



Summary of Judicial Decision

HKSAR v Lam Kai Man (“the Appellant”) CACC 246/2019; [2020] HKCA 624

Decision	: Appeal against sentence dismissed
Date of Hearing	: 9 July 2020
Date of Judgment	: 9 July 2020
Date of Reasons	: 27 July 2020

Background

1. The Appellant set up an arrangement to meet X, a girl aged 18, on a “compensated dating” basis. At an hourly-rental guesthouse, upon the Appellant’s request, X performed oral sex for him. The Appellant, claiming to be a police agent, requested X to have sexual intercourse with him, and the act had to be recorded. The Appellant refused to let X go or put her clothes back on. X felt threatened and intimidated by the Appellant’s words, and it was only in those circumstances that she had sexual intercourse with the Appellant. She did not engage in the sexual intercourse of her own volition. The Appellant did not use any condom.
2. The Appellant was originally charged with the sole count of Rape. Before committal, the Appellant had offered to plead guilty to the charge of Procurement of unlawful sexual act by threat, contrary to s.119(1) of the Crimes Ordinance (Cap 200). The offer was repeatedly rejected by the Prosecution. The Appellant had never indicated to the committal magistrate or the trial judge of the same. Moreover, he went on to instruct his counsel that consent and X’s credibility were to be in issue at a contested trial. Eventually after the trial had started in the CFI, the offer was renewed and was accepted by the Prosecution.
3. The sentencing judge adopted a starting point of 6.5 years but only gave a 20% discount for his guilty plea. The Appellant was thus sentenced to 5 years and 2 months’ imprisonment.

Issue in dispute

4. The issue on appeal was whether the Appellant should still be entitled to the full one-third discount for his plea.

Department of Justice’s Summary of the Court’s rulings

(full text of the Court’s judgment is at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.js



[p?DIS=129690&QS=%2B&TP=JU\)](#)

5. At the start of the hearing, the Court informed parties of its provisional view on the starting point adopted. The Court considered that, given the aggravating features involved, the present case would have merited a starting point of 7 years' imprisonment. The starting point then ought to have been appropriately enhanced for the Appellant's recent, previous similar conviction for rape. The Court deemed an enhancement of 1 year to be proportionate to the sentence for the substantive offence, thus making a notional sentence after trial of 8 years' imprisonment. (paragraphs 17-18)
6. If the Court were to accede to the complaint, then the Court would be required to sentence afresh. Therefore, even if the Court were to accede to the submission that the Appellant should receive a full one-third discount for plea, the resulting sentence would be 5 years and 4 months' imprisonment from an enhanced starting point of 8 years. Counsel for the Appellant, after advising the Appellant the above, informed the Court that he was instructed to withdraw the appeal against sentence. (paragraphs 19-21)
7. The Court further considered it necessary to supplement what has been said in *HKSAR v Ngo Van Nam* [2016] 5 HKLRD 1 in respect of the position where early pleas of guilty to lesser offences or alternative charges are offered by a defendant but rejected by the prosecution, which pleas either match the eventual verdict of the jury or are later accepted by the prosecution. (paragraphs 22)
8. In summary, the further principles are that:
 - (1) If a defendant wishes to plead guilty to a lesser or alternative charge, he should make a clear and unequivocal statement of his position in court and on the record, either by formally entering a plea to the proposed charge on the court record or through stating formally on the court record the defendant's intention and the basis of his proposed plea; (paragraph 53)
 - (2) the defence must adhere to the stated position for the remainder of the proceedings; and (paragraph 54)
 - (3) the extent of the discount depends on the stage at which the proposed plea is clearly and unequivocally entered on the court record, applying the principles set out in *Ngo Van Nam*. (paragraph 56)
9. However, if for some reason the defendant did not make a clear and unequivocal statement of his position in court and on the record, the



court should satisfy itself that there was good reason for the plea not being formally entered on the court record, and the onus will be firmly upon the defendant seeking the discount to show that he clearly and unequivocally offered the plea in question and the basis for the plea; and that such position had been adhered to for the remainder of the proceedings. (paragraph 55)

10. In addition, because the offence of manslaughter may be committed in a number of ways, the Court particularly raised the situation where in murder cases manslaughter is offered as an alternative by a defendant. If a particular discount is sought, that the defendant's plea and the basis for the plea should be formally presented before the court on the record in clear and unequivocal terms. It will not be sufficient for counsel to inform the court, in the event of a verdict of manslaughter on a particular basis being recorded by the jury, that an offer to plead guilty to manslaughter simpliciter was offered to the prosecution in pre-trial discussions and rejected. Even if the verdict is in the terms of that which was offered by way of plea, the defendant will need to provide good reason why the plea was not entered on the record and to establish that its terms were adhered to by the defence for the remainder of the trial. (paragraphs 57-58)

Prosecutions Division
Department of Justice
July 2020