CACC 77/2019

[2020] HKCA 269

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF APPEAL**

CRIMINAL APPEAL NO 77 OF 2019

(ON APPEAL FROM DCCC NO 860 OF 2018)

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HKSAR Respondent

v

SK WASIM Appellant

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Before: Hon Macrae VP and Zervos JA in Court

Date of Hearing: 21 April 2020

Date of Judgment: 21 April 2020

Date of Reasons for Judgment: 24 April 2020

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R E A S O N S F O R J U D G M E N T

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Hon Zervos JA (giving the Reasons for Judgment of the Court):

Introduction

1. On 6 March 2019, the appellant was convicted on his own plea in the District Court by HH Judge Sham (the judge) of a single charge of trafficking in a dangerous drug, namely 11.7 kilogrammes of cannabis resin. He was sentenced to 3 years and 6 months’ imprisonment.
2. On 4 December 2019, the appellant was granted leave to appeal his sentence by a single judge.[[1]](#footnote-1)
3. At the conclusion of the hearing, we allowed the appeal and reduced the appellant’s sentence from 3 years and 6 months’ imprisonment to 3 years and 4 months’ imprisonment. These are our reasons for doing so.

The issue on appeal

1. On 15 March 2019, the appellant filed a notice of application for leave to appeal against sentence. The general grounds of appeal that he listed in his notice have now been substituted with a single ground in which it is complained the judge wrongly found there was an international element in his offence and consequently erred in enhancing his sentence by 3 months for this aggravating factor. This issue primarily depended on the facts outlined to the judge and admitted on behalf of the appellant.[[2]](#footnote-2)

The agreed facts

1. On 7 May 2018, police officers were carrying out an anti-drug operation at Chungking Mansions in Tsim Sha Tsui, Kowloon. One of the police officers observed on the security camera system a delivery worker moving cartons into Flat B2 on the 7th Floor at Block B of the building (Flat 5B). When the police officer went to the flat, the delivery worker was still moving cartons into Flat B2. Inside Flat B2, he saw the appellant moving some of the cartons, while another Indian male, known as “Taz”, stood at the entrance of the flat keeping an eye on the cartons on the floor.
2. The police officer intercepted the appellant, who told him that someone had paid him $200 to deliver the boxes. When asked who paid him, he said he did not know the person. The police officer observed that Flat B2 was a subdivided unit and the door to Room 6 was opened. Inside the room were 5 cartons, while 10 cartons were still outside in the corridor of Flat B2. The police opened and checked the 15 cartons and found inside 418 packets of purported Indian snacks in which were concealed 48 plastic bags containing a total of 11.7 kilogrammes of cannabis resin.
3. The estimated street value of the drugs at the time of the offence was $1,380,600.
4. It was an admitted fact that the cartons of goods had been sent from Kolkata, India on 3 May 2018 to “Nadir Ahmed” at Flat B8, 12th Floor, Block B, Chungking Mansions, with the contact telephone number “5534 9336”. On 7 May 2018, the delivery worker received a telephone call on “5534 9336” and the caller requested him to deliver the cartons to Flat B2 on the 7th Floor at Block B of Chungking Mansions. Also, on 7 May 2018, the landlord of Flat B2 received a telephone call on “5534 9336” from a male who asked him if he could rent one of the rooms in Flat B2. The landlord agreed and allocated Room 6 to him. He gave the caller the password to Flat B2 and informed him that the keys to Room 6 were inside the room.
5. The CCTV footage of the 7th floor captured the arrival of the appellant and Taz at 10:19 am and the delivery workers soon thereafter. The door of Flat B2 was opened by another Indian male, known as “Haydar”. After the appellant and Taz had entered Flat B2, the delivery workers commenced moving the cartons inside. Haydar left at 10:26 am.
6. An examination of the appellant’s mobile telephone, revealed that at 10:16 am a WhatsApp message was received with the password to Flat B2 from two telephone numbers “5534 9336” and “5374 2473”.
7. In a subsequent video record of interview, the appellant stated that on the morning of 7 May 2018, he went to Taz’s residence on the 12thFloor at Block B of Chungking Mansions to play games. Also present at the residence was Haydar, who asked the two men to collect some cartons on the 7th Floor at Block B. They agreed and went to the floor as instructed. Haydar sent the password to Flat B2 to the appellant via WhatsApp. However, they could not get into the flat so they called Haydar, who came to open the door. The goods then arrived and Haydar acknowledged receipt of them. The appellant said he moved the cartons inside the room, while Taz and Haydar were outside.
8. The appellant acknowledged he knew the telephone number “5534 9336”, which he said belonged to a friend whose name was “Azer”. He said “Azer” sent him the password to Flat B2 and he lived with Taz and Haydar in the flat on the 12th Floor at Block B of the building. He also acknowledged that he was a Form 8 recognizance holder.
9. In pleading guilty to the offence, the appellant accepted that he possessed the dangerous drugs for the purpose of trafficking.

