由此

CACC 531/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CRIMINAL APPEAL NO. 531 OF 2005
(ON APPEAL FROM DCCC NO. 776 OF 2005)

BETWEEN

HKSAR Respondent

and

TSEUNG YIM KWAN (蔣艷群) (D2) Applicant

Before: Hon Stuart-Moore VP, Stock JA and Reyes J
Dates of Hearing: 28 June 2006 and 4 July 2006
Date of Judgment: 4 July 2006

J U D G M E N T

Stuart-Moore, VP (giving the judgment of the Court):

Background

1. On 13 December 2005, following a trial in the District Court before Judge M Yuen, the applicant was convicted on two charges of

possessing a false instrument, contrary to section 75(2) of the Crimes Ordinance, Cap. 200 (charges 2 and 3) and a further charge of attempting to land in Hong Kong without permission, contrary to section 38(1) of the Immigration Ordinance, Cap. 115 and section 159G of the Crimes Ordinance (charge 4). In total, the judge imposed a sentence of 4½ years' imprisonment.

2. The applicant now seeks leave to appeal against conviction and sentence. She has the benefit of legal representation only so far as the sentence application is concerned. In regard to sentence, Mr Reading SC, for the respondent, made the concession from the outset that the sentence, in its totality, could not be supported.

The facts

3. Firstly, we shall deal in brief form with the facts which led to the applicant's conviction.

4. On 20 June 2005, at about 7.10 am, the police intercepted a sampan in Hong Kong waters as it headed towards Hong Kong. On board, were Yeung Kwok (D1) and the applicant. The applicant told the police that she was called Qiu Lian, that she had no identity document, that she did not have permission to come to Hong Kong, and that she had never been to Hong Kong before. She was, she said, taking a boat tour for fun. When the sampan was searched, two documents purporting to be Chinese two-way permits, later established to be false instruments, were found together with items of clothing and a Mainland identity card in a bag which had been placed under some fishing nets. The applicant admitted that the bag belonged to her and that the two-way permit in the name of

'Qiu Lian' and bearing a photograph of herself was hers. She stated that the other two documents belonged to her friends.

5. At trial, D1 pleaded guilty to a charge of assisting the passage to Hong Kong of an unauthorized entrant (charge 1). He then gave evidence against the applicant which, to a large extent, was accepted by the judge. In essence, D1 described how he had been asked to convey the applicant to Hong Kong waters where she would be collected by another vessel. He said that he bore no responsibility for the bag in which the false two-way permits were found.

6. The applicant's evidence at trial was that she was on D1's sampan in order to go fishing. She said she did not know why her bag was found on board or indeed why her photograph was found on one of the false two-way permits.

7. The judge, not surprisingly, found no truth in the applicant's account and convicted her. The evidence pointing to her guilt was overwhelming.

Conclusion on conviction

8. The applicant provided no written grounds of appeal against conviction and before us she added little which could be regarded as material to these proceedings. In effect, she expressed her dissatisfaction with the outcome of the trial and she stated that D1 had not told the truth. She added that she had not put the bag containing the two-way permits onto the sampan or paid money for them. There was no merit in this application and it is dismissed.

Sentencing

9. In sentencing, the judge began by pointing out that charges 2 and 3, brought under section 75(2) of the Crimes Ordinance for the mere possession of false instruments, carried the far lower maximum penalty of 3 years' imprisonment in comparison to the 14-year maximum for an offence under section 75(1). The judge continued by saying that under section 75(1), the prosecution needed to prove an intent on the part of the possessor of a false instrument to induce another person to accept the document as genuine and the judge might also have added, in the words of section 75(1), that "by reason of so accepting it to do or not to do some act to his own or any other person's prejudice". However, she went on to say that there was an "irresistible inference" that the applicant had these documents for the purpose of covering her own identity and that of others. The judge recognised, in spite of this, that the applicant could only be punished for a section 75(2) offence "though the facts fit into a section 75(1) offence". The judge then remarked, without any reference to the authorities she had in mind, that:

> "9. Almost all of the reported cases dealt with cases of possession of false documents with intention to induce others to accept them as genuine, where the usual sentence is that of 3 to 4 years.
>
> 10. D2 has with her two forged 2-way permits with different identities printed on them. It is quite unusual for a person to have chosen to keep 2 identification documents on her bearing different identities, unless if one of the false travel documents was for the use of another individual or alternatively as a replacement for D2 when the 1st false travel document was rendered useless for some reason."

