

ON APPEAL  
FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN :

THE ATTORNEY GENERAL OF HONG KONG Appellant

- and -

(1) IP Chiu

(2) TSUI Shu-hung Respondents

CASE FOR THE APPELLANT

RECORD

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1. This is an appeal from the judgment of the Court of Appeal of Hong Kong (Briggs C.J., Huggins and Pickering J.J.A.) allowing the appeal of the Respondents against the conviction of them by a Magistrate that they were guilty of accepting an advantage contrary to Section 4(2) of the Prevention of Bribery Ordinance Cap. 201 Laws of Hong Kong.

Appendix

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2. The offence with which the Respondents were jointly charged related to the acceptance of the sum of \$2,000 Hong Kong currency from one CHAN Kwan "as an inducement to or reward for or otherwise on account of (their) abstaining from performing an act in (their) capacity as public servants namely taking police action in respect of an alleged dangerous drugs offence." The acceptance of an advantage by a public servant in such circumstances is an offence contrary to Section 4(2) of the Prevention of Bribery Ordinance.

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3. After the close of the Crown's case during the trial at first instance the learned Magistrate amended this charge purporting to act under Section 27(2) Magistrates Ordinance Cap. 227 Laws of Hong Kong by (inter alia) deleting the words

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"as an inducement to or reward for or otherwise" from the particulars of charge, so that the charge of which the Respondents were convicted at first instance read as follows:-

Page 2  
Line 32

Statement of Offence

Accepting an advantage contrary to Section 4(2) of Prevention of Bribery Ordinance Cap. 201 .

Particulars of Offence

That you, IP Chiu and TSUI Shu-hung, being public servants, namely, Police Sergeant 4598 and Police Constable 6737 respectively of the Royal Hong Kong Police Force, on the 18th October 1976, at 246 Hollywood Road, second floor, in this Colony, without lawful authority or reasonable excuse, accepted an advantage, namely, the sum of \$2,000 Hong Kong currency from CHAN Kwan on account of your abstaining from performing an act in your capacity as public servants, namely, taking action in respect of an alleged dangerous drugs offence. 10

Page 72  
Line 19

4. The Court of Appeal in its judgment which is reproduced in the Record of Proceedings annexed hereto has criticized as unnecessary this amendment by the Magistrate. 20

Appendix

5. Under Section 25 of the Prevention of Bribery Ordinance, where, in proceedings under Section 4(2)(a) of the Ordinance, it is proved that the accused accepted an advantage, the advantage is presumed to have been accepted as such inducement or reward as is alleged in the particulars of the offence unless the contrary is proved. 30

6. The relevant Hong Kong Statutory Provisions are set out in the appendix hereto

7. The questions raised on this appeal are:-

(a) Notwithstanding that the fabrication of false evidence and the initiating of false prosecutions can never form part of the correct performance of a police officer's duty, is it possible for such conduct to fall within the meaning of "an act in his capacity as a public servant" within the meaning of Section 4(2)(a) of Prevention of Bribery Ordinance Cap. 201 Laws of Hong Kong? 40

(b) If it is possible, is the \$2,000 Hong Kong currency found as a fact to have been paid to the Respondents in the circumstances hereinafter set out capable of being an advantage accepted by them on account of their abstaining from performing an act in their capacity as public servants?

10 8. The trial took place between the 3rd and 5th January 1977 and the evidence called by the Crown is set out in full in the Record of Proceedings annexed hereto. The following are the salient points:-

Pages 3 to 31

20 (a) CHAN Kwan deposed that on the 18th of October 1976 he left his home at 246 Hollywood Road. He saw the Respondent IP Chiu (hereinafter referred to as the first Respondent), a person whom he had seen on an occasion earlier that month, sitting in a green car outside CHAN Kwan's house. CHAN Kwan boarded a public light bus and just as he did so saw also the Respondent TSUI Shu-hung (hereinafter referred to as the second Respondent), a person whom he had known for a long time and whom he knew to be a police officer. The second Respondent was talking to the first Respondent

