

HONG KONG / JUDGMENT

Z v. HKSAR

COURT

Court of Final Appeal

DECIDED

22 March 2007

CASE / FILE NUMBER

FACC9/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj FACC No. 9 of 2006 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION FINAL APPEAL NO. 9 OF 2006 (CRIMINAL) (ON APPEAL FROM CACC NO. 506 OF 2004)

Between: Z Appellant and HONG KONG SPECIAL ADMINISTRATIVE REGION Respondent

Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Lord Scott of Foscote NPJ Date of Hearing: 9 March 2007 Date of Judgment: 22 March 2007 J U D G M E N T Chief Justice Li: It is the policy of the courts to take into account in mitigation of sentence useful assistance the defendant had given to the authorities and usually to give an appropriate reduction from the sentence which the defendant would otherwise have received. The assistance is most often given by the defendant after his arrest for the offence for which he is being sentenced (post-arrest assistance). There may be occasions where the assistance is given by the defendant before his arrest (pre-arrest assistance). The question of law arising in this appeal is whether pre-arrest assistance should be taken into account in mitigation of sentence. The Court of Appeal had held that it could not be taken into account. The facts On 13 November 2004, after pleading guilty to five charges of fraud and four charges of theft, the appellant was sentenced in the District Court (Judge Line) to a total of five and a half years imprisonment. The offences were committed over a period of about 13 months between 5 June 2003 and 20 July 2004. The appellant had preyed on six female victims and had used his charm to defraud them of sums totalling over \$1.4 million from their savings. After committing the first three offences between June and September 2003, the defendant was first arrested on 17 September 2003 for these offences but was released on police bail pending further inquiries. Four days later, on 21 September 2003, he committed the fourth offence. He was arrested on 21 November 2003. After refusal of bail by the magistrate, he was granted bail by the Court of First Instance. He then committed five further offences between May and July 2004. The appellant has a most appalling record of dishonesty and was rightly described by the Court of Appeal as plainly a hardened confidence-trickster . Now in his mid 40s, he had appeared before the courts on seven previous occasions involving 24 criminal

offences including criminal deception, blackmail and theft for which he had served over ten years imprisonment. He first went to prison in 1989. In 1995, he was sentenced to imprisonment, the term of which was reduced on appeal by one year to two and a half years on the ground that he had provided material assistance to the police. This was followed in 1996 by a sentence of seven years imprisonment to run consecutively to the sentence he was already serving. He again sought reduction of sentence on appeal on a similar ground but was unsuccessful. The Court of Appeal held that the sentence had already adequately taken into account his co-operation with the police. The appellant was released from prison in September 2001. The appellant's pre-arrest assistance As noted above, the appellant was first arrested in connection with the first three offences in the present case on 17 September 2003. Some five months previously, on 18 April 2003, he had provided information to the police. He informed them that a number of illegal immigrants would be coming to Hong Kong from the Mainland on 24 June 2003 to commit robbery with firearms and that he had been asked to pick them up from a particular location on the shoreline of Lantau. The appellant attended at the location with the police on the day in question when three illegal immigrants were intercepted by the police. The appellant refused to be a witness. He did not give a witness statement and was given an assurance that he would not be listed as a prosecution witness. One illegal immigrant was repatriated following court proceedings. Another was sentenced to two years imprisonment for aiding and abetting illegal immigrants to come to Hong Kong. The third was convicted in February 2004 after trial for possession of a firearm and ammunition without a licence and was sentenced to 12 years imprisonment. When the appellant provided the information to the police on 18 April 2003, he was not the subject of police investigation. He knew the police officer to whom he provided the information as the officer had arrested him on past occasions which led to his previous convictions. And they had recently renewed contact. In providing the information, he did not obtain anything in return. In particular, he was not paid any sum for the information. In November 2004, when the appellant was sentenced in the District Court, the appellant did not rely on his assistance to the police as a mitigating factor. His explanation is that he was then unaware of the conviction and sentence of the third illegal immigrant in February 2004. After he was sentenced, he learnt of that conviction and sentence. He appealed to the Court of Appeal against sentence on the sole ground that it should be reduced because of the assistance he had rendered to the police. The Court of Appeal The Court of Appeal (Stuart-Moore VP and Yuen JA) dismissed his application for leave to appeal. It held that no discount should be given for any pre-arrest assistance. It stated that: 10. The courts do not offer discounts to those who have acted as informers before their arrest as they will have had their own motives to serve by acting in such a way, usually no doubt arising from the expectation of a financial reward either from an informer's fund or some other source.