The sentence

1. In sentencing the appellant, the judge adopted a starting point of 4 years and 6 months’ imprisonment for the quantity of drugs involved, which he enhanced by 6 months for the fact that the appellant was a Form 8 recognizance holder at the time of the offence and 3 months for the international element. He then reduced the notional sentence of 5 years and 3 months’ imprisonment by one third for the appellant’s guilty plea to 3 years and 6 months’ imprisonment.[[3]](#footnote-3)
2. The judge concluded that there was an international element in this case because the cartons, which contained the dangerous drugs, had been imported from India and, soon upon their arrival, the appellant had dealt with them. He said in his reasons for sentence:

“9. If there is an international element involved in drug trafficking, it is a ground for enhancing the sentence. In the instant case, the drugs were sent from India and arrived at its destination (Chungking Mansion); no sooner had the drugs arrived than the defendant was there to deal with it - such scenario clearly involves an international element, and I would on this ground increase the sentence by 3 months.”[[4]](#footnote-4)

The appellant’s submission

1. The appellant questioned whether, in the circumstances of his case, there was an international element simply because the dangerous drugs in question originated from India. It was submitted that from the admitted facts, the appellant’s criminal conduct was limited to moving the cartons containing the drugs into Room 6 and did not involve him either bringing the dangerous drugs into Hong Kong from India or being involved in an international drug trafficking syndicate for this purpose. Consequently, there was no international element involved in the appellant’s offence and he should not have had his sentence enhanced for this aggravating factor.
2. In support of this submission, Mr Wong Po Wing, for the appellant, made three points. First, the facts of the case did not allege that the appellant participated in cross-border trafficking or the importation of dangerous drugs into Hong Kong. Secondly, it was not established that the appellant knew the dangerous drugs had been sent from outside Hong Kong. Rather, the facts of the case only revealed that the dangerous drugs had been sent from India four days prior to the day of the appellant’s arrest, and the cartons in which they were contained had been addressed to a flat on a different floor of the same building and for the intended recipient “Nadir Ahmed”. There was no indication that the appellant knew of the cartons’ origin and destination, nor was he asked about it in his interview with the police. Thirdly, the prosecution had not put forward a case of international drug trafficking against the appellant.
3. Mr Wong referred to a number of key cases that deal with the issue of “international element”. He extrapolated from these cases that only in a case where a defendant has taken part in cross-border drug trafficking can his sentence be enhanced on the basis that “an international element is involved”. He contended that in *HKSAR v Abdallah Anwar Abbas*,[[5]](#footnote-5) the Court of Appeal recognised the distinction between cases involving an international drug trafficking element and local drug trafficking cases where there was no direct evidence linking them to the importation or exportation of a dangerous drug. He added that the Court also drew a distinction between international drug couriers and local drug trafficking cases with no proven international element.
4. Mr Wong submitted that from an examination of the facts of the cases where the Court of Appeal has endorsed the enhancement of a sentence for an international element, such as *HKSAR v Chung Ping-kun*[[6]](#footnote-6) and *HKSAR v Zaripov Eduard*,[[7]](#footnote-7) and the numerous cases that are referred to in these two cases, the international element is characterised by the importing or exporting of dangerous drugs into or out of Hong Kong.
5. Mr Wong contended that the aggravating factor of an “international element” should only be applied when the defendant is involved in either importing or exporting of a dangerous drug, and it would not be sufficient if the facts merely reveal that “the route that the dangerous drugs has taken to travel involved another region or country”. He also contended that no international element will be involved where the defendant is involved in local trafficking of dangerous drugs that have been imported into Hong Kong or exported out of Hong Kong, in which he has played no part in the importation or exportation as the case may be.

