



Summary of Judicial Decision

HKSAR v Herry Jane Yusuph (“the Appellant”)

CACC 93/2019; [2020] HKCA 974

Decision : **Appeal against sentence and forfeiture dismissed**
Date of Hearing : **20 May 2020**
Date of Judgment : **26 November 2020**

Background

1. The Appellant is a Tanzanian. She was convicted on her own plea for trafficking in 48.3 grammes of cocaine by importation. The Judge sentenced her to 5 years and 8 months’ imprisonment, having adopted a starting point of 8 years and discounted it by one-third for her guilty plea. The Judge further granted the Prosecution’s application for forfeiture of US\$1,800 found on the Appellant upon her arrival in Hong Kong.

Issues in dispute

2. Whether the sentence imposed on the Appellant was wrong in principle and/or manifestly inadequate. In particular, whether the Judge had erred in adopting a starting point that exceeded the arithmetically calculated starting point by some 6 weeks.
3. Whether for a drug trafficking offence, the determination of the initial starting point should be reached by a discretionless arithmetic calculation within the relevant sentencing band.
4. Whether the right to appeal against sentence under the Criminal Procedure Ordinance, Cap. 221, can be used as the mechanism for appealing a forfeiture order.
5. Whether the forfeiture was properly made.

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

(full text of Court of Appeal’s judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132122&QS=%2B&TP=JU)

6. In dismissing the appeal against sentence and forfeiture, the Court of Appeal conducted a review of the sentencing regime for drug trafficking cases and examined its jurisdiction to deal with an appeal against a forfeiture order.
7. The Court reiterated that sentencing guidelines are ‘lines to guide a judge in sentencing’ and ‘not fixed, compulsory or arbitrary straitjackets, nor should they be slavishly applied’. Guidelines cater for a discretionary element and are to be distinguished from tariffs (Paragraph 39).



8. The goal of sentencing guidelines must be to ‘achieve reasonable consistency in general, and justice in a specific, individual case’ (Paragraph 40).
9. The Court highlighted two particular facets of sentencing in trafficking cases, namely (a) there is often little to differentiate between the facts of different cases, save for the quantity of drugs involved and, where it can be established, the role played by a defendant (which is not often easy to discern with any great certainty) and (b) given the seriousness of trafficking offences and the appalling consequences of proliferation of drugs, the reasons for a defendant’s involvement in the crime and his personal circumstances are of far less importance than the society’s duty to protect its citizens and the Courts’ paramount function of ‘denunciation, deterrence and punishment’ of those who seek to traffic in dangerous drugs (Paragraphs 41-44).
10. Because of these two particular facets of sentencing for trafficking offences, consistency in sentencing is important. Offenders should be ‘dealt with in a similar way so far as determining the starting point for their respective offences’ (Paragraph 45).
11. Nevertheless, the Court retains an important element of discretion in sentencing for ‘consistent sentencing does not mean identical sentencing’ (Paragraphs 46-48).
12. The Court held that the observations of Stuart-Moore Ag. CJHC in HKSAR v. Manalo [2001] 1 HKLRD 557 were made *per incuriam*. The correct position should be that ‘the role played by an offender is always part of the circumstances for a sentencing judge to consider’ (Paragraphs 49-56).
13. In the assessment of culpability of an offender, the Court of Appeal identified 5 most common categories of traffickers likely to be encountered in practice by Courts in Hong Kong. In an ascending order of culpability, they are (a) the courier or storekeeper, (b) the actual (or direct) trafficker, (c) the manager or organiser, (d) the operator or financial controller and (e) the international operator or financial controller (Paragraphs 58-68).
14. There should be 6 steps in the proper sentencing approach.
15. The first step is to identify the relevant sentencing band (or bracket) applicable to the quantity of drug concerned. The second step is an assessment of the role and culpability of the defendant based on evidence before the Court. The third step is identify where in the relevant band of the guidelines the defendant comes. It may be necessary to go outside the band to reflect the particular circumstances of the offence and the role of the defendant. The fourth step is to consider aggravating factors which bear on the ‘notional sentence after trial’. The fifth step is to have regard to any matters of mitigation, bearing in mind that ‘personal circumstances will count for little,



unless they are exceptional'. Other forms of mitigation, such as assistance to the authorities, should be considered after the discount for plea is considered. The sixth and final step is for the judge to stand back and look at the overall sentence passed in order to ensure it is a 'fair, just and balanced sentence' (Paragraphs 57-79).

16. The notion of a discretionless starting point based upon the quantity of a dangerous drug is not the correct, or particularly helpful, way of looking at sentencing in drug trafficking cases. The danger of a strict arithmetical approach is that a defendant's role can become eclipsed as long as the defendant can be said to fit within the label of a 'courier' or 'storekeeper' (Paragraphs 80-82).
17. On the issue of jurisdiction to deal with an appeal against a forfeiture order, the Court held that an order for forfeiture forms part of the 'sentence' and hence the Court of Appeal has the jurisdiction to entertain such an appeal under the Criminal Procedure Ordinance. Previous lingering controversy over jurisdiction, as reflected in various decisions of the Court of Appeal, should be laid to rest. The position in Hong Kong is that a forfeiture order is a 'sentence', which is both penal and deterrent in nature (Paragraphs 83-104).
18. The Court rejected the Appellant's argument that for an order of forfeiture under section 56(1) of the Dangerous Drugs Ordinance, Cap. 134, the money in question must have been actually spent or used by the defendant. Affirming the majority judgment in *HKSAR v. Ngoma Juma Shabani* [2015] 5 HKLRD 57, the Court held that the decision was not only binding but also in accordance with a purposive construction of the law and consistent with common sense (Paragraphs 105-122).

**Prosecutions Division
Department of Justice**

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