11. It is not, therefore, mitigation of any weight that a person has acted as a police informer in the past. The policy of the courts is confined to rewarding offenders in the only practical and tangible way available to them by reducing the sentences of those who give valuable post-arrest information or assistance while, at the same time, providing a mechanism which is designed to act as an incentive to such persons to come forward with assistance to the

authorities. Leave to appeal The Court of Appeal in effect held that there is a bar against any recognition of pre-arrest assistance as a mitigating factor and giving any discount in sentence for such assistance. The appellant was granted leave to appeal by the Appeal Committee on the following certified question of law: Whether useful information provided by a defendant to a law enforcement agency is to be taken into account in mitigation of sentence even if such information was provided before his arrest. The policy The policy of the courts to recognise useful assistance to the authorities in mitigation of sentence is based on the public interest. It is in the public interest that appropriate punishment should be imposed on defendants convicted of criminal offences. But at the same time, the prevention, detection and prosecution of crime is also in the public interest. The use of the informer is a powerful weapon in the hands of the law enforcement agencies in society's fight against crime. Criminals should be encouraged to inform on other criminals. Honour among thieves should be discouraged. Indeed, dishonour and betrayal among thieves should be encouraged. The courts have therefore adopted the policy of accepting useful assistance to the authorities as a mitigating factor. A discount to the sentence which would otherwise have been imposed is usually given for such assistance. This is a common approach in many jurisdictions. Its object is to provide an incentive for offenders to co-operate with the authorities. It encourages them to assist by giving information about the criminal activities of others, by giving evidence in prosecutions brought and the like. It must be recognised that the offender would be receiving a punishment which is less than that which his crime would otherwise have deserved. But this is considered justified in the overall public interest. The courts approach in this regard is a pragmatic one. For the purposes of the policy, no distinction is drawn between disclosure of information concerning the crime for which the defendant is being sentenced and other crimes. The object of the policy is to encourage the disclosure by offenders of information about crimes to the authorities. So, consistently with that purpose, the assistance to the authorities is recognised in mitigation of sentence whether the disclosure concerns crimes for which the defendant is being sentenced or crimes associated with them or relates to crimes which are unconnected to such crimes. See *R v Sivan* (1988) 87 Cr App 407 at 412, *R v Many* (1990) 51 A Crim R 54 at 68, *R v Accused* [1993] 10 CRNZ 397 at 402, *R v Rostom* [1996] 2 VR 97 at 104. In *HKSAR v Au Wai-Yip* (CACC 166/2002 unreported, 23 August 2002), an unrepresented applicant relied on his assistance to the police in support of his application for leave to appeal against sentence. Leong CJHC sitting alone held that his assistance to the police did not deserve any leniency since it related to matters which pre-dated his arrest and had no connection with the present offence. The approach that the assistance should not be recognised as it related to crimes which were unconnected with the present offence is erroneous and should not be followed. (See further para. 18). Factors In deciding whether the assistance given by the defendant to the authorities merits a discount in a particular case and if so, its extent, a number of factors should be taken into account. Broadly speaking, the most important factors usually include:

