45/79

IN THE PRIVY COUNCIL No. 8 of 1979

O N A P P E A L

FROM THE SUPREME COURT OF HONG KONG

B E T W E E N :

THE ATTORNEY GENERAL Appellant

- and -

IP CHIU and TSUI SHU-HUNG Respondents

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal by special leave of the Judicial Committee granted on 16th March 1978 from a judgment of the Court of Appeal of Hong Kong (Briggs, C.J., Huggins and Pickering J.J.A.) given the 19th May 1977, which allowed an appeal by the Respondents from their conviction before N.G. Scriven Esquire, Magistrate of the said Colony, on 5th January 1977 whereby the Respondents were convicted of an offence contrary to s. 4(2)(a) of the Prevention of Bribery Ordinance and were each sentenced to two and a half years imprisonment.

2. The charge against the Respondents was as follows:-

Charge Accepting an Advantage — P.2

Statement of Offence:- Contrary to section 4(2) of Prevention of Bribery Ordinance, Cap. 201.

Particulars of Offence:- That you IP CHUI and TSUI SHU-HUNG, being public servants, namely Police Sergeant 4598 and Police Constable 6737 respectively of the Royal Hong Kong Police, did, on the 18th October 1976 at 246, Hollywood Road, 2nd floor, in this Colony, without lawful authority or reasonable excuse, accept an advantage, namely the sum of $2,000 Hong Kong currency from CHAN KWAN on account of your abstaining from performing an act

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in your capacity as public servants, namely taking police action in respect of an alleged dangerous drugs offence.

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[The words "as an inducement .... otherwise" were deleted by the Magistrate of his own motion at the end of the prosecution case].

3. The questions of law raised by this appeal are:-

(i) Whether the learned Magistrate should have ruled that the Respondents had "no case to answer" at the end of the prosecution case, the Crown having failed to prove that any advantage accepted by the Respondents was accepted (a) on account of their abstaining from performing <u>any</u> act in their capacity as public servants or (b) on account of their abstaining from performing the act alleged in the charge, namely "police action in respect of a dangerous drugs offence."

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(ii) Whether the learned Magistrate was entitled to rely, as he purported to do, on section 25 of the Ordinance despite his deletion from the charge of the words "as an inducement to or reward for........". <u>Section 25</u> provides "Where, in proceedings for an offence under section 4 or 5, it is proved that the accused gave or accepted an advantage, the advantage shall be presumed to have been given and accepted as such inducement or reward as is alleged in the particulars of the offence unless the contrary is proved."

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(iii) Whether the evidence of Kenneth Biss as to oral questions made to and answers given by the Respondents through an interpreter were admissible in law.

(iv) Whether the Court of Appeal were correct in regarding the deletion from the charge of the words "as an inducement to or reward for...." as causing no material alteration in the charge or whether, as the Respondents submit, the words "otherwise on account of" in the context of section 4(2) necessarily apply to circumstances where there is or has been no reward or inducement.

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4. At the Respondents trial, which took place on

the 3rd, 4th and 5th January 1977 evidence for the Crown was given as follows by CHAN KWAN:

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(a) In the afternoon of 18th October 1976 as CHAN KWAN left a public light bus he saw the first Defendant who "asked me to get into the car - the green car." This was right behind the public light bus. D2 in the car. I said "If I have committed any offence you might arrest me". He did not produce identity. I declined to get into car. D1 searched me, found nothing. D2 put his head out of the window and said "Chan Kwan get into the car". I said "You have to accept responsibility if I do". He said "I guarantee nothing will happen to you". I knew D2 to be a policeman. I have known him for a long time to be such. Then car driven along Queen's Road West, I was in the car. I had been searched by D1. Car went to compound at Chan Yuk Hospital and Yuk Tsui School. D2 drove. I sat at the back. D1 on my left. There was conversation. D2 said "Blockhead you are selling white powder. We have evidence to prove it". I said I admitted it was true - it was two months previously. At the school he was searched again, and then he was taken to his home having been further searched at Hollywood Road on the way. His home was searched, nothing was found. He overheard a conversation between the Defendants, and his wife D2 said something about money. That I was selling drugs in the past he had been trailing me for a long while there was no way for me to deny and that in due course he would beat me up. He was explaining my previous activities. They had found nothing. I heard my wife say I wanted to turn over a new leaf and that I was taking methadone treatment. The officers found nothing. I did not see them show anything to my wife. They did not show me anything. They found pawn tickets and cash $1,120. D2 found it in a handbag. He said it was only a small amount he would not take it. I heard my wife tell him I had turned over a new leaf - I could hear - D1 searching the sitting room. I heard D2 say to wife "it can be done. I can beg D1 for a chance for him". He spoke to D1. I heard him, he said "His wife said

