

HONG KONG / JUDGMENT

HKSAR v. YU WING HUNG

[2021] HKCA 1007

COURT

Court of Appeal

DECIDED

13 July 2021

CASE / FILE NUMBER

CACC128/2020

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bjbj YO8l

Before: Hon Zervos JA in Court Date of Hearing: 13 July 2021 Date of Judgment: 13 July 2021

J U D G M E N T

This is an application for leave to appeal against sentence. The applicant complains about the sentence of 7 years and 2 months imprisonment imposed upon him by Campbell-Moffat J (the judge) on 12 August 2020, following a plea of guilty to a single count of trafficking in a dangerous drug. He also complains about the forfeiture order in respect of two mobile phones and SIM cards. The applicant appears in person having had legal assistance refused by the Legal Aid Department and the Bar Free Legal Service Scheme. On 16 January 2019, the applicant was found inside a hotel room in Mong Kok with two other people. The applicant was carrying three plastic bags containing a total of 10.95 grammes of methamphetamine hydrochloride (Ice). He also had in his possession three mobile phones and cash, consisting of HK\$6,630 and RMB 110. He was arrested and upon being cautioned said: I really intended to make some money only. Give me a chance. On the table inside the room, there were four plastic bags containing a total of 1.43 grammes of Ice, 49 plastic bags and two plastic boxes, containing a total of 72.10 grammes of cocaine, 30 tablets containing 0.21 grammes of nimetazepam and two tablets containing 0.21 grammes of 3,4-methylenedioxymethamphetamine (ecstasy), HK\$7,600 in cash, some packing equipment and an electronic scale. The average price for all the drugs seized at the time of the offence was HK\$134,722. After being further cautioned, the applicant said: Ah Sir, the dangerous drugs on the table and the pack of dangerous drugs on me are of the same batch. I fetched them in one whole batch and intended to flower open them for sale. In a subsequent video record of interview, the applicant explained that he had paid HK\$30,000 for the drugs with the intention of selling them. He had packaged some of the drugs and intended to take the three packets of Ice to

see if anyone would purchase them. He said one of the seized mobile phones belonged to his friend, whilst the other phones were for the sole purpose of contacting his family. He claimed that the cash found on him was as a result of working as a decorator, earning a monthly income of around HK\$20,000. The applicant admitted to occasionally taking Ice. He also explained that the hotel room was rented by his friend upon his request because his mother would not allow him to return home and as he had lost his identity card he was unable to rent the room himself. In the facts agreed by the applicant when he entered his plea of guilty he admitted that he was trafficking in the drugs. The sole basis of the applicant's mitigation was that he was very cooperative with the police officers upon his arrest and entered his plea of guilty at the earliest opportunity. It was claimed that he had a drug addiction and that some of the drugs were to be used for his own consumption. However, when asked by the judge to support this submission with evidence, the point was not pursued. It was accepted that a substantial amount of the drugs were for the purpose of trafficking. It was noted that the applicant had previous convictions for drug related offences. In July 2002, he was sentenced to 15 years and 6 months imprisonment for trafficking in a dangerous drug. In December 2017, he was ordered to attend a Drug Addiction Treatment Centre (DATC) for possession of a dangerous drug. In her reasons for sentence, the judge found the applicant was not simply a courier. He had a client base and intended to sell the drugs to them. The judge also noted that the applicant was found in possession of a variety of drugs, including cocaine, methamphetamines, and nimetazepam. She adopted the combined approach when sentencing the applicant. She calculated that the 12.38 grammes of Ice corresponded to a term of imprisonment of 7 years according to the sentencing tariff for Ice, which was the equivalent of 35 grammes of cocaine according to the sentencing tariff for cocaine: *HKSAR v Wong Kin Kau* [2010] 4 HKC 443. Applying the tariff for cocaine as the base, she added the 35 grammes to the 72.10 grammes of cocaine recovered and adopted a starting point of 9 years and 6 months imprisonment for the total of 107.10 grammes of cocaine. To the notional starting point she added 3 months for the 30 tablets of nimetazepam and two tablets of ecstasy; 6 months for the aggravating factor that several different types of drugs were ready for sale on the day of the offence: *HKSAR v Wan Lau Mei* [2014] 4 HKC 75; and 6 months for the applicant's previous criminal record for trafficking in a dangerous drug and reoffending so soon after his release from the Drug Addiction Treatment Centre: *HKSAR v Yeung Kam Tung*, unrep., CACC 427/2012, 19 March 2013 and *HKSAR v Chau Hon Kwong* [2011] 1 HKLRD 630. This resulted in a total term of 10 years and 9 months imprisonment which she reduced by one third for the applicant's guilty plea to 7 years and 2 months imprisonment. The judge ordered that among the three mobile phones and SIM cards found on the applicant, two mobile phones and all SIM cards be forfeited. In his homemade grounds of appeal, the applicant advances three grounds of appeal. The first ground is that the enhancement of 6 months for trafficking in various drugs was wrong and the 30 tablets of 9 nimetazepam and 2 tablets of Ecstasy were for his own consumption. I do not consider that this ground to be reasonably arguable. The judge enhanced the sentence of 6 months because the applicant had several different types of drugs for sale, and the issue that some of the drugs were for the applicant's own consumption was not pursued because the evidence disclosed that the drugs were for sale. The second ground is that the 6 months enhancement for the applicant's previous convictions for this type of offending was

wrong. The judge was correct to enhance the applicant's sentence for his recidivism. He also complains that he was arrested in relation to the present offence in January 2019 and was recalled to DATC for further drug addiction treatment. He left the DATC in April 2019 and was detained in remand until sentence. He complains the judge did not take into account the 3 months in detention at the DATC. It appears that at the time of the present offence, the applicant was subject to a supervision order after his release from DATC. He was recalled to DATC and was detained until April 2019 in respect of his previous offence which was unrelated to the present offence. It was therefore a period of detention that was not covered under section 67A of the Criminal Procedure Ordinance, Cap

221. See *HKSAR v Eftakhar Beg* [2015] 5 HKC 427. The third ground is that the judge wrongly ordered forfeiture of the mobile phones and the SIM cards. The issue was fully ventilated before the judge and she concluded that two mobile phones and the SIM cards be forfeited pursuant to section 56(1) of the Dangerous Drugs Ordinance, Cap 134. She found on the facts agreed by the applicant that he was packaging and selling drugs and that the mobile phones and SIM cards had been used in the commission of or in connection with his drug trafficking activities. See *HKSAR v Shoki Fatumq Ramadhani* [2018] HKCFA 51. I am not satisfied that the complaints raised by the applicant are reasonably arguable. As pointed out by the respondent, the applicant could have received a further enhancement to his sentence for the role played by him, which as the judge described was far more serious than the role of a courier or storekeeper to which the sentencing tariffs normally apply. See *HKSAR v Herry Jane Yusuph* [2021] 1 HKLRD 290. I have also considered the nature and totality of the enhancements and the overall sentence imposed on the applicant but I do not find that this resulted in an inappropriate or unjust sentence as the enhancements were in accordance with sentencing principles and could have been greater in the circumstances. See *HKSAR v Islam Azharul* [2020] 1 HKLRD 644. The application for leave to appeal against sentence is refused. The applicant is reminded of his right to renew his application for leave to the Court of Appeal, but he is also informed of the consequences of doing so, which may include a 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 Ivan Shiu, SPP, of the Department of Justice, for the respondent. The applicant appears in person. PAGE

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