

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MAGISTRACY APPEAL NO 34 OF 2015
(ON APPEAL FROM FLCC 6723 OF 2014)**

BETWEEN

HKSAR

Respondent

and

KHAN AFTAB

Appellant

Before: Deputy High Court Judge S. D'Almada Remedios in Court

Date of Hearing: 17 February 2015

Date of Judgment: 17 February 2015

Date of Reasons for Judgment: 2 March 2015

J U D G M E N T

1. The appellant appeals against a sentence of 15 months' imprisonment. At the end of the hearing I dismissed the appeal and now hand down my reasons for so doing.

2. The sentence was passed upon his plea of guilty to one count of taking employment while being a person in respect of whom a removal order is in force contrary to section 38AA(1)(b) and (2) of the Immigration Ordinance Cap 115.

Brief facts

3. On 11 December 2014, the appellant together with three other co-defendants were intercepted and arrested by immigration officers. They were all holders of Immigration recognizance forms. The appellant was observed by immigration officers to have been working at a construction site carrying and disposing of construction waste. A service contract in respect of the appellant was found at the scene. At the material time, a removal order was in force in respect of the appellant.

The magistrate's reason for sentence

4. The magistrate¹ cited the case of *HKSAR v Shak Nasir*², she adopted a starting point of 22.5 months and reduced the term to 15 months' imprisonment taking into account his plea of guilty. She declined to exercise her discretion to deduct from that term the time spent by the appellant in administrative detention before the date of this offence. The magistrate stated that the deduction of time spent in administrative custody was a matter of discretion and the appellant had to satisfy the court that such period of detention was related to the present offence. She considered that the time spent in administrative detention was not related

¹ Ms Merinda Chow

² HCMA 147/2014

to the present offence and hence did not deduct the time spent in administrative detention for the appellant or his co-the defendants³.

The appellant's administrative detention

5. The appellant had sneaked into Hong Kong on 19 March 2012 and was arrested on 8 August 2012. The first period of his administrative detention by the Immigration Department was between 8 August and 28 September 2012, ie, a total of 52 days, until he was released on recognizance.

6. A removal order was issued in respect of the appellant on 24 October 2012 which was served on him on 15 November 2012. On 3 September 2013, the appellant was arrested again and his second period of administrative detention by the Immigration Department was between 3 September and 22 October 2013, ie, a total of 50 days, until he was released on recognizance.

7. Subsequent to the above periods of detention, the appellant committed the present offence. In total, the appellant was in administrative detention for 102 days prior to the present offence.

Grounds of appeal

8. In the appellant's homemade grounds of appeal the appellant claimed that about 9 of his inmates at Lai Chi Kok Reception Centre (LCKRC) who were charged with the same offence were given a

³ The co-the defendants had respectively spent 7, 10 and 14 days in administrative detention prior to the present offence.

deduction in their sentence for their administrative detention and as a result a deduction for his time spent in administrative detention should have been given to him by the magistrate.

Mitigation

9. The appellant was legally represented⁴ before the magistrate. It was raised on his behalf that he was in administrative detention for 102 days prior to the present offence however counsel accepted that the detention was not related to the present offence. Upon her refusal to exercise her discretion to deduct the time spent in administrative detention the appellant applied to review the sentence. At the review hearing the appellant acted in person. He pleaded for leniency and claimed he wanted to return to his home country to visit his sick mother. The magistrate refused the appellant's review application making clear that she would not deduct the time spent in administrative custody from the sentence.

Discussion

10. The sentence of 15 months' imprisonment after plea accords with the sentencing tariff for the present offence: see *HKSAR v Usman Butt*⁵.

⁴ Mr Charles Chan instructed by the Duty Lawyer Service

⁵ [2010] 5 HKLRD 452 see para 27 at 461

11. The issue on this appeal is whether the magistrate acted within her discretion in declining to deduct from the sentence the time spent by the appellant in administrative detention.

12. In the present case, the appellant was arrested on 11 December 2014 by immigration officers and he was brought to court on 13 December 2014⁶. In respect of the 102 days of administrative detention prior to the present offence, the appellant would not be entitled to any statutory reduction for that period as far as section 67A(1A) of the Criminal Procedure Ordinance, Cap 221 is concerned. That subsection provides: -

*“(1A) 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-***

(a) of the police, Customs and Excise Department or Independent Commission Against Corruption in connection with that offence; or

(b) under Part VII of the Immigration Ordinance (Cap 115) in connection with that offence.”