P.7 (margin, at line 5)

P.9 (margin, at line 32)

P.9 (margin, at line 39)

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she is going to borrow money. She will go to a friend Wah Hing for a loan she will phone her". The purpose was to give the Defendant money. This was not said to me personally. He said it would take at least several thousand dollars. Before anything can be done, he said "His wife is going to borrow money". D1 said "be quick". The amount of $3,000 was mentioned. D2 wanted $3,000. The amount was agreed with my wife. She made phone call in my presence. I heard her ask to borrow money. I listened in, D1 listened in, he could hear what my wife said. When she finished she left the flat - son stayed behind. D1 and D2 kept on searching the premises. $1,120 still in my wife's handbag. She was gone 7/8 minutes. She said Kai Hing's husband will only lend $1,000. She gave me $1,000. I took the $1,000 and $1,000 from the handbag and gave it to D2. D1 was also close by in the sitting room. D2 said "He only got $2,000". D1 replied, go downstairs with him. It went into D2's pocket. D1 could see this. D2 said to D1 "That's all he got, how about it?" D1 said "alright, take him down to the car". Three of us left flat, leaving his son and wife there. Went to car. Sat inside. D2 said to D1 "Ask him if he is sincere, I am honest". D1 then said to D2 "How about his wife?" He meant he wanted me to make no complaint about him. I said you can set your mind at ease, there will be no trouble from my wife. D1 said I will give you a chance to earn some money, he would allow me to carry on selling drugs but I said I would not. D1 said he would tell no one else, we might co-operate if we have a chance. I should be his informer. This was D2, he said phone number was 468450. I wrote it down when I returned home. D2 took my telephone number. I paid over $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. I was a Police Officer - for nearly 4 years."

P.10 (margin reference, at line 18)

P.13-16 (margin reference, at line 45)

(b) By LEUNG CHUN on the 18th October 1976 Leung Chun at 246, Hollywood Road was awoken by her 13 year old son TAM Kam-bor and saw her husband with the Defendants who searched the flat. I said "give him a chance, he has turned over a new leaf, he is now a hawker".

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I pleaded with D2. D2 said "there must be some way out". I said "If you have some good idea you had better say something." Then D2 said "you can't just do anything with words". I said "What are you up to you have completed search". I said "there is a pawn ticket for several $1,000. There was some money $1,200, this was in a handbag". They found it out put the money beside it. I said that was all I had, I did not offer it then, finally D2 said "it is only a small sum, Sergeant will not take it". I said "That's all I have if you want tea money you have better take it". He asked me to think of a way out and to get $3/4,000 more. D2 asked this. D1 was still searching sitting room. Everyone could hear when asked to get $3/4,000 more I said I had no more. D1 said if P.W.1 taken back he would be beaten up. When he said $3/4,000 I said I did not have it. I did pay them. I was scared. I said to D2 at most I could borrow a few hundred dollars. D2 said to try my best. I phoned to my old friend - I call her sister - D2 stood beside me and listened to what I said after making the call my friend said she would lend me $1,000. She asked me to go over as she was busy cooking. I went to outside post offices, Sheung Wan Market I met my friend's husband - Wing - he gave me $1,000. I then returned home and gave P.W.1 the money. He produced another $1,000 from his pocket, put $2,000 together and gave it to D2, when he took money he spoke to Sergeant. I did not hear what Sergeant said. The $1,000 came from the handbag. When $2,000 paid to D2 both officers went out with P.W.1 - all three together. My son was there when money transaction took place".

