

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

CRIMINAL APPEAL NO. 264 OF 2001  
(ON APPEAL FROM DCCC 244 OF 2001)

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BETWEEN

HKSAR

Respondent

and

WAN KA-CHEUNG (D1)  
LEE CHEUNG-LUNG (D5)

Applicants

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Before: Hon Stuart-Moore VP & Lugar-Mawson J

Date of Hearing: 22 February 2002

Date of Judgment: 22 February 2002

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J U D G M E N T

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

*Background*

1. These Applicants, D1 and D5 respectively, appeared in the District Court before Judge Wright with seven others to face charges in relation to a number of unauthorized entrants who had been brought into

Hong Kong. The Applicants and their co-defendants all pleaded guilty with the exception of D6 against whom no evidence was offered.

2. D1 pleaded guilty to charges 1 and 2. The first charge was that he had, on 1 December 2000, aided and abetted, counselled and procured Soong Siu-wah (D2) to use a forged identity card in the name of Cheung Yong, contrary to section 7A(1A) of the Registration of Persons Ordinance, Cap. 177 and section 89 of the Criminal Procedure Ordinance, Cap. 221. In the second charge, he was alleged to have used, on 6 December 2000, a forged Hong Kong identity card in the name of Cheung Hui, contrary to the same provisions of the Registration of Persons Ordinance as we have set out in relation to the first charge. D1 was sentenced to concurrent terms of four years' imprisonment on each charge.

3. D5 pleaded guilty to charge 7 which alleged that, on 9 December 2000, he had arranged the passage within Hong Kong of fifteen unauthorized entrants, contrary to section 37D(1)(a) of the Immigration Ordinance, Cap. 115. For this offence, he received a sentence of five and a half years' imprisonment.

4. The Applicants now seek leave to appeal against their sentences.

*Prosecution's case*

5. We are grateful to Mr Saw, SC, who appears on behalf of the Respondent together with Ms Polly Wan, for the preparation of a

summary of evidence which we propose, in large measure to adopt. It is plain that the broad basis of the case against these Applicants is accepted.

6. On 10 December 2000, a police investigation led to the arrest of twelve unauthorized entrants who were found inside a forty-foot container after it had been conveyed to the Kwai Chung Container Terminal No. 8. The container was scheduled to be loaded onto a ship which was due to leave Hong Kong on 11 December 2000 bound for Long Beach California in the U.S.A. Not surprisingly, in a criminal venture of this kind, a large number of persons were involved in varying degrees in the organization which lay behind it.

7. Sometime between late November and early December 2000, D5 contacted two taxi drivers in Hong Kong called Kwok Ping-man (Kwok) and Kwong Koon-yin (D9). D5 asked Kwok to assist in using his taxi to convey some unlawful entrants for the sum of \$1,500. A similar request was made by D5 to D9, although he was offered \$1,800 for each unlawful entrant. D9 contacted D7 and D8 who also agreed to join the venture.

8. D1 admitted, after his arrest, that a friend in the Mainland had asked him for help in hiring a container and in renting an office and a container-loading site. He was offered \$20,000 for this service. He was also told to use a forged identity card and, for this purpose, D1 gave photographs of himself and of D2 to his friend so that forged identity cards in the names of "Cheung Yong" and "Cheung Hui" could be obtained. In due course, forged cards in those names were made.

9. On 30 November 2000, D2 went into the office of a property agent and used the forged identity card bearing his photograph together with a photocopy of the business registration certificate of 'China Best Cargo Co.' to complete the formalities of renting a room in Fu Fai Commercial Building for 'shipping business'. These activities were covered by charge 3 in relation to D2.

10. On the same day, D1 arranged for a company chop in the name of 'Tai Cheung Company' and name cards, also in that name, to be prepared. The name of Cheung Yong appeared on the name cards as the manager of 'Tai Cheung Co.'.

11. On 1 December 2000, D1 instructed D2 to use the forged identity card to engage the services of a secretarial company which he had selected. D1 paid D2 \$3,000 to carry out this task. Details of incoming calls and messages for Tai Cheung Co. or for Cheung Yong would then be passed onto 'Mr Cheung' at the telephone number '9177 7372'. The mobile telephone with that number was later found inside D1's car after his arrest on 10 December 2000. These activities were covered by charges 1 and 4 against D1 and D2 respectively.

12. On 5 December 2000, D1 telephoned the shipping company to book the container and the shipping space for the container to be conveyed to the U.S.A. Subsequently, he asked the shipping company to convey the container to a container-loading site at Lok Ma Chau on 7 December 2001. He also arranged a transport company to convey the container from this site to a container-loading site at Kam Sheung Road, Lam Tin, on 7 February 2000, and from Lam Tin to Kwai Chung Container terminal No. 8 on 10 December 2000.