(Emphasis added)

13. Although the facts admitted to by the appellant did not state whether his administrative detention was under Part VII of the Immigration Ordinance or otherwise, the 102 days were not spent by the appellant immediately prior to his first appearance in court in

⁶ Charge sheet; AB p.4, 7

connection with the offence charged. His detention took place back in 2012 and 2013, more than a year before this case.

14. It appears from the wording of section 67A of the CPO that the time spent in detention, if it is to be discounted, has to relate to the offence for which the appellant was sentenced.

15. In *Usman Butt* the Court of Appeal made reference to the various appellants and acknowledged that the sentencing court reduced or did not reduce the time spent in administrative custody. No further discussion was mentioned or made of administrative detention.

16. In *HKSAR v Bogoda*⁷ the court noted that the sentencing court has a discretion to give credit to the time spent by a the defendant in detention to which section 67A(1A) of the CPO does not apply such as giving credit to a the defendant's detention outside Hong Kong. In *HKSAR v Lee Kwan Yee & Anor*⁸ the Court of Appeal set out the relevant principles in exercising the discretion to take account of time spent by a the defendant in custody outside Hong Kong⁹ (to which section 67A of the CPO does not apply)

“5. ... It is therefore a matter of discretion whether it should be taken into account or not, that discretion to be exercised in light of the relevant circumstances.

6. By way of guidance as to the exercise of that discretion, in *R v Law Yui Wo* [1994] 2 HKCLR 204, this court held that time spent in custody in a foreign jurisdiction was not generally a

⁷ HCMA 663/2010

⁸ [2004] 1 HKC 462

⁹ Para 5 to 6 at 464 A-C

matter to be taken into account unless, in the discretion of the judge, it was felt that justice demanded that account should be taken of it. There is not therefore a presumption that ordinarily credit must be given.”

17. It is apparent that the courts recognise a discretion to give credit to time spent by a defendant in custody outside Hong Kong or in administrative detention because both periods do not fall within the ambit of section 67A of the CPO. Ultimately, the giving of credit to time spent by a defendant in custody which would not otherwise be regarded or reduced under the provisions of section 67A remains only as a discretion and is not automatic.

18. In sentencing the magistrate referred to *Shak Nasir*. In that case the court in reference to other cases dealt with the court’s discretion to deduct time spent by a defendant in administrative detention. *Shakir* faced the same charge as this appellant, he was sentenced to 15 months’ imprisonment. The offence was committed about 1 month after the defendant was released from administrative detention. The defendant’s appeal was dismissed by the court, where it considered that there was nothing wrong with the refusal by the magistrate to exercise her discretion to deduct from the sentence the time spent by him in administrative detention.

19. In the instant case, on the facts as admitted by the appellant the administrative detention was clearly attributable solely to his illegal remaining in Hong Kong and had nothing to do with the present offence which concerned his taking employment while a removal order was in force. The factual background of his

administrative detention and the facts of the present offence were entirely unrelated. The 102 days spent in administrative detention were not connected to the present offence. His detention (in 2012 and 2013) took place more than a year before the present this case.

20. It is besides the point that there may be defendants in other cases with similar offences who might have been given deductions in their sentence. It is not known to this court which cases those are, nor the reasons behind those deductions. Specifically it is not known if such deductions could be attributed conclusively to time being spent by those other defendants in administrative detention.

21. At the end of the day, the question in this appeal is whether the magistrate in the present case made any mistake in her exercise of the discretion as regards the appellant's administrative detention. The magistrate's exercise of her discretion in respect of the appellant's sentence should only be upset if it be shown that she was plainly wrong or that she plainly failed to taken into account matters that she should have had in mind when exercising her discretion see : *R v Liu Kwok Kwong, Wallace*¹⁰ The magistrate did not err in either respect in the instant case.

22. The magistrate acted within her discretion in declining to deduct from the sentence the time spent by the appellant in administrative detention prior to the present offences. The

¹⁰ CACC205/1991

appellant's time in administrative custody had no connection with the present offence. The appellant's appeal against sentence is dismissed.

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

Mr Ivan Cheung, PP, of the Department of Justice, for the respondent

The appellant appeared in person