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(c) By TAM Kam-Bor, the Complainant's son that the two Defendants came to 246, Hollywood Road on 18th October 1976 and searched the premises. He heard the second Defendant have a conversation with his mother in the sitting room in a low voice. He heard his father ask his mother to make a phone call to borrow some money. He did not see the Defendants find anything whilst searching. He saw his father give $2,000 to the second Defendant in the presence of the first Defendant.

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P.18 — (d) By PUN Wing, a grocery hawker, that he received a phone call on 18th October 1976 and as a result took $1,000 to LEUNG Chun at the Post Office near Sheung Wan Market.

P.20 — (e) By Kenneth Biss, U.K. Police Officer on secondment to Hong Kong, who gave evidence of the arrest of the second Defendant on 2nd November 1976 with HUI Kor-man; Hui was acting as interpreter.

"Then I interviewed him with Hui acting as Interpreter. I asked questions. Hui translated the question then he reply. He asked no question of his own volition. I made notes at the end of the interview. Interview lasted 1 hour 3 minutes. This is my usual practice. (10)

P.20-25 — COURT: "Leave to refresh memory". Then followed a purportedly verbatim series of questions and answers.

P.26 — (f) By HUI Kar-Man who gave evidence that he acted as Interpreter on 2nd November 1976 (20) between the second Defendant and Mr. Biss. He said that no notes were made by either of them, but that he had seen Mr. Biss's notes. The Court declined to hear any more about the notes. Hui gave evidence of his recollection of the conversation "to the best of my recollection Mr. Biss told him of complaint on 18.10.76 told he he was alleged to have been with Ah Sum and to have (30) solicited $2,000 from P.W.1. Biss reminded him of his caution. After he had told him of the allegation, D2 denied being with Chan or solicited $2,000. Said he had been on 'B' shift duty. D2 finally said he had gone to visit his daughter-in-law that day but denied seeing P.W.1 that day". That interview lasted 20 minutes - at one stage I was alone with D2. P.W.5 had gone out of the room to have a cigarette - Biss to have a cigarette - I had (40) a short conversation with D2. I asked why he did not tell the truth, he replied "If I tell the truth, what benefits will I get?" I said I could give no benefit or make promises. He said "If I turn prosecution witness will it benefit me?" Then Biss came in, I told him and he said to D2 "Decision had to be

made by a Superior Officer, whether to deny or admit is up to you". Hui also gave evidence of interpreting for Biss on 3rd November when interviewing the first Defendant, Hui produced the written statement of the second Defendant.

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(g) By KWONG Chun-wah who produced the first Defendant's written statement.

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(h) The statements of the Defendants did not coincide with one another in certain respects and as said by the learned Magistrate in giving judgment "suggest a purely accidental or spontaneous social visit by both Defendants on P.W.1 on the day in question. In the course of cross-examination defence counsel had put to P.W.1 that he tried to offer a sum of money to D1 but that D1 pushed it away. She also suggested to P.W.1 that he had a revenge motive for bringing these allegations against D2. It is significant that neither of these factors are mentioned in either of the statements which the Defendants made to the investigating officers and which are not disputed to be voluntary and admissable. They do not contain confessions, and as I have said I merely look at them to see if to what extent they support or contradict the facts disclosed in the rest of the prosecution evidence, and I have come to the conclusion that they support the prosecution evidence to the extent of the visit but very little further, except to support P.W.1's allegation that he had conversation with the officers on leaving and at the outside door way and this I regard as a most important factor because this is where, according to P.W.1 the arrangement was made to get in touch with one another later and that P.W.1 would be allowed to carry on his business as drug pusher or would be invited to become a police informer. If the Defendants wanted to suggest that P.W.1. had attempted to bribe them without success or that he had a revenge motive against D2 then I would have expected that to appear in the statement, or that the Defendants would have given evidence to that effect before me, but they have not done so".

