

HONG KONG / JUDGMENT

HKSAR v. ZEHESAN, MAHMUD

COURT

Court of First Instance

DECIDED

19 September 2007

CASE / FILE NUMBER

HCMA475/2007

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bjbj HCMA475/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 475 OF 2007 (ON APPEAL FROM KCCC 780 OF 2007)

BETWEEN HKSAR Respondent and ZEHESAN, MAHMUD Appellant

Before : Hon McMahon J in Court Date of Hearing : 19 September 2007 Date of Judgment : 19 September 2007

J U D G M E N T

AUTONUMOUT The appellant, a 47-year-old Bangladeshi male, was convicted at Kowloon City Magistracy on his own pleas of an offence of breaching a deportation order, contrary to section 43(1)(a) of the Immigration Ordinance, Cap. 115 (the Ordinance) and of an offence of unlawfully remaining in Hong Kong, contrary to section 38(1)(b) of the Ordinance. AUTONUMOUT He was sentenced to 12 months imprisonment in respect of the 1st charged offence and to 15 months imprisonment in respect of the 2nd charged offence. Three months of those sentences were to run concurrently. That resulted in a total sentence of 18 months imprisonment. AUTONUMOUT The facts of the case, simply expressed, were that a woman police constable came across the appellant while she was performing her duties in Chung King Mansion in Kowloon. She asked him to produce proof of his identity and he was unable to do so. The appellant was arrested and after investigation it was learnt he had been made the subject of a deportation order on 5 September 2006 and had therefore returned to Hong Kong in breach of that order. Those facts grounded the 1st charged offence. His return to Hong Kong was an unlawful landing and he remained in Hong Kong without the authority of the Director of Immigration. That was the basis of the 2nd charged offence. AUTONUMOUT The appellant has a poor record in Hong Kong. He

has previous convictions for trafficking in dangerous drugs, possession of a part I poison, possession of a false instrument and breach of a condition of stay. AUTONUMOUT Acton-Bond who represents the appellant today does not dispute that the sentences imposed by the magistrate were appropriate in their totality. He does not seek therefore to challenge the sentences imposed in principle though in passing I must say I can see no good reason why the sentence imposed in respect of the offence of breaching a deportation order should be less than that for unlawfully remaining in Hong Kong. The former offence, to my mind, could well be considered as the primary offence. AUTONUMOUT Acton-Bond seeks a reduction of sentence on behalf of the appellant simply on the basis of humanitarian grounds. The ground he relies upon quite simply as it now stands is that the appellant's wife has recently died of cancer in Bangladesh and their three children, aged 14, 12 and 10 years, are being looked after by the appellant's brother and the brother's wife. AUTONUMOUT In support of his application the appellant has provided the court with various documents apparently issued by medical institutions, doctors and local politicians in Bangladesh. Those documents purport to trace aspects of the appellant's wife's medical history prior to her death. AUTONUMOUT Such documents are unfortunately, as the result of experience, looked at with some skepticism by these courts and in many cases, as with those provided to me, there are oddities in the documents construction or contents which enhances those suspicions. It must be said also that the appellant's previous conviction for possession of a false instrument causes me added concern. AUTONUMOUT That instrument, I am told, was a false document purporting to be signed on behalf of or by the Director of Immigration allowing the appellant an extension of his stay in Hong Kong. That being so I have some unease so far as this previous offences implications are concerned regarding the documents placed before me today. AUTONUMOUT On balance, taking all these matters into account, I cannot say the documents provided to me fill me with any great confidence. AUTONUMOUT In any event however in the present case, regardless of the truth or veracity of the documents provided by the appellant, the factual situation relied upon by him is quite clear and, in my view, does not give rise to such exceptional humanitarian considerations so as to trigger a reduction in the appellant's sentence. AUTONUMOUT He says his wife has recently died. He provides me with a telegram to that effect from a person he says is his brother. If true it is most unfortunate that his wife has died. But as Mr Aton-Bond concedes the opportunity for the appellant to be with his wife before her death has now passed. That leaves, in my view, as the sole remaining humanitarian consideration the well being of the appellant's children. AUTONUMOUT Chan for the respondent points out to me that there is no independent documentary proof that the appellant has any children. But accepting the appellant's contentions in that regard, his three children are presently being looked after by his brother and his brother's wife. Nothing material has been provided to me to suggest that their well being is imperilled. The appellant will be released from prison, assuming the usual discount, in little more than four months. There is accordingly no urgency in his return to Bangladesh. AUTONUMOUT Sad though it may be that the appellant's wife has died, if that be so, I am unable to say that the appellant's present circumstances or those of his children are so exceptional as to warrant any reduction in the appellant's sentence as an act of clemency. AUTONUMOUT The appeal is dismissed. (M.A. McMahon) Judge of the Court of First Instance High Court Ms Grace Chan, SGC of the

Department of Justice, for HKSAR Mr Jonathan Acton-Bond, instructed by Messrs Tang Tso & Lau, assigned by the Director of Legal Aid, for the Appellant PAGE - PAGE A B C D E F G H I J 1udk &`#\$ KF^XZ KF^X & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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