HCMA 716/2014

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO 716 OF 2014
(ON APPEAL FROM TWCC 3180 OF 2014)

BETWEEN

HKSAR Respondent

and

KHALID MEHMOOD Appellant

Before: Deputy High Court Judge S. D'Almada Remedios in Court
Date of Hearing: 26 February 2015
Date of Judgment: 26 February 2015
Date of Reasons for Judgment: 27 February 2015

J U D G M E N T

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1. The appellant was convicted upon his own pleas of guilty before Acting Principal Magistrate Mr Joseph To of two charges. They were as follows :-

Charge 1:- taking employment while a removal order was in force, contrary to section 38AA(1)(b) of the Immigration Ordinance, Cap 115; and

Charge 2:- using an identity card relating to another person, contrary to section 7A(1A) of the Registration of Persons Ordinance, Cap 177.

2. The appellant was sentenced to 18 months' imprisonment on the 1st charge and 8 months' imprisonment on the 2nd charge, 4 months of the sentence in respect of the 2nd charge was ordered to run consecutive to the 1st charge, resulting in the total sentence of 22 months' imprisonment.

3. The appellant appeals against his sentence on the ground that his sentence was excessive.

4. At the end of the hearing I allowed the appeal to the extent that the sentence was reduced by 4 months resulting in a total sentence of 18 months' imprisonment on both charges. I now hand down my reasons for so doing.

Grounds of appeal

5. In his home made written grounds of appeal, the appellant states that two other inmates at Tai Lam Prison received 15 months' imprisonment in relation to the offence of unlawfully taking employment. He further relies on the fact that he has four young children aged 11-18. He is the sole bread winner of the family and wished to return home to his family to take care of them.

6. At the present hearing he added a further ground requesting that the approximate two odd months he spent in Castle Peak Immigration Centre (CIC) in 2009 and 2013 be taken into account and deducted from the total sentence.

Facts

7. On 1 November 2014, while the appellant and his colleague from a transportation company were moving goods to a shop in Tung Chung using a cart, the appellant accidentally injured a passer-by. The case was reported to the police and it transpired that the appellant was a Form 8 recognizance holder who was not allowed to take up employment in Hong Kong.

8. Further police inquires revealed that the appellant had produced a Hong Kong Identity Card relating to another person in order to secure employment at the said transportation company on 24 November 2009.

9. The appellant entered Hong Kong legally on 7 August 2004 from Pakistan as a visitor and was allowed to stay until 21 August 2004.

10. On 5 March 2009, he surrendered himself to the police for having overstayed. Between 27 July 2012 and 16 February 2013, the appellant had failed to report to the Immigration Department.

11. On 20 February 2013, he was convicted of breach of condition of stay and sentenced to 3 months and 5 days' imprisonment.

12. Shortly after his release from custody on the 8 May 2013, the appellant made a torture claim. Eight days thereafter on 20 May 2013, a removal order was issued against him.

13. The appellant's Form 8 Recognizance commenced subsequent to the removal order, namely, on 10 June 2013.

Reasons for sentence

14. No authorities were cited by the magistrate.

15. The magistrate stated that the normal sentence after a plea of guilty on charge 1 ranged between 12 – 15 months' imprisonment. As the appellant had worked illegally in Hong Kong for over four years, the magistrate enhanced his sentence to 18 months for the 1st charge.

16. For the 2nd charge, the learned Magistrate adopted a starting point of 12 months and reduced it to 8 months upon the appellant's guilty plea. He ordered 4 months to run consecutive to charge 1.

17. The magistrate in his reasons for sentence said[1] :-

> "9 Whilst the defendant uttered the identity card relating to another person only once when he applied for a job in 2009, he has maintained the false representation to his employer over the entire period of his employment with that company. This is, in the court's view, not the kind of illegal utterances of document for a single or liquidated benefit: for each day the defendant has remained in that illegal employment, he has continued to derive benefits from the initial utterance of that document. Bearing in mind the fact that the defendant has derived uninterrupted benefits for a total of some four years from the illegal utterance,

[1] p 19 Appeal Bundle (AB) para 9 of reasons for sentence

> I order that four months of the sentence in Charge 2 are to run consecutively to the 18 months' imprisonment in Charge 1."

Discussion

18. The relevant sentencing principles and considerations were discussed in great detail in *HKSAR v Usman Butt and Others* [2010] 5 HKLRD 452 and *HKSAR v Tran Viet Thanh and others* [2012] 1 HKLRD 903, both by Cheung JA (as he then was).

Usman Butt

19. In *Usman Butt*, 4 of the appellants were illegal immigrants, while one was an overstayer. They came from countries such as Pakistan, India and Nepal. They had lodged claims for asylum or refugee status or claimed they would be tortured if returned to their original abode (torture claimant). They were prosecuted under section 38AA(1) of the Ordinance. They pleaded guilty.

20. The appellant is similarly a torture claimant from Pakistan and pleaded guilty to an offence under s 38AA.

21. The Court of Appeal dealt with the appropriate sentences under s 38AA offences. At paragraph 27, the view of the Court was that a sentence of 15 months' imprisonment (after plea) is required to be applied in a section 38AA offence with the primary reason being deterrence.