- (a) The nature and extent of the assistance. In relation to this, matters which are relevant include: the degree to which the defendant gave full and frank disclosure; the truth and reliability of the information; the range and seriousness of the criminal activities disclosed; the significance and usefulness of the information and the extent to which it could potentially assist or had actually assisted the authorities; whether the authorities were already in possession of the information and whether the defendant believed this to be the case; the extent of the defendant's assistance, in particular, whether he was prepared to give evidence.
- (b) The likely consequences of the defendant giving assistance such as threats to his safety, more burdensome conditions of his imprisonment as he may have to be placed in protective custody, and danger to himself and his family after his release from prison. See generally *R v King* (1985) 82 Cr App R 120, *R v Sivan*, *R v Many*. Post-arrest assistance In many cases, assistance is given by the defendant after his arrest. Having been arrested, the defendant faces a stark choice. On the one hand, if he provides useful assistance to the authorities, such assistance would be recognised in mitigation of sentence. On the other hand, if he does not, such a factor would not be available in favour of leniency. In these circumstances, it is in the defendant's own interests to co-operate. Further, quite apart from self-interest, there are cases where the defendant on being arrested wishes to turn over a new leaf and to make a clean breast of his criminal activities. His assistance to the authorities may depending on the circumstance be accepted as a demonstration of genuine remorse which would be taken into account as a separate mitigating factor in sentencing. Pre-arrest assistance The question is whether there should be a bar against recognition of assistance provided before arrest in mitigation of sentence. The object of the policy is to encourage useful assistance to the authorities for the prevention, detection and prosecution of crime. That purpose would be equally served whether the assistance is provided before or after arrest. The information provided before arrest may be as useful to the authorities as that provided after arrest. There is therefore no justification for drawing a curtain between pre-arrest and post-arrest assistance and for imposing a bar against recognition of the former. This conclusion is consistent with the approach adopted in authorities in Australia and New Zealand that pre-arrest assistance may be recognised in mitigation of sentence. See *R v Kelly* (1993) 113 ALR 535 at 541, *R v Accused* (New Zealand CA 443/97 unreported, 4 March 1998), *R v A* (New Zealand CA 308/02 unreported, 16 December 2002). In Hong Kong, pre-arrest assistance was recognised as a mitigating factor by the Court of Appeal in *R v Chui Wai-Tai, Ip Wai-Sheung* () and another (Criminal Appeal No. 254 of 1991 unreported, 7 May 1993). Before Ip's arrest for dangerous drugs offences, he had given statements to the police concerning a murder which implicated Chan Wai-Keung. Subsequently, after his conviction but before sentence, Ip gave evidence at Chan Wai-Keung's trial for murder. In sentencing Ip, the judge stated that he did not commence his co-operation or did not demonstrate his co-operation until after conviction (see page 11 of the Court of Appeal's judgment). He was sentenced to 18 years, having been giving a discount of five years for his co-operation. The Court of Appeal did not accept that Ip only demonstrated his co-operation after his conviction. Noting that

he had given a statement before his arrest, it proceeded instead on the basis that he had at all times demonstrated his willingness to co-operate with the police, and on that basis reduced his sentence by a further year to 17 years. (See page 12) In contrast, in *HKSAR v Au Wai-Yip*, Leong CJHC had refused to recognise pre-arrest assistance. It had pre-dated the offence by two years. The judge stated that it had no connection with the present offence and could not be taken as any indication of remorse (at para 9). The judge's view appeared to be that pre-arrest assistance should not be recognized at all or at any rate unless it was connected to the present offence or was an indication of remorse (presumably envisaging a scenario where the present offence had been committed at the time of assistance but no arrest had been effected). Having regard to the conclusion above that pre-arrest assistance may be recognized, this view is not correct and this decision should not be followed. Although pre-arrest assistance may be recognized, the court should examine the circumstances relating to it before deciding whether and if so, the extent to which it should be taken into account. In a post-arrest case, the defendant has been apprehended. Having regard to the policy of recognizing assistance in mitigation of sentence, it would be in his self-interest to co-operate and his rendering of assistance is usually readily understandable. In a pre-arrest case however, the reason for his co-operation may not be apparent and it is even more important for the court to understand the circumstances relating to his assistance before deciding whether and if so, the extent to which a reduction in sentence is merited. Obviously, the circumstances which a sentencing court may have to consider vary from case to case and are of an infinite variety. For present purposes, a number of matters may be mentioned. First, the defendant may have assisted the authorities out of good motives. He may have had a genuine wish to assist the authorities. His assistance in these circumstances would usually deserve full recognition in mitigation of sentence. Secondly, the defendant may have received payment or other consideration for his assistance. It has to be recognised that payments to police informers are a fact of life and the use of informers is necessary in society's fight against crime. Although assistance for which payment or other consideration was given may be recognised as a mitigating factor, the court should carefully consider all the circumstances in deciding whether the assistance in the case in question deserves any reduction and if so, the amount of reduction. The more substantial the payment or consideration, the less sympathetic should the court be in this regard. Thirdly, the courts should be wary of the situation in which a defendant who is engaging or is intending to engage in criminal activities gives assistance to the authorities in order to build up credit for himself to be used later if apprehended for the purpose of minimising the consequences of his crimes. Although there is no bar against the recognition of assistance given in such a situation, the courts should proceed with considerable circumspection in deciding whether, taking into account all the circumstances, the assistance merits any recognition and if so the degree of any discount. It is undesirable for the courts to take an approach which has the effect of fostering potential defendants trying to build up goodwill in this way. See *R v Mundy* (1994) 76 A Crim R 92 at 95, *R v A* (New Zealand CA 308/02 unreported, 16 December 2002) at para 19 and *R v Hayes* (1981) 3 A Crim R 286 at 287. Whether reduction In the present case, the appellant did not obtain anything in return for