Pages 6 to 13

30 CHAN Kwan took the public light bus to Central Street, Hong Kong and when he alighted found that the green car was also there. He was ordered into the car. He was reluctant to comply but eventually did so. Before getting in he was searched by the first Respondent. The second Respondent drove the car to a school compound and during the drive said, "Blockhead, you are selling white powder. We have evidence to prove it." CHAN Kwan admitted that he had done so some two months before. On arrival at the compound the first Respondent searched him again and again found nothing. The first Respondent and the second Respondent then  
40 decided to take him back to Hollywood Road to search his home. On arrival at 246 Hollywood Road, Hong Kong CHAN Kwan's son TAM Kam-bor let the party in. CHAN Kwan's wife LEUNG Chu was also in the house.

The first Respondent and the second Respondent carried out a search of the

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premises. During the search the first Respondent said, "There is evidence to prove it." The second Respondent asked LEUNG Chu to go into a cubicle in the flat and said to her, "He cannot deny anything, there is no way for him to deny." CHAN Kwan also heard him mention money but could not remember exactly what he said except that it was to the effect that he did not want the money, it was a small sum. He further mentioned knowing about CHAN Kwan's drug activities in the past.

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CHAN Kwan says that the first Respondent and second Respondent found nothing as a result of this search except pawn tickets and cash in the sum of \$1,120 Hong Kong currency in LEUNG Chu's handbag.

The first Respondent was searching the sitting room while the second Respondent was talking to LEUNG Chu and CHAN Kwan heard the second Respondent say to LEUNG Chu, "It can be done. I can beg D1 (i.e. the first Respondent) for a chance for him." The second Respondent then said to the first Respondent, "His wife (i.e. LEUNG Chu) said that she is going to borrow money. She will go to a friend Wah Hing for a loan. She will phone her." The second Respondent wanted \$3,000 Hong Kong currency. CHAN Kwan heard LEUNG Chu speak on the telephone in the presence of the first Respondent asking for money. She then left the flat and 7/8 minutes later came back with \$1,000 Hong Kong currency which she gave to CHAN Kwan. He then took \$1,000 from her handbag and gave the \$2,000 Hong Kong currency to the second Respondent. The first Respondent was close by in the sitting room.

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The second Respondent said, "He (has) only got \$2,000 ....., that is all he ('s) got, how about it?" The first Respondent said, "Alright, take him down to the car." In the car CHAN Kwan was asked to be a police informer.

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The purpose of paying over the \$2,000 was to stop the Respondents "planting" white powder on him (white powder is a common local term for the drug heroin). The police officers

made a thorough search of his home but found nothing.

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- (b) LEUNG Chu deposed that on the 18th of October 1976 her husband CHAN Kwan came home with the Respondents who searched the house. Having found nothing the first Respondent wanted to take CHAN Kwan back (to the police station) but LEUNG Chu pleaded with him that her husband had turnover over a new leaf.

Pages 13 to 16

10 After more conversation along this line, the first Respondent still wanted to take CHAN Kwan back but the second Respondent said, "There must be some way out." LEUNG Chu replied, "If you have some good ideas you had better say something." And the second Respondent said, "You can't just do anything with words." LEUNG Chu said, "What are you up to, you have completed a search, there is a pawn ticket for several thousand dollars." She pointed out the  
20 money in her handbag and the second Respondent then said, "It is only a small sum, Sergeant (i.e. the first Respondent) will not take it." The second Respondent then asked LEUNG Chu to think of a way out and get three or four thousand dollars more. LEUNG Chu told the second Respondent that she did not have that sum of money but could borrow a few hundred dollars. The second Respondent told her to try her best and she telephoned her friend,  
30 after which she left the premises and went to Sheung Wan Market where she borrowed \$1,000 from her friend's husband PUN Wing. She returned home and gave the sum to her husband who then gave the second Respondent \$2,000, speaking to the first Respondent at the same time. The first Respondent, the second Respondent and CHAN Kwan then left the premises.

40 The Respondents wanted the money "to refrain from taking (her husband) back". That was why she obtained the money.

- (c) TAM Kam-bor deposed that he was aged 14, the son of CHAN Kwan and LEUNG Chu. On 18th October 1976 his father came home with the Respondents who searched the house. He heard the second Respondent talking with his mother LEUNG Chu in a low voice in the sitting room.

