

HONG KONG / JUDGMENT

HKSAR v. ZHU YUEPENG

COURT

Court of First Instance

DECIDED

7 March 2007

CASE / FILE NUMBER

HCMA71/2007

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bjbj HCMA71/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 71 OF 2007 (ON APPEAL FROM STCC 11169 OF 2006)

BETWEEN HKSAR Respondent and ZHU YUEPENG (total sentence of 27 months imprisonment imposed upon him on 15 November 2006 by Mr T.S. Jenkins following his pleas of guilty in the Shatin Magistracy to six charges of making a false representation to an immigration officer, contrary to section 42(1)(a) of the Immigration Ordinance, Cap. 115 (the Ordinance). Mr Jenkins ordered that the appellant serve 12 months imprisonment in respect of each of the six charges and ordered that six months of the sentences imposed in respect of charges 3 and 4 be served consecutively with the sentences imposed in respect of charges 1 and 2, and that nine months imprisonment of the sentences imposed in respect of charges 5 and 6 be served consecutively to those sentences of imprisonment. AUTONUMOUT On 12 November 2006, the appellant was refused permission to land in Hong Kong, after he was identified by an immigration facial recognition system as a person who had previous to be refused entry to Hong Kong. In May 2003, the appellant was repatriated to the Mainland having been convicted of the offence of possession of a forged Hong Kong identity card, for which offence he had been sentenced to 12 weeks imprisonment. AUTONUMOUT However, on 26 August 2003 and 2 November 2005 (charges 1 and 2), the appellant gained entry to Hong Kong by falsely representation to an immigration officer on each occasion that he was Chen Cong as described in a two-way permit he presented that was issued in that name and which bore his photograph. Under caution he admitted that he had obtained that document for the payment of RMB1,000. AUTONUMOUT On 25 March and 15 August 2006 (charges 3 and 4), the appellant presented that permit to Hong Kong immigration officers to gain entry to Hong Kong. On 20 November 2003 and 22 October 2006 (charges 5 and 6), the appellant gained entry to Hong Kong by falsely representing to an immigration officer on each occasion that he was Peng Shao Hui as described in a two-way permit he presented, that was issued in that name and bore his photograph. Once again, he had obtained the two-way permit, so he admitted, on payment of RMB1,000. AUTONUMOUT By his acceptance of the Summary of Facts, the appellant accepts that he had used each of the two permits to enter Hong Kong from

the Mainland regularly, the one in the name of Chen Cong in the period of 2003 to 2005, and the other in the name of Peng Shao Hui in the period of 2003 to 2006. REASONS FOR SENTENCE AUTONUMOUT In his Reasons for Sentence, the magistrate noted that the appellant had been convicted on four previous occasions of offences contrary to the Ordinance. In 1992, the appellant had been sentenced to three months imprisonment, suspended for 12 months for each of two offences one remaining in Hong Kong without the authority of the Director of Immigration after having landed unlawfully in Hong Kong, contrary to section 38(1)(b) of the Ordinance and secondly, for possession of a forged Hong Kong identity card. In 1994, the appellant was sentenced to 18 months imprisonment, ordered to be served concurrently for each of two offences namely, using an identity card relating to another, contrary to section 7A(1A) of the Registration of Persons Ordinance, Cap. 177, and a second offence contrary to section 38(1)(b) of the Ordinance. In December 1999, the appellant was fined \$1,000 for breach of a condition of stay, contrary to section 41 of the Ordinance. Finally, on 30 May 2003, the appellant was sentenced to 12 weeks imprisonment for the offence of possession of a forged Hong Kong identity card. AUTONUMOUT In determining the appropriate starting point of the sentence, Mr Jenkins stated that he was guided in so doing by the judgment of McMahon DJ (as he then was) in HKSAR v. Yim Lee Kuen, HCMA1187/2002. In that case, the judge was dealing with an appeal against sentence, inter alia, for the sentences imposed upon that appellant for representations made to an immigration officer on each of two occasions in respect of a false two-way permit, in order that the appellant be able to gain entry to Hong Kong. The magistrate had taken a starting point of sentence for each of those two offences of 18 months imprisonment. Of that McMahon DJ said

17. In my view, it is almost unanswerable that the same logic should apply to any similar comparison with offences contrary to section 42(1) of the Ordinance, where a forged or false two-way permit is produced to immigration officers so as to mislead them as to the individual's identity. That is even more so if the comparison be between sentences imposed in respect of section 42(1) offences and section 42(2) offences under the Ordinance involving the gaining of entry to Hong Kong by using false travel documents. In my view then there is considerable merit in Mr Cheung's argument that offences contrary to section 41(1) but that is clearly a typographical error and is a reference to section 42(1) involving the unlawful gaining of entry to Hong Kong by use of a false two-way re-entry permit, as occurred in the present case, should have sentences imposed after plea which are comparable to sentences imposed in respect of other offences involving the gaining of entry into Hong Kong with false travel documents.
18. I agree that for no apparent reason offences involving the production of a false two-way permit seem to have obtained a sentencing niche for themselves which cannot be justified on the authorities of So Man King and Lam Ping Chun. AUTONUMOUT In the result Mr Jenkins took a starting point of 18 months imprisonment for each of the six charges, which accordingly apparently conventional discount for his pleas of guilty, he reduced in each case the sentences of 12 months imprisonment. AUTONUMOUT Finally having regard to the totality of the sentence imposed on the appellant, the magistrate said of the appellant's