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5. Counsel for the Respondents submitted at the

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close of the Crown case that the prosecution had failed to prove each element of the charge:

(a) that as the Complainant said he made payment as he was threatened with having drugs planted on him, and as he was threatened with being beaten up neither of the Defendants could be said to be acting within their capacity as public servants;

(b) that even assuming the payment was made the presumption under s. 25 should not apply since mere payment to a public servant cannot be an offence whatever the purpose. 10

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6. The learned Magistrate proceeded to amend the charge by striking out the words "as an inducement to or reward for or otherwise" and ruled that on an objective test "I cannot say any material element of the charge against either Defendant is missing and there is a case to answer both Defendants".

PP.33-34

7. No evidence was called on behalf of either Defendant whereafter Counsel for the defence further 20 submitted that there was no reliable evidence of payment, and that if there was it could have been a loan thus negativing s. 25.

PP.35-41

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8. In his judgment the learned Magistrate said "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 30 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 both were off duty. I have reviewed briefly the evidence of the main prosecution witnesses and I am satisfied beyond all reasonable doubt that both Defendants went to P.W.1's house, that the search was made and the money paid over to D2 in the presence of D1 and 40 that both Defendants were on what was undoubtedly a completely joint enterprise". And in regard to the presumption under s. 25 he ruled as follows: "I cannot accept defence Counsel's submission that the presumption under section 25 of the 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 on P.W.1's evidence that whether to prevent beating up, planting or to prevent future harrassment, it was made to keep the officers "off his back", and the totality of the evidence satisfies me beyond all doubt that 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 further action against P.W.1. That means that the charge is proved against both Defendants and they are convicted as charged accordingly".

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9. The Defendants were each convicted and sentenced to:

(a) 2½ years imprisonment

(b) to pay $1,000 each compensation to P.W.1 — P.42

(c) to pay $1,000 each towards the costs of the prosecution.

10. The learned Magistrate gave an additional Statement of Findings on the 11th January 1977 in the course of which he said "Payment was in my judgment made to avoid harrassment of P.W.1. (Chan Kwan) of one kind or another". — PP.62-63; P.62

11. The Respondents' appeal to the Court of Appeal of Hong Kong (Briggs, C.J., Huggins and Pickering J.J.A.) was allowed in a written judgment dated 19th May 1977. — PP.68-79

12. The Judgment of the Court was delivered by Huggins J.A. who first set out such of the evidence as the Court of Appeal assumed was accepted by the learned Magistrate, then considered and rejected the first ground of appeal, a purely technical ground. — P.69-70; P.70-71

13. Huggins J.A. continued:

"The second ground of appeal contends that the charge as amended was defective. Although it is not suggested that the charge as it originally stood was bad for duplicity, the

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argument is that by virtue of the use of the word "otherwise" in s. 4(2) it had to be shown that the payment was

(i) as an inducement to,

(ii) as a reward for, or

(iii) on account of (but not as an inducement to or as a reward for)

abstaining from performing an act in their capacity as public servants. Therefore, the word "otherwise" having been deleted from the charge, the third alternative was (it is said) insufficiently described. We would not wish to discourage the use of the precise words of the statute in drafting charges, but we think that an allegation that the payment was "on account of" abstaining is in fact wide enough to include a case where it was made "as an inducement to" or "as a reward for" abstaining, these being merely particular instances of payments "on account of" abstaining. The amendment was made because the magistrate thought those two particular instances were not relevant to the present case and he thought he was narrowing the issues. We take a slightly different view and are satisfied that the amended charge was not defective and that the charge was, indeed, not materially altered by the amendment. Since this Judgment was drafted we have seen the Judgment of McMullin, J. in Chan Wing-yuen v. Reg. Criminal Appeal No. 192 of 1977 and we respectfully agree with the observations he there made on this point".

14. Huggins J.A. then considered the third ground of appeal:

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"3. That the learned Magistrate erred in law by invoking and taking into consideration the presumption contained in section 25 of the Prevention of Bribery Ordinance (Cap. 201).

3A. Alternatively that the learned Magistrate erred in law in relying on the said presumption as the same was rebutted by the evidence of the prosecution itself.