10. The judge then took a 2-year starting point for each charge of possessing a false instrument. For the offence in charge 4 of attempting to

land in Hong Kong without permission, the judge adopted a sentence of 18 months' imprisonment because, as she explained:

> "13. For remaining in Hong Kong without lawful authority, the usual sentence on a plea of guilty being entered is a term of 15 months' imprisonment. When D2 was attempting to do the same, the gravity and criminality of the event is comparable to a charge of illegally remaining. The same tariff ought to be adopted."

11. Dealing with totality, having imposed 2-year terms of imprisonment on the 2nd and 3rd charges, the judge ordered that 12 months of the sentence on charge 3 should run consecutively, making 3 years' imprisonment to be served on these charges. The sentence of 18 months on charge 4 was ordered to run consecutively bringing the totality to 4½ years' imprisonment.

The application

12. When this application originally came before us on 28 June 2006, the arguments which were presented were along relatively straightforward lines. We shall deal with these before turning to an development of potential importance which was raised for the first time at the start of these proceedings.

13. Ms Monica Chow, on the applicant's behalf, raised two substantive grounds of appeal.

14. She argued, firstly, that as the underlying objective behind the applicant's possession of the false instruments in charges 2 and 3 was closely connected to the applicant's attempted entry into Hong Kong, the combined sentence for those two offences should in any event have been

no longer than the sentence which the applicant received on the 4th charge of attempting to land in Hong Kong without permission, namely 18 months.

15. Secondly, Ms Chow contended that the judge erred when making the sentence on charge 4 wholly consecutive to the terms of imprisonment she had imposed on charges 2 and 3. In the result, Ms Chow submitted that the sentence was, in its totality, manifestly excessive.

16. Mr Reading, in response, submitted that the individual sentences imposed by the judge were, in themselves, appropriate but that the totality of the sentences on all the charges should have been in the region of 3 years' imprisonment. In support of his argument he made reference to the view taken by this court in *R v Yu Wing-wut* CACC 346/1984 (unreported). In that case, the appellant had pleaded guilty to the possession of a forged travel document, contrary to section 42(2)(c)(i) of the Immigration Ordinance, Cap. 115, and to remaining in Hong Kong after landing unlawfully without the appropriate authority, contrary to section 38(1)(b) of the same ordinance. On these charges, the appellant was sentenced to concurrent terms of 3 years and 12 months' imprisonment respectively. The facts were that the appellant had presented a genuine Hong Kong British passport, from which the original photograph had been replaced by one of himself, as he attempted to leave for the Philippines from Kai Tak Airport after he had been in Hong Kong for about ten days. The court in that case, dealing with the concurrent terms imposed by the judge, said that the judge:

> "… must have taken the view that the [two offences] formed part and parcel of one transaction. With respect we do not think that is so, although it would be fair to assume that the appellant had

> never intended to remain [in Hong Kong] for very long and that some overlapping is justified."

In the event, the court substituted sentences of 18 months and 6 months respectively and ordered that 3 months of the latter sentence should be served consecutively, making 21 months in all.

17. Recognizing that the false documents in the present case were not strictly speaking travel documents, Mr Reading nonetheless argued that the position was analogous to the facts in *R v Yu Wing-wut* and he suggested that if 18 months was an appropriate sentence following a plea of guilty to possessing a forged travel document in that case, this was indicative of a starting point of about 27 months after trial. We pause here to observe that *Yu Wing-wut's* case was decided well before the policy, which is now almost routinely applied, of giving a one-third discount for a plea of guilty. It follows, therefore, that the Court of Appeal may not, in 1984 when judgment was given in *Yu Wing-wut*, have had a starting point as high as 27 months in mind. Whether or not that is so, Mr Reading submitted that on any view sentences of 24 months on charges 2 and 3 after trial in the present case could not be regarded as manifestly excessive. However, in regard to those charges, Mr Reading argued that, contrary to the approach taken by the judge, there was no real justification for making the sentences even partly consecutive.