The respondent’s submission

1. Mr David Chan, with Mr Jerome Ching, for the respondent, submitted that the judge did not err in enhancing the appellant’s notional sentence by 3 months for the international element. He argued that the courts have recognised the feature of an international element where drug traffickers knowingly assist or facilitate the importation of dangerous drugs into Hong Kong by collecting overseas parcels that have been sent here. See *HKSAR v Ali Qasim*;[[8]](#footnote-8) *HKSAR v Sitoe Claudio Marcelino*;[[9]](#footnote-9) and *HKSAR v Fitri*.[[10]](#footnote-10)
2. In the present case, Mr Chan argued that the appellant by his conduct had knowingly facilitated the importation of the dangerous drugs across the border. He contended that the appellant was the first point of contact after the dangerous drugs arrived in Hong Kong for delivery to the address in question. He pointed out that some of the cartons were marked as having been sent from India, which the appellant would have appreciated when he was moving the cartons and therefore must have known it was an international delivery. He noted that during the sentencing hearing no issue was raised that the appellant was not aware of the fact the cartons had been delivered from overseas.
3. Mr Chan further argued that even if the appellant did not know about the origin of the cartons containing the dangerous drugs, as he was the first person to receive them in Hong Kong, there was the objective aggravating factor of an international element in his offending that the judge could take into account. Technically this statement of fact is not correct. According to the appellant, the first person to receive the cartons was Haydar, who signed the receipt for them, after which the appellant moved the cartons into Room 6.
4. The concept of “the first person to receive an overseas parcel” that Mr Chan relied upon, comes from the sentencing remarks of HH Judge Dufton in *Sitoe Claudio Marcelino*, who, having found there was an international element, said:

“Whether or not the defendant’s role was limited to receipt of the parcel, the defendant was the first person receiving the drugs on their importation into Hong Kong.”[[11]](#footnote-11)

