amongst these similar offences, then the number of offences the defendant committed and the degree of their seriousness. Having considered the most serious cases in this type of offences, the maximum penalty, the sentencing guideline and the normal sentence imposed in similar cases, the judge should proceed to decide the starting point for those offences. The next step is to consider the mitigating factors such as a plea of guilty, recompense effected, lack of criminal record, etc in order to arrive at the appropriate reduction. Finally the totality principle should be considered to determine the total sentence. ...
14. In *HKSAR v Yip Pik-kwai* [1999] 3 HKLRD 42, where the applicant had pleaded guilty to one count of trafficking in dangerous drugs, one count of possession of dangerous drugs and two counts of theft and was sentenced to a total of 8 years imprisonment by the trial judge, the Court of Appeal said: In the event of separate parcels of dangerous drugs being found by the authorities it is normally the practice to sentence a defendant on the total quantity of dangerous drugs rather than on the individual smaller quantities. This can be a matter of significance as the sentencing guidelines do not increase at a constant rate. We do not see any reason why a different approach should be adopted simply because the two separate parcels of dangerous drugs are of a different nature namely ice and heroin.

15. In *HKSAR v Chow Yu-chi*, CACC 359/2000 (5 Dec 2000, unreported), the applicant pleaded guilty to two charges of trafficking in mixtures which contained respectively 3.96 grammes of heroin hydrochloride and 13.43 grammes of the same drug, totalling 17.39 grammes. The trial judge gave him 2 years of imprisonment for the first charge and 2 years for the second charge. The Court of Appeal had this to say: In arriving at an overall sentence for these offences, the judge adopted the somewhat laborious route of taking, for each offence, a separate starting point before making adjustments for totality. In the circumstances such as these, where both offences were committed on the same day on closely linked facts, it would have been proper for the judge to have calculated the overall starting point by combining the weights of heroin in each charge to arrive at a total weight. The approach taken by the judge in arriving at two starting points reveals an error of principle. By looking at the two counts separately and taking individual starting points for the two quantities of heroin, she effectively arrived at six years and nine months as the starting point for the combined amount of drugs in the two counts which she then discounted by one-third to give credit for the pleas. As we have said, six years was the proper starting point for this case, and we can say that if the judge had taken the recommended route by which to ascertain an overall starting point, she would very probably have reached the same conclusion.
16. In her sentencing exercise in the instant case, the Judge fell into the same error as that criticised by this Court in *Wong Lou Tak*, *Yip Pik-kwai* and *Chow Yu-chi* cited above. The tariffs
17. According to the sentencing tariff for trafficking in heroin laid down by *R v Lau Tak-ming & Others* [1990] 2 HKLR 370, for the heroin content of the trafficking between 50 grammes and 200 grammes, it calls for a sentence of 8 to 12 years imprisonment, and where the heroin content exceeds 600 grammes, it calls for a sentence of 20 years and over. It is therefore correct, totality aside, for the Judge to have adopted the starting point of 9 years, 21 years and 7 years for respectively Counts (1), (2) and (5) against D1.
18. It is pertinent to note that in *The Queen v Ho Chi Ming* [1995] 2 HKCLR 29, the Court of Appeal opined that there was nothing wrong for the trial judge to have adopted a starting point of 25 years imprisonment for the applicant who had pleaded guilty to trafficking in 1.213 kg of salts of ester of morphine. In *HKSAR v Lee Kwok Keung*, CACC 5/1999 (14 Dec 1999, unreported), for three counts of trafficking in a combined quantity of 1,770 grammes of pure heroin hydrochloride, the Court of Appeal considered that a 25-year starting point was within the proper range of the guidelines laid down in *Lau Tak-ming*.
19. It is also well settled in *R v Tang Kam-kwong*, Crim App No 183 of 1996 (unreported) and *R Cheung Wai-kwong & Another* [1997] 3 HKC 496, that the sentence for manufacturing of dangerous drugs is higher than that for trafficking in dangerous drugs. Although the quantity of the drugs involved in the manufacturing is one of the factors to consider in assessing the sentence for manufacturing, other factors to be considered include the scale of the operation, the capacity of the equipment, whether the manufacturing station has been producing or is likely to produce substantial quantities of dangerous drugs and the role

of the accused. In HKSAR v Tang Siu-man CACC 360/1996 (8 July 1997, unreported), where the accused was convicted of one count of manufacturing and one count of trafficking in dangerous drugs, involving 1,039 grammes of heroin, the Court of Appeal opined that for the trafficking, 24 years imprisonment was appropriate and for the manufacturing the proper sentence should be 25 years. In the circumstances of this case, totality apart, the Judge's adoption of 21 years imprisonment as the starting point for the manufacturing Count