22. In paragraph 55, the Court stated that they would refrain from giving detailed guidelines on how the sentence may be adjusted. The Court of Appeal adopted what was said in *The Queen v So Man-king*[2] that repeated offences was clearly an aggravating factor. In addition, the guidelines in *So Man King* were reiterated:

> "The guideline already allows for the almost inevitable plea of guilty, but voluntary surrender to the authorities should warrant a substantial discount, and strong humanitarian considerations should always be honoured, even to the extent sometimes of suspending whatever prison sentence is otherwise thought appropriate. On the other hand, the Court should take into account, by upward adjustment, any previous unlawful entry, whether resulting in prosecution or not, and other circumstances which may aggravate the offence, such as the actual use of a forged or other person's identity card to obtain some particular benefit." (emphasis added)

Using identity card relating to another - Tran Viet Thanh

23. In *Tran Viet Thanh*, the Court of Appeal[3] clarified the decision in *HKSAR v Li Chiang Li*[4] where it held that 12 months' imprisonment should be imposed on a defendant (for possession of forged identity card or identity card relating to another) even if the defendant is entitled to enter or remain in Hong Kong lawfully. But where the false identity card was actually used such as to gain employment (emphasis added) where his condition of stay may prohibit employment locally, the sentence could be enhanced to 15 months (paragraph 21).

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[2] [1989] 1 HKLR 142
[3] at para 21
[4] [2004-2005] HKCLRT 193

24. The Court of Appeal added[5] that if an illegal immigrant used a forged identity card for a benefit such as seeking employment, then the 15-month sentence can be adjusted upwards.

25. The enhancement applied in *Li Chiang Li* was 3 months' imprisonment for using an ID card relating to another or a forged ID card to gain employment.

Conclusion

26. In respect of charge 1, the magistrate stated[6] the normal sentence, even on a plea of guilty, for charge 1 should range between 12 and 15 months' imprisonment. He then sentenced the appellant to 18 months stating there should be an enhancement.

27. The magistrate did not point out his sentence adopted after a plea of guilty nor did he state the amount of enhancement. It is unclear what he considered to be the appropriate sentence upon a plea of guilty or the quantity of enhancement. He should have done so.

28. The magistrate had considered that it was an aggravating factor that the appellant had worked illegally for over 4 years and enhanced the sentence on that basis. It is to be noted that although the appellant had obtained his employment in 2009 by using an identity card relating to another, the 1st charge related to unlawful employment while a removal order was in force. The removal order commenced on 20 May 2013. Consequentially under the charge, the appellant had only

[5] at para 22

been working illegally for approximately 1½ years since May 2013 when the removal order was issued and not as incorrectly stated by the magistrate for 4 years.

29. It is clear from *Usman Butt* that a sentence of 15 months' imprisonment after a plea of guilty is required to be applied in a section 38AA offence. In following the decision in *Li Chiang Li*, an upward adjustment of 3 months is typically applied to the 15 months' imprisonment where an ID card is used for the benefit of seeking employment.

30. Assuming that the magistrate had considered a sentence of 15 months imprisonment after a plea of guilty to be appropriate and applied a 3 month enhancement his sentence 18 months on the 1st charge was entirely appropriate.

31. In respect of charge 2, a sentence of 15 months' imprisonment after a plea of guilty is appropriate. Again an upward adjustment would be one of 3 months for benefiting from the card by seeking employment.

32. The magistrate's sentence of 8 months' imprisonment on charge 2 was lenient, it should be substituted with a sentence of 18 months' imprisonment.

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[6] para 6 of reasons for sentence AB p.19

33. Turning to whether the sentence on charge 2 should be consecutive. The Court of Appeal in *Tran Viet Thanh* considered whether concurrent or consecutive sentences should be imposed for using a forged identity card and unlawful remaining. The Court said:-[7]

> "17 Further as apparent from *Chan* and *Tam* and *Wong Ping* this Court has consistently imposed a concurrent sentence for forged identity card offence and unlawfully remaining in Hong Kong in the absence of exceptional circumstances.
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> 22 … The underlining criminality of an illegal immigrant in possession of a forged identity card is his unlawful presence in Hong Kong. This is the mischief that the deterrent sentence of 15 months' imprisonment is aimed at. The forged identity card must primarily be for the purpose of ensuring his illegal status in Hong Kong would not be so easily detected. If he makes use of the card for a benefit, such as seeking employment, then the 15-month sentence can be adjusted upwards.
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> 23 The enhancement provides a degree of flexibility in arriving at the appropriate sentence even if the two sentences remain concurrent. *Wong Ping* did not state categorically that there must be concurrent sentences. Whether in a case there should be consecutive sentences must be fact specific. By giving a proper adjustment to the standard sentences, we do not envisage in a normal situation that there is a real need to use a partially consecutive sentence approach."

34. Mr Pierre Lui[8] counsel for the respondent did not seek to uphold the sentence on the 2nd charge. He conceded that the proper sentence should have been one of 18 months' imprisonment and that it should run concurrently with the sentence of 18 months on the 1st charge. I am in agreement with him. With respect to the magistrate, there was nothing specific on these facts to warrant a partially consecutive sentence.

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[7] at para 17, 22 and 23
[8] Public Prosecutor

35. Section 67A(1A) of the Criminal Procedure Ordinance Cap 221 states that :

> "The length of any sentence of imprisonment imposed on a person by a court shall also be treated as reduced by any period during which he was, immediately prior to his first appearance in court in connection with any proceeding relating to the offence for which the sentence of imprisonment was imposed, in custody."

36. It is clear that the appellant's custody in CIC (administrative detention) was at a time long before the commission of these offences and thus has nothing to do with the present offences. In the circumstances, I decline to deduct any time spent by the appellant in administrative detention to reduce the sentence.

37. In the circumstances the sentence on the 1st and 2nd charges is one of 18 months' imprisonment, both charges are to run concurrent to each other. This has the effect of reducing the applicant's total sentence by 4 months, from 22 months to 18 months' imprisonment. To this extent the appeal is allowed.

(S. D' Almada Remedios)
Deputy High Court Judge

Mr Pierre Lui, PP, of the Department of Justice, for the respondent

The appellant appeared in person