1. These remarks need to be understood in the factual context of that case. The defendant collected an overseas parcel from DHL and purported to be the recipient. He provided the relevant details relating to the parcel and after signing a receipt, took delivery of it. His Honour concluded: “The defendant was collecting the parcel, knowing the drugs had come from overseas.”[[12]](#footnote-12) This was the basis on which he found there was an international element involved in the offence alleged against the defendant. It was a case where the defendant was arranging or facilitating the importation of the dangerous drugs.
2. Mr Chan argued that the involvement of an international element will depend upon the facts of the case and will therefore take a variety of forms. He illustrated his point by referring to a number of cases where the court has found an international element was involved in the offence and enhanced the sentence of the defendant. These are mainly cases where foreign nationals have come to Hong Kong for the specific purpose of committing crimes and as a consequence the presence of this “foreign element” is recognised as an aggravating factor that would warrant an enhancement of the sentence. See *HKSAR v Montoya Munoz* *Mauricio*[[13]](#footnote-13) (a Colombian national came to Hong Kong to engage in drug trafficking); *HKSAR v Aguilar Garcia Milner* *Javier*[[14]](#footnote-14) (a Peruvian national who whilst in Hong Kong as a visitor committed a series of thefts); *HKSAR v Pham* *Bich Thuy*[[15]](#footnote-15)(the defendants targeted Mainland tourists for pickpocketing); *HKSAR v Leo Yee Sang Patrick*[[16]](#footnote-16) (the defrauding of local branches of overseas headquartered banks, having banking interests in many countries); *HKSAR v Hsu Yu Yi*[[17]](#footnote-17) (a foreign national who engaged in money laundering by setting up a local bank account to receive overseas deposits from fraud cases); *HKSAR v Boma*[[18]](#footnote-18) (a defendant’s bank accounts involved transactions with or from different countries); *HKSAR v Lam Shek Fai*[[19]](#footnote-19) and *HKSAR v Chen Liting*[[20]](#footnote-20) (the defendants possessed or used forged credit cards with internal data that corresponded to foreign credit card accounts).
3. Mr Chan contended that in the wider context, the courts have drawn a distinction between the objective aggravating factors involved in a crime and the defendant’s knowledge of these factors. He argued that where the facts of the case disclose an “international element” as an objective aggravating factor, whether the defendant knows of it or not, it does not preclude a sentencing court from taking it into account. He referred to the money laundering case of *Boma* where the Court of Appeal held, amongst other things, that when sentencing money launderers, a sentencing court should take into account the nature of the predicate offence, and the offender’s ignorance of it did not mean that the sentencing court was precluded from taking it into account.[[21]](#footnote-21) The Court also emphasised that where the offender has knowledge of the predicate offence, this was a separate aggravating factor because he knows the nature of the predicate offence and is therefore more culpable than the person who does not.[[22]](#footnote-22)
4. Mr Chan submitted that drug trafficking is a serious offence which warrants a strong general deterrent sentence to discourage the international drug trade. He invited the court to find that there is an objective international element in the facts of the present case, and even if the court was of the view that the appellant was unaware of the overseas origin of the drugs, his sentence should still be enhanced because of the presence of an international element.

Discussion

1. As is apparent from the cases that have been discussed, the involvement of an “international element” in a drug trafficking case is an aggravation of the offence that may warrant an enhancement of the sentence imposed on the offender. Whether an “international element” is involved will be fact and case sensitive and therefore may manifest itself in a variety of ways. The vast majority of cases have usually involved a foreign national or local resident who brings drugs in or takes drugs out of Hong Kong (cross-border drug trafficking). In *Abdallah Anwar Abbas*, the Court of Appeal held, after an extensive review of the sentencing authorities, that where “an international element is involved” this is an aggravating factor calling for the enhancement of the starting point after trial of at least 2 years’ imprisonment for trafficking more than 1 kilogramme of heroin or cocaine.[[23]](#footnote-23) In *Chung Ping-kun*, the Court of Appeal further defined the guideline and suggested a level of enhancement of 6 months for up to 250 grammes, 6 months to 1 year for between 250 and 500 grammes, and 1 year to 2 years for between 500 to 1,000 grammes.[[24]](#footnote-24)
2. In their discussion of the international element in drug trafficking cases, the Court in *Abdallah Anwar Abbas* noted:

“21. It has long been accepted that the international element in trafficking, whether by importation or by exportation, is to be regarded as a factor in material aggravation of the offence for sentencing purposes, whereas ‘local’ offences, confined to trafficking in Hong Kong, will usually result in lower starting points for about the same quantity of heroin or cocaine. …”[[25]](#footnote-25)

1. The Court emphasised that the very act of importation from abroad was an aggravating factor and quoted, with approval, the following passage from *HKSAR v Hong* *Chang Chi*:[[26]](#footnote-26)

“22. When it comes to importing drugs from other jurisdictions into Hong Kong, the public interest demands that the message should be made more clearly than in almost any other situation. Drug traffickers from abroad, importing drugs into Hong Kong, should plainly understand that they will receive no sympathetic consideration whatsoever on account of their status as foreigners or, as in this case, on account of their incarceration some distance from home. On the contrary, in cases of this kind, the very act of importation from abroad, is an aggravating factor. Those who live outside its jurisdiction, such as the applicant in the present case, must be disabused of any notion that Hong Kong is anything other than resolute in dealing with such offences.”[[27]](#footnote-27)