his assistance. He did not receive any payment or other consideration. The assistance was given in April 2003 before the first offence was committed in June 2003. Although the appellant has previous convictions and in past cases, had relied on assistance to the authorities in support of appeals against sentence, there is no reason to suppose that in giving assistance in April 2003, the appellant was seeking to build up credit in order to minimise the consequences of crimes he might thereafter commit. Indeed at that time, as was pointed out by Mr Cross SC, the Director of Public Prosecutions, for whose helpful submissions the Court is indebted, the decision in *HKSAR v Au Wai-Yip* was against any recognition of pre-arrest assistance in mitigation of sentence. The information given by the appellant was useful and he accompanied police officers to the location where three culprits arriving illegally from the Mainland were apprehended. His assistance prevented serious crimes of robberies with the use of firearms from being committed. Although the appellant refused to give evidence, one culprit was convicted of and sentenced to two years imprisonment for aiding and abetting illegal immigrants to come to Hong Kong. Another culprit was convicted of possession of a firearm and ammunition without a licence and sentenced to 12 years imprisonment. Further, the appellant has been put in protective custody in prison as a result of his assistance. Presumably, this would continue throughout his sentence rendering his term of imprisonment more burdensome. In the circumstances, the appellant's assistance merits some reduction. Extent of reduction The Court of Appeal is well placed to consider the range of reductions of sentence for co-operation with the authorities. It has used various percentages of discount for different degrees of assistance. It has applied a usual discount of 40% (including the one third reduction for a guilty plea) for an appellant who had provided assistance to the authorities without testifying against those about whom they had provided information. *HKSAR v Y* [2005] 3 HKC 337 at 340. (Compare its earlier decision in *HKSAR v Ng Shek-Yu* (CACC 178/2000 unreported, 1 March 2001) referring to a discount of between 40% to 45% as usually appropriate in such circumstances.) Where an appellant had not only given information but had proceeded to give truthful and material evidence, the Court of Appeal has given a usual discount of 50% (including the one third reduction for pleading guilty). *HKSAR v Lee Yat-Fan* (CACC 414/1999 unreported, 30 May 2001). Where the level of co-operation is such as to place the appellant in the supergrass category, a maximum discount of two-thirds has been used. *R v Chan Fukui* [1986] HKLR 967 at 968, *HKSAR v Ng Shek-Yu* (at p 3). In the present case, the relevant figure is the usual discount of about 40% as the appellant had provided useful information but had not given evidence. Its appropriateness has not been questioned in this appeal. A 40% discount (including the one third discount for the guilty plea) would result in a sentence of 59.4 months, that is four years 11 months and 12 days. In the result, the sentence should be reduced from five and a half years to five years. Disposal Accordingly, the answer to the certified point of law (see para 9) is in the affirmative; there is no bar to pre-arrest assistance being taken into account in mitigation of sentence. The appeal should be allowed and the sentence should be reduced to five years. An order is made that leave should not be granted under rule 72(1)(c) of the Hong Kong Court of Final Appeal Rules, Cap. 484, for inspection of the documents referred to therein without affording the appellant an opportunity to be

heard. Mr Justice Bokhary PJ: I agree with the Chief Justice's judgment. Mr Justice Chan PJ: I agree with the Chief Justice's judgment. Mr Justice Ribeiro PJ: I agree with the Chief Justice's judgment. Lord Scott of Foscote NPJ: I agree with the Chief Justice's judgment. Chief Justice Li: The Court unanimously allows the appeal and reduces the sentence to five years. An order is made that leave should not be granted under r 72(1)(c) of the Hong Kong Court of Final Appeal Rules for inspection of the documents referred to therein without affording the appellant an opportunity to be heard. (Andrew Li) (Kemal Bokhary) (Patrick Chan) Chief Justice Permanent Judge Permanent Judge (R.A.V. Ribeiro) (Lord Scott of Foscote) Permanent Judge Non-Permanent Judge Mr Robert Y.H. Pang and Ms Cancy S.S. Liu (instructed by Messrs S.H. Chan & Co. and assigned by the Legal Aid Department) for the appellant Mr I. Grenville Cross SC, Mr Cheung Wai-sun and Ms Vinci Lam (of the Department of Justice) for the respondent The facts relating to Ip's co-operation are set out in greater detail in the decision of the Privy Council in the appeal of Chan Wai-Keung against his conviction for murder. [1995] 1 WLR 251 at 253-255. Note that Ip Wai-Sheung was referred to in the Privy Council's judgment as Yip Wai-Sheung, Ip and Yip being different persons. 9TB.s Normal.dot setup Microsoft Word 9.0 zONl zONl Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=56477

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/z-v-hksar-2007>

Prepared on 25 October 2026 · Esheria