criminal record that it was apparent that he had sought to evade Hong Kong immigration control since the early 1990s and that the charges that the defendant faced in this case were mere examples of his continued evasion of Hong Kong immigration control. He went on to conclude I have been dealing with this type of case for approximately 9 months in the immigration plea court in Shatin and this case was in my view one of the worst cases of deliberate immigration deception that I have come across to date. GROUND OF APPEAL AGAINST SENTENCE AUTONUMOUT In his notice of appeal against sentence, the appellant asserts of the sentence simply that it was too severe . In his oral submissions in court, he asserts that he feels remorseful, acknowledged that he had been foolish and reminded the court that he had pleaded guilty. THE RESPONDENT'S SUBMISSIONS AUTONUMOUT Lily Wong, who appears on behalf of the respondent, reminds the court that the outset that the maximum penalty that may be imposed for an offence under section 42(1)(a) of the Ordinance is a sentence of two years imprisonment. She invites the court to have regard to the judgment of McMahon DJ in Yim Lee Kuen, in particular his conclusion that depending on the circumstances of the particular case, a sentence of 18 months imprisonment after trial for an offence of the kind committed by this appellant is certainly justified.

AUTONUMOUT Of the magistrate's approach, the totality of sentence she invites the court to have regard not only to the fact that the magistrate was dealing with a total of six offences committed over a period of more than three years by the use of two different false two-way permits, but also to the appellant's history of immigration offences committed in the previous decade. A CONSIDERATION OF THE SUBMISSIONS AUTONUMOUT In my judgment, the magistrate was correct in having regard to the analysis contained in the judgment of McMahon DJ in Yim Lee Kuen, which led McMahon DJ to the conclusion in paragraph 19 of the judgment and cited earlier depending on the circumstances of the case, starting points of sentence of 18 months imprisonment are certainly justified in the circumstances of the present offences involving the production of a false two-way permit to gain entry to Hong Kong. Indeed on the authorities, the starting point of sentence even higher than that would be justified. AUTONUMOUT It is to note that in the judgment of Longley DJ in HKSAR v. Zeng Yow Shui (unreported), HCMA1074/2006, an appeal from a sentence of 12 months imposed by Mr Jenkins after a plea of guilty to a single offence contrary to section 42(1)(a) of the Ordinance, Longley DJ accepted that Mr Jenkins was correct to be guided by the judgment of McMahon DJ in taking a starting point for sentence of 18 months imprisonment. AUTONUMOUT In HKSAR v. Tseung Yim Kwan (unreported), CACC531/2005, the applicant had been convicted after trial of a charge of attempting to land in Hong Kong without permission, contrary to section 38(1) of the Ordinance (charge 4), and to two charges of possession of a false instrument, contrary to section 75(2) of the Crimes Ordinance, Cap. 200 (charges 3 and 4). The two false instruments in question were two false two-way Mainland re-entry permits which bore the appellant's photograph and which had been found in the appellant's handbag. The appellant had been stopped on board of a sampan as it headed towards Hong Kong. The judge imposed sentences of two years imprisonment in respect of each of charges 3 and 4, but ordered that one year of the sentence of one offence be served consecutively to that imposed in respect of the other. In

allowing the appeal, the Court of Appeal stated in its judgment that the sentence of 18 months imprisonment after trial was the appropriate sentence for charges 2 and 3. In addition, given that the two false documents being found together in the same handbag of the appellant, the sentences were ordered to be served concurrently. AUTONUMOUT In the result, in my judgment, the magistrate was entirely justified in taking a starting point for sentence for each of the six offences of 18 months imprisonment and discounting that starting point for the pleas of guilty to individual sentence of 12 months imprisonment. AUTONUMOUT The remaining issue is whether or not the magistrate arrived at the appropriate total sentence, namely 27 months imprisonment. The offences with which the magistrate was dealing were offences that had been committed over a period of more than three years. There were two offences in 2003 (charges 3 and 5), each of which involved the use of a different false two-way permit; one offence in 2005 and two offences in 2006 (charges 4 and 6). Furthermore, as adverted to by the magistrate in his Reasons for Sentence, the charges were clearly sample charges. Finally, these offences came to be committed after the appellant had been convicted on no less than four occasions over a period of a decade of immigration offences in Hong Kong for which he had been sentenced to terms of imprisonment of immediate effect on two occasions, once for 18 months and more recently for 12 weeks. AUTONUMOUT In those circumstances, it was clearly appropriate that the magistrate reflect the fact of the contemptuous attitude displayed by the appellant towards Hong Kong immigration law, as evidenced by his continuing transgressions against the law. In making six months imprisonment of the sentences imposed in respect of charges 3 and 4 consecutive to sentences of imprisonment imposed in respect of charges 1 and 2, the magistrate reflected in sentence the fact that in the latter two charges, the false representation albeit in the name of the same person Chen Cong were committed later in time, namely in 2006, rather than 2003

2005. In making nine months imprisonment of the sentences imposed in respect of charges 5 and 6 consecutive to the sentences of imprisonment imposed in respect of charges 3 and 4, the magistrate reflected the fact that those offences involved the use of the second false two-way permit and in the case of charge 6 involved an offence committed in October 2006. AUTONUMOUT In the result in my judgment, in all the circumstances, the individual sentences of 12 months imprisonment imposed in respect of each offence and the totality of imprisonment imposed on the appellant, namely 27 months; were entirely justified. The appeal is dismissed. (Michael Lunn) Judge of the Court of First Instance High Court Ms Wong Sze Lai, Lily, SGC, of Department of Justice, for the Respondent Appellant in person
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Prepared on 29 October 2026 · Esheria