18. Again, with reference to the view taken by the court in *Yu Wing-wut*, Mr Reading submitted that there was a respectable argument for saying that the sentence on charge 4 should have been made at least partly concurrent to the other sentences.

19. With regard to the length of the sentence on the 4th charge, Mr Reading reminded us that in *R v So Man-king and Ors* [1989] 1 HKLR 142 (decided five years after *Yu Wing-wut*), the guideline tariff for unlawfully remaining in Hong Kong, contrary to section 38(1)(b) of the Immigration Ordinance, was set at 15 months' imprisonment following a plea of guilty. This was followed in *Attorney General v Ng Kin-hung and Ors* and *Cheung Kwok-sang and Ors* [1991] 1 HKLR 81, where the court of five judges extended the guideline tariff to other immigration offences, including the offence of attempting to land in Hong Kong without permission. Mr Reading submitted, therefore, that the sentence of 18 months' imprisonment on charge 4, which was imposed after trial, was not in any sense excessive.

20. Plainly, Ms Chow found little in Mr Reading's argument with which to disagree. However, as we have indicated already, she took issue with the suggestion that a 2-year sentence was justified on charges 2 and 3. She submitted also that it was inappropriate to compare an offence of possessing a forged passport to the possession of a false two-way permit when the latter, unlike a passport, is limited to travel between the Mainland and Hong Kong. Furthermore, she observed that the maximum sentence for the possession of forged travel documents under section 42(2)(c) of the Immigration Ordinance is 14 years whereas there is a 3-year maximum for the offences covered by charges 2 and 3.

21. We are in agreement with both counsel that the sentence which the judge imposed was, in its totality, manifestly excessive. In the light of their arguments, we consider that 18 months' imprisonment represented a proper sentence on charges 2 and 3. By way of comment, we

can see no particular reason why these offences were even made the subject of separate charges. Both false instruments were found in the same bag, at the same time and place, and they could quite easily, in our opinion, have been included in one charge. In the circumstances, we consider that the sentences on these charges should have been ordered to run wholly concurrently.

22. So far as the 18-month sentence on charge 4 is concerned, this was somewhat shorter than it might have been in normal circumstances, bearing in mind that the matter had been contested and that the usual sentence on a plea of guilty is 15 months' imprisonment. We also have in mind that, unlike the position of an offender who has committed a criminal offence in Hong Kong after landing without permission, where the sentence for the immigration offence is almost invariably made wholly consecutive, there is no such requirement to follow this course in the present case. The applicant had not landed in Hong Kong and the false two-way permits were no doubt to facilitate her stay in Hong Kong once she had arrived. In such circumstances, we consider that 12 months of the sentence on charge 4 should be made consecutive to the other sentences.

23. However, as it turned out, there was one further circumstance which we had to consider.

Psychiatric reports

24. We have indicated already that, at the commencement of proceedings on 28 June 2006, we were confronted with a fresh development of potential importance. Ms Chow presented us with a psychiatric report dated 13 June 2006 from Dr Eugenia YC Lok, a visiting

psychiatrist at Siu Lam Psychiatric Centre. This report was in response to a request made on behalf of the Director of Legal Aid on 25 May 2006 when it was realised that the applicant had been transferred to Siu Lam Psychiatric Centre (Siu Lam).