- (3) cannot be criticised for being excessive.
20. Mr Vincent Wong, for the respondent, submits that in respect of two of the counts, namely Counts (2) and (4) against D1, the starting points of 21 years and 8 years adopted by the Judge are too low. He suggests that the proper starting point should be 25 years and 12 years respectively. Regarding to the sentence for Count (2) involving 1,115.51 grammes of heroin hydrochloride, he relies on Ho Chi Ming for comparison. However, he accepts that the total quantity of heroin involved in all the trafficking in heroin counts in the instant case, being 1,285.83 grammes (for details see below), would also attract about the same sentence of 25 years as in Ho Chi Ming.
21. Regarding Count (4), the possession of a pistol with five live rounds of ammunition for that pistol with no evidence of its being used recently and an unusable start-pistol, Mr Wong refers us to two decisions of this Court, namely, *The Queen v Au Yeung Wai-kwong*, Crim App No 238/1994 (17 August 1994, unreported) and *The Queen v Yeung Hiu Shing*, Crim App No 339/1996 (8 May 1997, unreported), in both of which it was held that 12 years of imprisonment should be the proper starting point. The Court in the latter case also pointed out that the sentence of 8 years after plea in *R v Ho Chun*, Crim App No 330/91 (unreported) might create difficulties because that sentence was passed before it became customary to grant a discount of one third on guilty pleas. It further said that even in simple cases of possession 12 years imprisonment was an appropriate sentence after trial. The Judge in the instant case had referred to Ho Chun before she adopted 8 years as the starting point for Count (4), and Mr Wong submits that that is too lenient. We agree. D1's guilty pleas
22. What is significant in this case as far as D1 is concerned, in our view, was his willingness to be co-operative with the police and his admissions to all the six counts against him. As far as Counts
- (1) and (2) are concerned, since the dangerous drugs involved were found on his person and in his Shek Ho House home, it can be said that apart from admitting guilt, he had no alternative. Of course, that would not have affected the discount to which he was entitled. However, the evidence on Counts (3), (4), (5) and (6) was much weaker. Without his confession to the police, the evidence against him would have been very slender. But he frankly admitted to these four counts. In view of his trying to exonerate D2 and his giving evidence in D2's favour, saying that D2 had no knowledge and played no part in respect of the subject matters of these four counts, it can be said that D1's admissions to these four counts were an attempt to exonerate D2. Nonetheless, it was held in HKSAR v Chan Man-

chau, Crim App No 503 of 1999 (7 Nov 2000, unreported) that the rejection of an accused person's testimony for a co-accused should not reduce his discount in pleading guilty. D1's attempt in exonerating D2 in his statement to the police and his testimony to that effect, therefore, should not affect the discount for his pleas. The appropriate sentence