1. There have been a number of recent decisions of this Court that have sought to address any misunderstanding about the concept of an “international element” as an aggravation to the offence of drug trafficking. See *Zaripov Eduard*[[28]](#footnote-28) and *Ali Qasim*.[[29]](#footnote-29)
2. In the course of his discussion on the issue of an “international element” in this context, Macrae VP in *Ali Qasim* sounded a cautionary note about applying the label without discriminating between the different circumstances giving rise to it.[[30]](#footnote-30) He explained the basis of his concern as follows:

“27. ... the danger of a label such as ‘international element’ is that it can sometimes obscure the factual differences that exist between cases involving the importation (or, for that matter, exportation) of dangerous drugs. It seems to us that there is a tangible distinction, for example, between a defendant who, pursuant to the elaborate arrangements of an international syndicate, crosses continents from a foreign country and arrives at Hong Kong International Airport with dangerous drugs secreted within his baggage or person, and a defendant who goes to the Post Office on someone else’s instruction to collect the parcel posted from abroad which he knows contains dangerous drugs. The first defendant can be said to be actually importing dangerous drugs into Hong Kong, while the second defendant is generally aiding and abetting someone else’s act of importation; although, of course, the evidence may sometimes establish that he himself is the importer. Both are plainly guilty of trafficking in dangerous drugs but their culpability may differ.”

1. Two issues arise. First, there will be varying levels and degrees as to the nature and gravity of the international element and the connection, if any, of the defendant to this aggravating factor.
2. Secondly, it is important that there is a clear understanding as to what we mean by “international element” in the context of a drug trafficking offence, so as to ensure it is correctly and appropriately applied as an enhancement to a defendant’s sentence.
3. In the case of *Ali Qasim*, the applicant went to the Post Office to collect a parcel knowing that there were dangerous drugs concealed within it. He produced a screenshot on his mobile telephone to the postal officer when collecting the parcel, which contained the tracking details of the parcel’s journey from Brazil. The applicant, therefore, must have known the parcel came from abroad and such evidence was therefore sufficient to establish an “international element” by way of aiding and abetting the importation of drugs. On this basis, Macrae VP held that the conduct of the applicant was more aptly characterised as “facilitating the importation into Hong Kong”, which was a description taken from *Fitri*.[[31]](#footnote-31)
4. Macrae VP also made the point that the collection of a parcel from a Post Office for another person is different from the international courier who himself trafficks dangerous drugs across the border into Hong Kong. He added, however, that in distinguishing between these two types of trafficking, it is not to be taken that the conduct of a defendant who collects a parcel containing dangerous drugs from a Post Office is necessarily any less serious or culpable than a defendant who carries drugs across the border into Hong Kong. He stressed that much will depend on the facts of the case and the extent of the involvement of the defendant.[[32]](#footnote-32)
5. For an international element to be an aggravating factor, it must go to the aggravation of the offence as alleged against the defendant. It is not enough that the dangerous drugs were imported or to be exported at some time, unless it can be shown that it is a feature of the offence for which the defendant has been charged. It can manifest itself in a variety of ways, such as the importation or exportation of dangerous drugs into and out of Hong Kong or the assisting or facilitating such importation or exportation; or the involvement of foreign drug traffickers or members of an international drug syndicate in furthering the drugs trade in or through or out of Hong Kong. Whatever the case, for there to be an international element involved in the offence of drug trafficking, it must be apparent from the facts as found or agreed in the case alleged against the defendant.
6. In the present case, there was no admission by the appellant that he knew the 15 cartons of snacks with dangerous drugs inside were sent from India. The appellant was merely engaged to “collect the cartons on the 7th Floor of Block B” and move them into Room 6.[[33]](#footnote-33) The instructions to the delivery worker to take the cartons to a different address were conveyed by someone else, not the appellant.[[34]](#footnote-34) There was insufficient evidence contained in the facts and circumstances outlining the offence to show that the appellant knew or must have known the cartons were sent from India and that he was a party in assisting or facilitating the importation of the cartons into Hong Kong. The case against the appellant was simply that he had been hired by another person to move into a room the cartons that had been delivered, knowing that they contained dangerous drugs.
7. Therefore, in our view, the aggravating factor of an international element was not made out in the offence as charged against the appellant.