13. On 6 December 2000, D1 used the second forged identity card and a photocopy of the business registration certificate of 'China Best Cargo Co.' to rent the container-loading site at Kam Sheung Road, Lam Tin, for use between 8 December 2000 and 7 February 2001 for the monthly rental of \$16,000 (charge 2).

14. On 8 December 2000, during the evening, D5 contacted Kwok and the other taxi drivers. They were due to meet with each other at about 7.30 a.m. on 9 December 2000 outside a restaurant near Sai Kung Pier.

15. At the appointed time, Kwok and D7-9 arrived with their taxis and met D5 and another man outside the appointed restaurant. D5, and the other man he was with, led the party to a car park at Tai Mong Tsui in Sai Sha Road to pick up a total of fifteen unauthorized entrants. D7's taxi was eventually stopped by the police at a roadblock at Lam Kam Road. D7 and the three unlawful entrants in his taxi were brought back to the police station. Kwok, D8 and D9 used a different route to convey the remaining twelve unlawful entrants to the container site at Kam Sheung Road. A friend of D5 met the taxis and received the unlawful entrants. These activities were covered by charges 7 and 9 to 11 against D5, D7, D8 and D9 respectively.

16. On 10 December 2000, during the afternoon, a container tractor bearing the number GN5788 was seen at Kam Sheung Road site. This conveyed the container to the Kwai Chung container terminal. A private car which bore the registration number JN8506 followed GN5788 for a while before it altered its course and headed towards Kowloon. On

the same day, the police intercepted that car at To Kwa Wan and arrested D5 and the three men who were with him.

17. Inside the Kwai Chung container terminal, the container GN5788 was searched. This revealed twelve unlawful entrants inside. They were in a semi-conscious condition. This was, of course, well before their passage by sea to America had even begun. They were given a few minutes to recover before being arrested. The container was examined and found to have been modified. Ventilation and escape hatches had been cut into the floor and the front panels. The container had been equipped with a large quantity of dried food, water, bedding and other facilities, including bags for waste disposal.

18. On 10 December 2000, a few minutes after GN5788 had left the Kam Sheung Road site, D1 had been seen to close the door at the entrance. He had then boarded a private car and headed for Kowloon City where he was subsequently arrested. In his possession was a notebook which contained the records of the container's registration number, GN5788, and a note of the name Tai Cheung Company. After inquiries, D1 led the police to recover the forged identity cards from inside a private car which had been registered in his wife's name. In a subsequent search of his home, the company chop and name cards and two copies of the business registration certificate of Tai Cheung Company, a copy of the business registration certificate of 'China Best Cargo Company', and other items were found. Under caution, D1 admitted having prepared the forged identity cards and directing D2 to use them for the purposes of renting the Kam Sheung Road site. He also confessed that he had booked and arranged for the container to be sent to the U.S.A. for a reward of \$20,000. He did, however, when interviewed,

deny any knowledge that this operation involved human smuggling. He said that he thought the container was to be used for smuggling cars.

19. Shortly after his arrest, D2 was found and arrested in the vicinity of D1's car in Kowloon City.

### *Sentencing*

20. Turning to the sentences imposed by the judge for charges 1 and 2 against D1, the court adopted an overall starting point of six years' imprisonment which was reduced by one third to take into account D1's pleas of guilty, leaving a sentence of four years' imprisonment for each charge to run concurrently.

21. D2 was sentenced to three years' imprisonment on charges 3 and 4 alleging the use of forged identity cards. These were ordered to be served concurrently.

22. On charges 5 and 6, conspiracies to arrange the passage of unlawful entrants to and within Hong Kong respectively, D3 was sentenced to six and a half years' imprisonment on each charge to be served concurrently.

23. On charge 5, D4 was sentenced to four and a half years' imprisonment.

24. On charge 7, the judge adopted a starting point of nine years and, after giving D5 a discount of one-third and a small further discount, imposed on him a sentence of five and a half years' imprisonment.

25. Lastly, on charges 9-11 which alleged against D7, D8 and D9 that they had assisted the passage of unlawful entrants within Hong Kong, each of them was sentenced to two years' imprisonment after being given one-third reduction from a starting point of three years.

26. In the sentencing remarks concerning D1, the judge took into account his previous good character and the pleas of guilty which he had entered. He also took into account D1's disputed knowledge that the cargo involved in this operation consisted of human beings. We observe that although D1 had claimed that he thought the container was used to smuggle cars, it is apparent that he had given no explanation as to why he held such a belief. In any event, D1 was well aware that he was engaged in a smuggling operation which involved an international element with a cargo to be smuggled from Hong Kong into the U.S.A.

27. The judge also took into account that D1 had been prepared to arrange for forged Hong Kong identity cards to be made, to enlist the help of one other, and to use the forged identity cards in the smuggling operation.

28. So far as D5 is concerned, the judge described his role in the course of his sentencing remarks. He said:

“It was the Fifth Accused who recruited the drivers; who then summoned them to the rendezvous, who, together with another male, met them there and instructed them where to drive to meet their passengers, whom he knew full well to be unauthorized entrants; who went along to that meeting place; who instructed the drivers where to take their passengers; who later met up with Kwok after he had offloaded his passengers; who followed the container for a distance after it left the Kam Sheung Road site the following day.



