

HONG KONG / JUDGMENT

HKSAR v. ZZAMAN MD ASADU

[2019] HKCA 625

COURT

Court of Appeal

DECIDED

31 May 2019

CASE / FILE NUMBER

CACC296/2018

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bjbj CACC 296/2018

[2019] HKCA 625 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CRIMINAL APPEAL NO 296 OF 2018 (ON APPEAL FROM
DCCC NO 238 OF 2018)

HKSAR Respondent v ZZAMAN MD ASADU Applicant

Before: Hon Zervos JA in Court Date of Hearing: 31 May 2019 Date of Judgment: 31 May 2019

J U D G M E N T

On 12 September 2018, the applicant was convicted after trial by District Court Judge E Yip of a single charge of trafficking in 10 grammes of a mixture containing 6 grammes of cocaine. He was sentenced to 36 months imprisonment. The applicant now applies for leave to appeal against conviction and sentence. His complaint against conviction is that he should not have been found guilty of trafficking in the drugs, as he admitted he was in possession of them but for his own consumption. He relies on the fact that he tested positive for cocaine when a urine test was conducted on him, which evidenced his addiction to the drug. He also complained at the leave hearing that he did not have an interpreter at trial, but that was not the case because a court interpreter was present throughout his trial. His complaint against sentence is without any grounds. At the time of the offence, the applicant was a Form 8 recognizance holder. It was not in dispute that on 18 January 2018, the applicant was stopped and searched by the police. They found in his possession a small metal box which contained 14 transparent resealable plastic bags, containing a total of 6 grammes of cocaine narcotic. He told the police at the time of his arrest

that: I bought these drugs for my own consumption a few times. I bought them for \$5000 from an unknown male at Chungking Mansion. In a subsequent interview, he said that the drugs were for his own consumption and it was cheaper to buy 14 packets of the drugs at one time, which would last him for one month. He said he won \$12,000 betting on the horse races and used \$5000 to purchase the drugs. The applicant testified at trial. He admitted possession of the drugs which he claimed he had purchased that day for his own consumption. He said he won \$12,000 from betting on the horse races the day prior to his arrest, and had spent \$5,000 on the purchase of the drugs, and gave \$4,000 to his roommate to hold for him. In giving evidence about his drug consumption, he said that generally he would share his drugs with his friends, and they would share theirs with him. Of the 14 packets of drugs, he said his friends might consume them if they did not have the money to buy drugs. It was on the admission by the applicant that the drugs would be made available to his friends that the judge found the offence of trafficking proven, and accordingly convicted him. It was noted in the reasons for verdict that the defence counsel accepted that the offence had been proved by the admission of the applicant in the witness box that the drugs in question might be made available to his friends. It was not in dispute that the sentencing guidelines in *R v Lau Tak Ming & Others* [1990] 2 HKLR 370 applied to the present case. The quantity of 6 grammes of cocaine narcotic fell within the band of up to 10 grammes which corresponded to a term of imprisonment of 2 to 5 years. It was accepted that the applicant at the time of the offence was a Form 8 recognizance holder which was an aggravating factor, and that some of the drugs were for the applicant's own consumption which was a mitigating factor. In mitigation, defence counsel submitted that according to the sentencing guidelines, the starting point for the quantity of cocaine narcotic should be 3 years imprisonment. He further submitted that the applicant should receive a discount to his sentence of 25% because some of the drugs were for the applicant's own consumption, and an enhancement of 10-15% to his sentence because he was a Form 8 recognizance holder at the time of the offence. In sentencing the applicant, the judge adopted a starting point of 40 months imprisonment which he increased by 5 months to 45 months because of the applicant's status as a Form 8 recognizance holder. He then reduced the sentence by 9 months on the basis that some of the drugs would be used for the applicant's own consumption. This resulted in a sentence of 36 months imprisonment. There is clearly no basis to challenge the conviction for trafficking in the drugs, which he had admitted were in his possession, and furthermore that he would use and share the drugs with his friends. As provided under section 2 of the Dangerous Drugs Ordinance, Cap 134, trafficking, in relation to a dangerous drug, includes importing into Hong Kong, exporting from Hong Kong, procuring, supplying or otherwise dealing in or with the dangerous drug, or possessing the dangerous drug for the purpose of trafficking, and traffic in a dangerous drug shall be construed accordingly. There is also no basis to challenge the sentence. The starting point adopted by the judge was slightly less than it could have been on an arithmetic calculation according to the sentencing guidelines. The enhancement of 5 months for the fact that the applicant was a Form 8 recognizance holder was in line with *HKSAR v Ali Saif*, CACC 309/2017, 14 June 2018, unreported. The reduction of 9 months on the basis that some of the drugs were for the applicant's own consumption, represented a percentage discount of 20%. This percentage discount was accepted by the respondent. In light of foregoing, I find no merit in the applications for leave to appeal

against conviction and sentence, and accordingly they are refused. In relation to the applicant's applications for leave to appeal against conviction and sentence, I remind him of his right to renew his applications for leave to the Court of Appeal, but he is also warned 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 applications. (Kevin Zervos) Justice of Appeal Ms Samantha CHIU, SPP of the Department of Justice, for the respondent The applicant appeared in person PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V {ojf h_BT gdi< gdXxN gd) gd } {w{s hRQ8 hLU5 haG9 hw{v hXxN gd_j hKz1 hYNN h^ V hSKg gdzLD gdzLD gdf% hk&} hSKg ht5(hzLD ht5(hzLD h}> h'> }yiea h'> hk&} gd'> :p'> [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` | PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .jx E /,EE\} theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> setup hca.dot Windows User Microsoft Office Word Judiciary Hong Kong Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{C16B590E-2228-4A20-861F-C305E020039A}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Word 97-2003 Document MSWordDoc Word.Document.8

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Prepared on 26 October 2026 · Esheria