Pages 16 to 18

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There was further conversation which he did not hear but eventually CHAN Kwan asked LEUNG Chu to make a telephone call to borrow money. The first Respondent started to search. The second Respondent also began to search. His mother went out for 5-10 minutes and came back with some money which she gave to his father. He then took some money from his pocket and gave the total sum to the second Respondent. The second Respondent said something to the first Respondent and then the first Respondent, the second Respondent and his father left.

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Pages 18  
and 19

- (d) PUN Wing deposed that on the 18th October 1976 LEUNG Chu met him at a post office near Sheung Wan Market where he lent her \$1,000 Hong Kong currency.

It was not uncommon for her to borrow money from him (PUN Wing) or his wife.

He was asked to remember 18th October 1976. He made a statement on 23rd October 1976 to ICAC.

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Pages 20 to  
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- (e) Kenneth Biss deposed that as an officer of the ICAC he went to the second Respondent's home on the 2nd of November 1976 and arrested the second Respondent. He interviewed the second Respondent on the 3rd of November 1976 in the presence of an interpreter who was in fact the officer in charge of the case, Mr. HUI Kar-man. He made notes at the end of the interview and (refreshing his memory from those notes with the leave of the Court) recalled that the second Respondent told him that he had been with the first Respondent on the 18th October 1976 but only to give him a lift to Central Police Station. On being further questioned he said that what happened was that he had met his old school friend CHAN Kwan arguing in the street with Sergeant Ip (the first Respondent). He drove them to CHAN Kwan's home and went in to the flat with CHAN Kwan and the first Respondent. He saw CHAN Kwan and the first Respondent talking together on a verandah but did not hear what they were talking about. The second Respondent then elected to give a written statement under caution.

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- (f) HUI Kar-man deposed that he took a statement under caution from the second Respondent TSUI Shu-hung and tendered the said statement in evidence. Pages 26 to 30
- (g) KWONG Chung-wah deposed that he took a statement under caution from the first Respondent IP Chiu and tendered the said statement in evidence. Page 31
- 10 9. The statement under caution of the second Respondent TSUI Shu-hung was admitted in evidence as exhibit 1 and the translation is Exhibit 1(b). Pages 44-48
10. The statement under caution of the first Respondent IP Chiu was admitted in evidence as exhibit 4 and the translation is Exhibit 4(b). Pages 50-54
- 20 11. After a submission of no case to answer by defence counsel and prior to make any ruling on the said submission, the learned magistrate in purported exercise of his power under section 27 Magistrates Ordinance Cap. 227 Laws of Hong Kong amended the charge in the manner set out in paragraph 3 hereto. The learned magistrate then ruled that there was a case to answer on the amended charge in respect of each of the Respondents. Pages 31 to 34
12. Both of the Respondents elected not to give evidence and not to call any evidence in their own defence. Page 33  
Line 33
- 30 13. The learned magistrate gave judgment on 5th January 1977 as a result of which he brought in a verdict of guilty against, and convicted, both of the Respondents of the charge as amended by him. He gave a written judgment in which he set out in full the reasons for his decision. Pages 34 and 35  
Pages 35 to 41
- In his judgment the learned magistrate did not consider in any detail the question raised in this appeal, but said:- Page 38  
Lines 28 to 42
- 40 "At the close of the prosecution's case .... the prosecution evidence had established the visit, the search and the payment of \$2,000 and at this stage (counsel for the defence) made a submission that even if I found those matters proved beyond all reasonable doubt, a material element of the charge under section 4(2)(a) was missing namely that the

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Page 38  
Line 51 to  
Page 39  
Line 15

prosecution has not proved that the payment was made "on account of the defendants performing acts as a public servant ....."

"Reviewing the evidence as a whole therefore and considering the way in which the witnesses gave their evidence I have to consider whether I am satisfied beyond all reasonable doubt that all the elements of the offence as charged in the amended charge have been proved. It is necessary at this point to recall that it was agreed that both defendants were government servants, serving police officers and thus public servants "within the meaning of section 4(2)." It was further admitted that on the day in question they were both off duty ....