Conclusion

1. In the circumstances, we considered that the enhancement of 3 months’ imprisonment to the appellant’s sentence for the involvement of an “international element” in the offence was not correct, and accordingly the notional starting point should be reduced by 3 months from 5 years and 3 months’ imprisonment to 5 years’ imprisonment, which resulted in a sentence of 3 years and 4 months’ imprisonment after reducing it by one third for the appellant’s guilty plea.
2. The appellant’s sentence of 3 years and 6 months’ imprisonment was therefore reduced to 3 years and 4 months’ imprisonment. It followed that the appeal against sentence was allowed and the sentence was reduced to the extent indicated.

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| (Andrew Macrae) |  | (Kevin Zervos) |
| Vice-President |  | Justice of Appeal |

Mr David Chan, SADPP, and Mr Jerome Ching, PP, of the Department of Justice, for the respondent

Mr Wong Po Wing, instructed by S H Chan & Co, assigned by the Director of Legal Aid, for the appellant

1. [2019] HKCA 1352, 4 December 2019. [↑](#footnote-ref-1)
2. Appeal Bundle, 3 – 6. [↑](#footnote-ref-2)
3. Appeal Bundle, 8 – 11. [↑](#footnote-ref-3)
4. Appeal Bundle, 10. [↑](#footnote-ref-4)
5. [2009] 2 HKLRD 437. [↑](#footnote-ref-5)
6. Unrep., CACC 85/2014, 2 July 2014. [↑](#footnote-ref-6)
7. Unrep., CACC 165/2018, 21 March 2019. [↑](#footnote-ref-7)
8. Unrep., CACC 332/2020, 14 January 2020. [↑](#footnote-ref-8)
9. Unrep., DCCC 407/2018, 21 November 2018. [↑](#footnote-ref-9)
10. Unrep., CACC 265/2016, 5 April 2017. [↑](#footnote-ref-10)
11. At [22]. [↑](#footnote-ref-11)
12. At [23]. [↑](#footnote-ref-12)
13. [2019] 1 HKLRD 439. [↑](#footnote-ref-13)
14. Unrep., CACC 485/2012, 11 June 2013. [↑](#footnote-ref-14)
15. [2010] 2 HKLRD 1177. [↑](#footnote-ref-15)
16. Unrep., CACC 494/2004, 28 July 2005. [↑](#footnote-ref-16)
17. [2015] 5 HKLRD 545. [↑](#footnote-ref-17)
18. [2012] 2 HKLRD 33. [↑](#footnote-ref-18)
19. Unrep., CACC 138/2015, 4 May 2016. [↑](#footnote-ref-19)
20. Unrep., CACC 130/2007, 6 March 2008. [↑](#footnote-ref-20)
21. At [40(1)]. [↑](#footnote-ref-21)
22. At [40(2)(a)]. [↑](#footnote-ref-22)
23. At [42] and [43]. [↑](#footnote-ref-23)
24. At [9]. [↑](#footnote-ref-24)
25. See also [27]. [↑](#footnote-ref-25)
26. [2002] 1 HKLRD 486. [↑](#footnote-ref-26)
27. At [30]. [↑](#footnote-ref-27)
28. At [41] – [43]. [↑](#footnote-ref-28)
29. At [26] – [30]. [↑](#footnote-ref-29)
30. At [30]. [↑](#footnote-ref-30)
31. At [24]. It may be noted that the Appeal Committee of the Court of Final Appeal dismissed the applicant's further application for leave to appeal under Rule 7 of the Hong Kong Court of Final Appeal Rules, Cap 484: see *HKSAR v Friti* (Unrep., FAMC 13/2017, 27 October 2017). [↑](#footnote-ref-31)
32. At [30]. [↑](#footnote-ref-32)
33. Appeal Bundle, 5, Admitted Facts [16(b)]. [↑](#footnote-ref-33)
34. Appeal Bundle, 4, Admitted Facts [11]. [↑](#footnote-ref-34)