

HONG KONG / JUDGMENT

R. v. CHAN LEONG

COURT

Court of First Instance

DECIDED

11 August 1995

CASE / FILE NUMBER

HCMA169/1995

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bjbj& IN THE COURT OF APPEAL 1995, No. 169 Magistracy Appeal

- Headnote - Sentencing - Attorney General s guidelines on prosecutions under s.38(1)(b) Immigration Ordinance - Defendant pleaded guilty but disputed the factual background - Magistrate held Newton inquiry and concluded that the defendant had lost the benefit of the remorse shown by his guilty plea to an extent. Held (Court of Appeal) : Magistrate adopted the right approach. IN THE COURT OF APPEAL 1995, No. 169 Magistracy Appeal BETWEEN THE QUEEN and CHAN LEONG

Coram: Hon Litton, V-P, Mortimer and Ching, JJ.A. Date of hearing: 4 August 1995 Date of delivery of judgment: 11 August 1995

J U D G M E N T

Litton, V-P giving the judgment of the Court:

Introduction

This is an appeal against sentence imposed by a magistrate, Mr J.E. Acton Bond on 20 December 1994, referred to us by the High Court for determination under s.118(1)(d) of the Magistrates Ordinance. The appellant had pleaded guilty to one charge of illegal entry under s.38(1)(b) of the Immigration Ordinance and been sentenced to 18 months imprisonment. Attorney General s guidelines Under lying the point of principle giving rise to this appeal is the government policy concerning the prosecution of illegal immigrants from Mainland China, following amendments to the Immigration Ordinance enacted in November 1990. Normally, under the policy, illegal immigrants would be repatriated to China as soon as practicable. They would only be prosecuted for remaining in Hong Kong, under s.38(1)(b) of the Immigration Ordinance if :

- (i) They are found at any place of employment; (ii) They have committed any other criminal offence whether immigration related or not. The facts In this case, the appellant came to be prosecuted because two police officers on patrol on Lantau Island, at about 8:20 am on 25 November 1994, found the appellant in a construction site near the South Lantau Road. The appellant was unable to produce any personal identification when challenged. Under caution, he said that he had been working and sleeping at the construction site for four days. The hearing before the magistrate At his trial on 5 December 1994 the appellant pleaded guilty to the charge. The facts, as stated above, were then put to the magistrate by the prosecutor. However, the appellant disputed the statement of facts in two respects :
- (i) He had only been sleeping at the construction site, but had not been working there (thereby, in effect, resiling from his admission to the police that he had been working there for four days prior to his arrest); (ii) He was not found by the police inside the construction site, but only by the side of the construction site . The magistrate then decided to hold a Newton enquiry (named after the case of R. v. Newton [1982] 77 Cr. Appr.13) at the conclusion of which the magistrate was wholly satisfied that the facts were as stated by the police. In his helpful Statement of Findings, the magistrate explained the reasons for the 18 months imprisonment in this way I considered that by his approach to the factual issue he had shown a lack of remorse and to an extent lost the benefit of the remorse apparently shown by his plea of guilty. The issue on appeal The question for our determination is whether the magistrate was right in his approach, having regard to the fact that there is a government policy concerning the prosecution of illegal immigrants under s.38(1)(b) of the Immigration Ordinance and the fact that if the appellant had not been found at a place of employment he would not have been prosecuted. This matter has vexed the High Court in its appellate jurisdiction for a number of years. As the magistrate has pointed out in his Statement of Findings, there seems to be two lines of cases :
- (i) A decision of Sears, J. in Chan Kwok Wah (M.A. No.745 of 1992 decided on 5 November 1992) where the judge held that a Newton enquiry was unnecessary, because the question whether the illegal immigrant had been properly prosecuted within the guidelines was irrelevant to sentence. In other words, the tariff sentence suggested by this court in R. v. So Man King [1989] 1 HKLR15 as appropriate for such cases should be applied without reference to the Attorney General s guidelines for prosecution. (ii) Duffy, J. in R. v. Lee Kei (M.A. No.1472 of 1994, 7 February 1995) came to the opposite view. There, Duffy, J. said The learned magistrate decided to hold a Newton enquiry for the purposes of sentence. There is no question but that he was correct to do so. This was not an enquiry held to decide whether the prosecution was properly brought, but to decide what was the proper sentence in this case, as the facts which bore upon the sentence, i.e. whether or not the appellant was working, were in dispute. What is the right approach? What is in issue here is a question of the proper approach to sentencing. It focuses upon this question : is the court, in sentencing, concerned with whether the defendant has been properly prosecuted under the guidelines? At first blush, Sears, s robust approach would appear to be correct. It is no part of the magistrate s function in sentencing to police the operations of the prosecuting

authorities. But, upon deeper analysis, the issue is not so simple. Assuming it were shown to the satisfaction of the magistrate that some mistake had in fact been made, and if the true facts as disclosed upon the Newton enquiry were known, the defendant would not have been prosecuted at all : clearly, in these circumstances, the magistrate would be entitled to regard that as a very strong mitigating circumstance and, instead of imposing the tariff sentence of 15 months imprisonment, would be right to impose a much lighter sentence, or not to order an immediate custodial sentence at all, thus enabling the defendant to be repatriated right away. Once it is accepted that a Newton enquiry in these circumstances is properly held, and that the facts disclosed upon such an enquiry might be relevant in mitigation of sentence, it must logically follow that those facts might also be relevant as to the degree of mitigation.

Conclusion

Here, the appellant had challenged the facts stated by the prosecution and had lost in his challenge. The magistrate was not punishing the appellant for challenging the facts. Nor was he saying that he was giving the appellant no credit at all for his guilty plea - as the District Judge did in *R. v. Lee Chau Pang*, (Criminal Appeal No.93 of 1995, unreported, 7 June 1995). He merely concluded that to an extent the defendant had lost the benefit of the remorse apparently shown by his guilty plea, and accordingly imposed a heavier sentence than the normal tariff on a guilty plea. We cannot see how he can be faulted in any way in his approach. In conclusion, it may be helpful to add this observation. Here, the facts relevant to the exercise of the discretion to prosecute were so closely bound up with the ingredients of the offence under s.38(1)(b) that, quite rightly, the magistrate concluded that this was a strict Newton situation. However, it is worth bearing in mind that the burden of establishing facts in mitigation are generally upon the defence, since such extraneous matters would not normally be within the knowledge of prosecution witnesses : see *Blackstone's Criminal Practice* (1995) page 1381. In our judgment, the magistrate reached the right conclusion in this case and the appeal must be dismissed. (Henry Litton) (Barry Mortimer) (Charles Ching) Vice President Justice of Appeal Justice of Appeal Mr W. Walsh (Crown Prosecutor) for Respondent Mr Lambert K.C. Lee (DLA) for Appellant - PAGE - PAGE &`#\$ W[SO @& > @& > @& @& " & 6" IN THE COURT OF APPEAL Registrar, Supreme Court Normal Microsoft Word 8.0 IN THE COURT OF APPEAL Title _PID_GUID Microsoft Word MSWordDoc Word.Document.8

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