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Page 40  
Line 45 to  
Page 41  
Line 22

"I cannot accept defence counsel's submission that the presumption under section 25 of the Prevention of Bribery Ordinance does not apply until the prosecution have proved the particulars of the charge, and I hold therefore it is a burden on the accused once payment has been proved beyond doubt, to show that it was for an honest purpose. I am not however relying on the presumption alone in this case because having reviewed the evidence as a whole I am satisfied beyond all doubt ..... that whether to prevent beating up, planting, or to prevent future harassment, it was made to keep the officers "off his back", and the totality of the evidence satisfies me beyond all doubt that the payment was made, that it was "an advantage", that it was made in connection with both the accused's activities as police officers without authority or excuse, and on account of their abstaining from taking future action against (CHAN Kwan). That means that the charge is proved against both the defendants and they are convicted as charged accordingly."

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Pages 56 to  
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14. On 7th January 1977 the Respondents gave notice of their intention to appeal against conviction.

Pages 64 and  
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15. On 7th March 1977 (and erroneously dated the 7th February 1977) the Respondents filed substituted grounds of appeal against conviction.



16. On a date unknown but approximately the 28th of April 1977 the Respondents filed further grounds of appeal against conviction.

17. The appeal was heard by Mr. Justice McMullin on 14th March 1977 and he referred the appeal on all grounds to the Court of Criminal Appeal of Hong Kong in exercise of his power so to do under section 118(1)(d) Magistrates Ordinance Cap. 227.

10 18. The appeal was heard by the Court of Appeal of Hong Kong on 29th April 1977 and judgment was reserved. The decision of the Court of Appeal was given on 19th May 1977. On the question of whether the Respondents could be said to have received an advantage in their capacity as public servants, the Court of Appeal had the following to say:-

Pages 68 to 79

20 "Ground 4 raises a question which has caused difficulty on a large number of occasions - whether a public servant has done something "in his capacity as" a public servant. Mr. Litton argues that the act which the public servant is to do or to abstain from doing must be one which is legitimately within his capacity as a public servant. The learned magistrate unfortunately took the view that it was unnecessary to make a precise finding as to the reason for the payment. He said:

Page 73 Line 45 to Page 75 Line 43

30 'Having reviewed the evidence as a whole I am satisfied beyond all doubt ..... that whether to prevent beating up, planting [ of dangerous drugs on Mr. Chan ] or to prevent future harassment, it was made to keep the officers 'off his back'.

40 'Harassment' is a vague term which would include both legitimate police action in prosecuting a person repeatedly for repeated offences and the laying of unfounded charges. The evidence of Chan was: 'I paid over the \$2,000 because from beginning to end they were over-exercising their power but I was in their hands I was afraid of a plant'(sic). Whilst 'over-exercising their power' is equally non-specific, the fabrication of false

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evidence, even if effected during the course of a police officer's duties, could never be part of his duties or be done in his capacity as a police officer. We agree with Mr. Bellanto that it was not incumbent on the prosecution to particularize the alleged dangerous drugs offence, but on the other hand it was, in our view, necessary to show that there was an allegation of an offence, which allegation was not to the knowledge of the Appellants false. It is not disputed that Chan had committed an offence two months before, and if the payment had been related to that the conviction would have been supportable, but the evidence showed that the payment was made in respect of a possible future allegation of a future 'offence' which would be proved by planted evidence. It is immaterial that the various searches were carried out by the Appellants in their capacities as police officers: the act from which they abstained would not have been so done. It follows that when they received money in respect of that abstention they did not receive it on account of their abstaining from performing an act in their capacity as public servants. Mr. Bellanto suggested, on the authority of S0 Sun-leung v. Reg. Criminal Appeal No. 261 of 1973, that the test was "whether the gift would have been given or could have been effectively solicited if the person in question were not the kind of public servant he in fact was". Even accepting that as a correct test we do not agree that the answer in this case must be "No", any more than it would be "No" if a police officer in uniform received money as a result of using his service revolver to commit a robbery when on beat duty: his duty would be the opportunity for the commission of the robbery but the robbery would not be committed "in his capacity as a police officer". In our view the magistrate should have found that there was no case to answer on the charge of accepting an advantage, but there was evidence of a possible offence of blackmail and the proper course was for him to amend the information accordingly in the exercise of his powers under s. 27 of the Magistrates Ordinance."