I have been referred to a decision of the Court of Appeal in respect of the appropriate sentence for transporting unauthorized entrants within Hong Kong by taxi. It is of limited application in respect of this Accused. I shall deal with it when turning to the drivers themselves. The Fifth Accused's involvement is at a higher level than and quite different from theirs.

It is an obvious and necessary inference from the Summary of Facts that the Fifth Accused was aware of the transportation of the unauthorized entrants into Hong Kong by sea and that he was aware of their onward journey in the container. His role was to take up their transportation on their arrival and to move them on to the next stop on their journey. It was a vital role.

I regard 9 years as the proper starting point in his instance, subject to reduction for the plea, his role being somewhat less than that of the Third Accused. I must ensure that he receive a meaningful discount from my maximum jurisdiction.”

### *The applications*

29. Although D1 complained that his sentence was too severe, he provided no reasons in his written notice of appeal for saying this. In court today, he has effectively repeated most of the important points which were brought to the attention of the judge in the court below, and he has said nothing to us today which was not already known.

30. So far as D5 is concerned, Mr McGuinniety, on his behalf, has submitted firstly that the judge failed to have proper regard to what was said in *HKSAR v Chan Lai-choi*, CACC 166/1997 (unreported).

31. This was the case to which the judge had referred in his sentencing remarks as having “limited application” to D5. The judge was perfectly entitled to have taken that approach in the light of the

passages at page 6 in *Chan Lai-choi*, to which Mr McGuinniety referred.

These read:

“Offences which involve the carriage of unlawful entrants from another country into Hong Kong must be distinguished from cases such as the present one, in which the passage of unlawful entrants who have already entered Hong Kong is assisted. The former offences involve, we are satisfied greater culpability”

A little later, the judgment continued:

“In the present case, the applicant had no part in the bringing of the unlawful entrants from China into Hong Kong and was not involved in any carriage by sea. After they had landed he transported them, on what was an otherwise normal taxi journey, from one part of the territory to another. His culpability cannot, we are satisfied, be equated with that of a captain of a vessel bringing unlawful entrants into the territory. We consider that an appropriate starting point would be three years.”

32. Plainly in the present case, D5 was aware of the wider implications of his involvement in the trafficking of humans from the Mainland to a country overseas. In the particular circumstances, he is fortunate that the police were able to discover his activities before the unlawful entrants remained any longer inside the container and their condition deteriorated further. In such an event, he may well have found himself faced with far more serious charges. Of course, Mr McGuinniety accepted that the facts in the case presently before us are more serious than in *Chan Lai-choi's* case, but he suggested that the starting point of nine years was far too high.

33. Mr McGuinniety put forward a second ground which is closely allied to the first one. In this, he complained that the judge had

drawn an inference which was far from overwhelming against D5. This, of course, related to the judge saying that D5 was “aware of the transportation of the unauthorized entrants into Hong Kong by sea and that he was aware of their onward journey in the container”. We cannot agree with the contention that this inference was not open to the judge to draw. Indeed, it was the only sensible inference he could have drawn on the facts which had been put before the court.

34. The last two grounds of appeal make similar points on D5’s behalf, but in view of the comments we have made on the first two grounds they carry the matter no further forward.

35. D5 had, as the judge had said, a vital role to play. He was an essential cog in the arrangements which were being made, with an organising element in the part he had to play, for the passage of fifteen unlawful entrants within Hong Kong. The whole purpose of these manoeuvres was for their onward removal from Hong Kong to the U.S.A. D5 had agreed a substantial reward to the taxi drivers for conveying them in Hong Kong and he was well aware of the proposed ongoing journey of those illegal entrants using the container.

36. Judges, when looking at a set of circumstances with a view to passing a just and proper sentence, are not expected to adopt the kind of blinkered approach, apparently advocated by Mr McGuinniety in this application, which is far removed from the realities of the case. Judges, on the contrary, are expected to consider all of the circumstances. The judge in the present case carried out this exercise with great care, before arriving at a soundly based judgment. The inferences he drew were

overwhelming, and the role played by D5 was rightly described as a vital one.

37. We are left in no doubt, as the judge in the court below also was, that this was an extremely serious case of its kind.

38. The sentences imposed on D1 and D5 were in no way wrong in principle or manifestly excessive, and so these applications are dismissed.

(M. Stuart-Moore)  
Vice-President

(G.J. Lugar-Mawson)  
Judge of the Court of  
First Instance

Mr D.G. Saw, SC, DDPP and Ms Polly Wan Shuk-fung, SGC, of the  
Department of Justice, for the Respondent.

D1/Applicant in person.

Mr E.L. McGuinniety, instructed by Messrs Wong, Packwood & Co., for  
D5/Applicant.