23. In our judgment, the Judge had adopted a wrong approach to the sentencing. She should have taken into account the total quantities of the heroin in Counts (1) and (2) on the one hand, and Counts
- (5) and (6) on the other hand together. The subject matters of these counts were discovered on the same day, 9 December, and D1 admitted his involvement in all of them. His admission was that the drugs found on his person and at his home were taken out by him from the Green Villa premises the night before. Following the approach in Wong Lou Tak, Yip Pik-kwai and Chow Yu-chi, she should have considered the total of the quantities involved in sentencing. As said before, the total narcotics content of the following counts come to 1,285.83 grammes of heroin (Count (1): 126.07 + Count (2): 1,115.51 + Count (5): 44.25 grammes) and 29 tablets of methaqualone (Count (6)). An appropriate starting point would be in the region of 25 years. We are of the view that in the circumstances of the present case, these 4 counts as well as Count (3), the manufacturing, should be treated together for sentencing purposes. The drugs in all the five counts, except Count (4) relating to the arms, were derived from the Green Villa premises, and they were found on the same day. Just as it would be unreasonable to sentence D1 by treating the heroin found on his person separately from that found in his home, it would similarly be unreasonable to pass a separate and additional sentence on him for the quantity of heroin found in the Green Villa premises instead of taking the total quantity of all the drugs into account. Bearing in mind the totality principle, a starting point of 25 years imprisonment for the trafficking would not be inappropriate.
24. We also accept Mr Wong's submission that the manufacturing in Count (3) increases the criminality of D1 in that he was not only a person who involved himself in manufacturing heroin, he was further involved in trafficking the drugs manufactured as a distributor or courier. In our view, when one adds on the criminality for the manufacturing in Count (3), the total sentence after trial of about 27 years would have been appropriate.
25. The Judge seemed to have taken a lenient view on Count (4) against D1 (Count (2) against D2) by adopting a starting point of 8 years for the possession of arms and ammunition after referring to Ho Chun. Be that as it may, even if she had adopted the proper starting point of 12 years and reduced it by one-third to 8 years for D1 for his plea, again the totality principle comes into play. In our view, a total of 30 years imprisonment for all the counts against D1 would not be inappropriate. This would reflect suitably as compared with the sentence of 25 years imposed on D2, who was not involved the heroin in Counts (1) and (2) to which D1 had pleaded guilty. But because of his plea, and such plea was made at the earliest opportunity, D1 should be allowed a one-third reduction from the total starting point sentences that were applicable to offenders after trial. This was accepted by the Judge.

26. It is necessary to distinguish the treatment of an offender, like D1, who is remorseful and has pleaded guilty at an early opportunity and another who, such as D2, who has been convicted after trial. This is a well-established principle adopted by our courts. In the present case, albeit D1 was involved in a much larger quantity of drugs than D2, ie, the quantities in Counts (1) and (2) against D1 with which D2 was not charged, the same sentence of 25 years passed by the Judge for each defendant might give rise to the wrong impression of a dilution or diminution of the principle.
27. In the circumstances, we consider that the total sentence for D1 that is appropriate is 20 years in all, ie, from the 30 years starting point as reduced by one-third for his pleas. The total sentence passed by the Judge on D1, being 25 years imprisonment, is in our view manifestly excessive as it effectively assumes an overall starting point of 37 years. We shall effect the reduction of sentence by making the following orders. The sentence passed by the Judge on D1 for Count (3) is set aside, and we substitute a sentence of 18 years imprisonment for this count. The sentence of 5 years and 2 months for Count (5) imposed by the Judge is also set aside and in substitution therefor, a sentence of 4 years and 8 months is imposed, to reflect the proper reduction of one-third from the starting point of 7 years adopted by her. The sentences imposed by the Judge for Counts (1), (2) and (6) are affirmed. However, all the orders she made as to how the sentences for all the 6 counts should run, either concurrent or consecutive, are set aside. We order that the sentences for Counts (1), (2), (5) and (6) are to run concurrently with the sentence we impose for Count (3). In respect of Count (4), the possession of firearms and ammunition, a sentence of 8 years be substituted for the sentence of 5 years 4 months passed by the Judge. Out of this 8 years, 6 years are to run concurrently with the sentences for Counts (1), (2), (3), (5) and (6), and the remaining 2 years are consecutive. In the result, D1 is to serve a total of 20 years imprisonment.

Conclusion

28. We allow the application of D1 in respect of sentence, and treating the application as the appeal proper, we make the orders mentioned above and allow his appeal to that extent. (M. Stuart-Moore) Ag Chief Judge, HC (Brian Keith) Justice of Appeal (K H Woo) Justice of Appeal Mr Vincent Wong, SGC of the Department of Justice, for HKSAR (respondent). Mr Paul Dinan, instructed by the Director of Legal Aid, for Wong To, D1 (applicant). PAGE - 91zLr f[:7 k1B[p JpHzF k1B[JpHz f[:7 h<XFh<XF0 & 6" CACC SiuLing Mok stock.dot Sharon LY Shum Microsoft Word 9.0 CACC Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 28 October 2026 · Esheria