Accordingly the conviction was quashed.

19. The remaining grounds of appeal were dismissed.

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20. The Appellant respectfully submits that:-

(a) The Court of Appeal erred in law in holding the fabrication of false evidence, even if effected during the course of police officer's duties, could never be a part of his duties or be done in his capacity as a public servant namely a police officer;

10 (b) The Court of Appeal erred in law in holding that a prosecution initiated by a police officer which was to his knowledge false, even if effected during the course of his duties as a police officer, could never be part of his duties or be done in his capacity as a public servant namely a police officer;

20 (c) The Court of Appeal could in law in holding that it was necessary to show that there was an allegation of an offence which was not false to the knowledge of the Respondents;

(d) The Court of Appeal erred in law in holding that the Respondents could not be said to have received \$2,000 Hong Kong currency on account of their abstaining from performing an act in their capacity as public servants.

21. It is respectfully submitted that the law is correctly stated by Leonard J. in Kong Kam-Pin and another v. The Queen 1973 H.K.L.R. 120 at page 129:-

30 "As I see it the question which one must ask oneself when considering the correctness of a gift given to or solicited by a public servant in order to induce him to abstain from a proposed course of action is "Would that gift have been given or could it have been effectively solicited if the person in question were not the kind of public servant he in fact was?" If the answer is "Of course not" as it is in this case then

40 the gift has been solicited or given to him in his capacity as a public servant and is a correct one."

This test was expressly approved by the full Court

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(Briggs C.J. and McMullin and Pickering J.J.) in So Sun Leung and another v. The Queen Criminal Appeal No. 261 of 1973 in the Supreme Court of Hong Kong (Appellate Jurisdiction). It is submitted that this approach is supported by Attorney General of Ceylon v. de Livera 1963 A.C. 103.

Page 75  
Line 22

22. The Appellant respectfully submits that, contrary to the finding of the Court of Appeal of Hong Kong, on the facts of the instant case the answer to the question "whether the gift would have been given or would have been effectively solicited if the person in question were not the kind of public servant he in fact was" must be "No".

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23. The Appellant respectfully submits that the judgment of the Court of Appeal was wrong and ought to be reversed, and that this appeal ought to be allowed and that the convictions of the Respondents ought to be restored for the following (among other)

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R E A S O N S

(1) BECAUSE the fabrication of false evidence and the initiation of false prosecutions by a police officer does fall within the meaning of "an act in his capacity as a public servant" within the meaning of section 4(2)(a) of the Prevention of Bribery Ordinance if it is an act performed by him under the colour of the authority of his office as a public servant and if such advantages as he may obtain from the commission of that act are advantages which he would not obtain if he was not such a public servant;

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(2) BECAUSE the acts threatened by the Respondents in the instant case were acts which would have been effected by them using their positions as police officers, notwithstanding up with and analogous to the duties of such police officers that such acts would have been wrongful, and were thus capable of being acts performed by them under the colour of the authority of their office as public servants and can therefore properly be described as acts done in their capacity as such public servants;

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- (3) BECAUSE the advantage received by the police officers, namely the sum of HK\$2,000, can properly be described as an advantage which they could only have received by the exercise, albeit a wrongful exercise, of their office and which they would not have been able to obtain had they not been such public servants, namely police officers.

GRAEME HAMILTON. *Q.C.*

IN THE PRIVY COUNCIL          No.          of 1978

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ON APPEAL  
FROM THE COURT OF APPEAL OF HONG KONG

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BETWEEN :

THE ATTORNEY GENERAL OF  
HONG KONG

Appellant

- and -

(1) IP Chiu

(2) TSUI Shu-hung

Respondents

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CASE FOR THE APPELLANT

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