25. In the report, Dr Lok referred to the observation, which had been made at the Tai Lam Centre for Women, that the applicant was "tearful and emotional in March 2006". The applicant was transferred to Siu Lam for assessment after she had attempted to slash her wrist on 8 March 2006. Initially, she refused to talk and to take her meals. She merely responded by shaking or nodding her head except that she expressed feelings of guilt towards members of her family. She was relatively uncooperative in providing information about her background save that she said she was born in Guangxi and had completed "secondary three" education. The applicant also said that she had worked "in a salon" and later in the "sex business" and she claimed that she had been "cheated by friends to come to Hong Kong illegally". Dr Lok's report continued with the following information:

> "5. Since April 2006, she was noted to have irrelevant speech. Later, she started to have abnormal behaviour, including taking off trousers, and urinating on the floor. Her mental state further deteriorated in May 2006. She could not sleep at night. She harboured paranoid ideas against staffs, and believed staffs were hiding secrets from her. She became more playful, hostile, challenging, and guarded. She harboured grandiose belief that she could deliver a child by herself. She kept on causing disturbance by shouting at night, hitting her head against the wall, and breaking a bucket cover.
>
> 6. Her mental state improved with antipsychotic, Quetiapine. She gradually became more cooperative. During the latest interview on 12th June 2006, her mood became stable. She gave relevant and coherent answers. However, she still harboured persecutory belief against staffs.

> 7. Opinion: TSEUNG is suffering from a psychotic disorder. The prognosis cannot be determined at this stage because further observation and adjustment of medication is needed.
>
> 8. She is mentally fit to plead and give instruction."

26. Plainly, all of these developments occurred well after 13 December 2005 when sentence was imposed on the applicant. However, in view of the applicant's claim to the psychiatrist that she had been worked in the "sex business" and had been "cheated by friends" to come to Hong Kong as well as her claim to us that she had not put the false two-way permits on board the sampan, we felt it right to investigate further whether there might not have been some mitigation available to her on the basis of a possible mental condition at the time of these offences. As Dr Lok's report gave no indication about how longstanding the applicant's condition might have been beyond the fact that the first manifestations of the applicant's illness were noticed in March, we adjourned the hearing until 4 July 2006, in an attempt to discover the answer.

27. In this context, we feel it necessary to comment that Dr Lok's report, which Ms Chow has had in her possession since 14 June 2006, should have been forwarded without delay both to the court and to the respondent. Instead, the report was retained until the hearing before us started on 28 June 2006 by which time there was no hope of being able to make any constructive enquiries arising from it. This has effectively resulted in a further hearing which in all probability could have been averted if earlier notice had been given of the existence of Dr Lok's report.

28. We have now been provided with a further report from Dr Lok, dated 30 June 2006, in which she states, from repeated examinations

of the applicant, that the applicant has at no stage reported that she experienced any mood changes or psychotic symptoms at or around the time when the offences were committed. The applicant only became "agitated" after her conviction and Dr Lok is unable, in the absence of any other information, to comment further about the applicant's mental state at the time of her arrest. We have, however, today been told by the applicant's counsel that there had been no difficulty in taking instructions from the applicant prior to the time of trial.

29. Turning to a more positive note, the applicant's psychotic disorder has now been stabilized with medication. It is Dr Lok's opinion that the applicant's condition was probably caused by feelings of stress as a result of the length of her sentence and from problems related to adjustment to prison life. Dr Lok observed that it is important for the applicant to continue her medication and that "the prognosis is fair at this stage".

Conclusion

30. On any view, the overall length of the sentence imposed on the applicant was, as we having already indicated, manifestly excessive. We shall, therefore, grant leave and treat the hearing as the appeal.

31. We are satisfied that the psychiatric evidence we have had the advantage of reading had no bearing on anything which might have been advanced in the court below or on our decision in these proceedings. We shall, therefore, as we have indicated, reduce the sentences on charges 2 and 3 to 18 months' imprisonment in each case, and order that these should be served concurrently. On charge 4, the sentence of 18 months'

imprisonment will remain unaltered but we shall order that only 12 months of this sentence should run consecutively, making a total sentence of 2½ years' imprisonment. This represents a reduction of 2 years in the applicant's overall sentence and, to this extent, the appeal is allowed.

(M. Stuart-Moore)	(Frank Stock)	(A. T. Reyes)
Vice-President	Justice of Appeal	Judge of the Court of First Instance

Mr Reading SC, DDPP, and Ms Peggy Lo, GC, of the Department of Justice, for the Respondent.

Ms Monica Chow Wai Choo, instructed by Director of Legal Aid, for the Applicant (re: Sentence).

The Applicant (D2), in person (re: Conviction).