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The foundation of the argument was the amendment by which the magistrate deleted the words "as an inducement to or reward for" from the charge. Section 25 of the Ordinance is in these terms:

"Where, in any proceedings for an offence under Section 4 or 5, it is proved that the accused gave or accepted an advantage, the advantage shall be presumed to have been given and accepted as such inducement or reward as is alleged in the particulars of the offence unless the contrary is proved".

Mr. Litton says that by reason of the amendment the Appellants were no longer alleged in the particulars of offence to have accepted an advantage "as such inducement or reward": they were, in effect, alleged to have accepted it otherwise than as such inducement or reward. It may well be that the draftsman intended that s. 25 should, on proof of the gift of an advantage, apply to every case under s. 4, but we agree that it does not. But for what we shall have to say later it would be necessary to consider to what extent the magistrate relied upon the presumption".

15. The fourth ground of appeal, whether a public servant has done something in his capacity as a public servant found greater favour with the Court. It was considered that the fabrication of false evidence even if effected during a police officers duties could never be part of those duties or done in the capacity of a police officer. To be within the capacity of an officer it must be shown that there was a bona fide allegation of an offence when, if payment had been received in relation to that, the conviction of this offence would be supportable. But here the 'offence' so-called was to be the planted evidence; to receive money on account of their abstaining from performing an act in relation to planted evidence could not, therefore, be in their capacity as public servants. Even where the argument that the gift had been more effectively solicited because the person in question was a public servant, So Sun-leung v. Reg. Crim. Appeal No. 261 of 1973, it would be no more pertinent as, for example, if an officer used his police revolver to commit a robbery when on duty it could surely not be argued that such an act was "in his capacity as police officer".

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16. The fifth ground of appeal, that Mr. Biss gave hearsay evidence of what the Defendants had said as he was simply repeating the interpretation, was rejected by the Court. "Mr. Biss purported to give evidence of what the Appellants had said. Strictly he should not have done that as he does not understand Cantonese...." It is respectfully submitted that this was correct and that the learned Judge fell into error when he went on "... but should have confined himself to reporting what Mr. HUI had said to him". The view was later evinced by the Court that such reporting was not evidence of the truth of what was said but merely of the fact that it was said. It will be contended that in accordance with the leading authority R.v. Attard (1959) 43 Cr. App. R. 90 only the interpreter can give evidence of the questions he put to the Defendants and of the answers given in reply. The practical difficulties inherent in the situation are solved by the police officer taking a note but entirely for the benefit of the interpreter who should sign the note as being correct at the time.

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17. The Court allowed the appeal on the fourth ground of appeal. Had they not done so they would have considered the third ground in greater detail.

18. In the view of the Court the learned Magistrate could and should have amended the charge to one of blackmail for which there "was ample evidence to justify (and, indeed, to require) an amendment of the charge to one of blackmail".

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19. The Respondents respectfully submit that the decision of the Court of Appeal was correct for the reasons which were given by Huggins J.A. Extortion of money by means of a threat to "plant" false evidence upon and/or to "beat up" the complainant and/or to harass him by one means or another does not amount to abstaining from the performance of an act in (the Respondents) capacity as public servants. Such acts would clearly be outside the Respondents' capacity as public servants.

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20. The Court of Appeal should have allowed the appeal on the following additional grounds:-

(i) The learned Magistrate expressly made no specific finding as to the act or abstention on account of which the Respondents accepted an advantage. By holding that

"whether to prevent beating up, planting or to prevent future harassment, (the payment) was made to keep the officers "off his back" and "payment was in my Judgment made to avoid harassment.... of one kind or another" the learned Magistrate made it clear that he was not satisfied beyond a reasonable doubt of the sole abstention alleged in the charge, namely, from "taking police action in respect of an alleged dangerous drugs offence".

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Accordingly it is submitted that he should have found no case to answer and/or should have dismissed the charge on this ground.

(ii) The learned Magistrate erred in law in relying on section 25 of the Ordinance. The presumption to which the operation of the section gives rise is a presumption that the advantage under consideration has been "accepted as such inducement or reward as is alleged in the particulars of the offence", not a general presumption of corrupt intent. In the instant case the words "inducement to or reward for..." had been deleted from the charge. Further, as submitted above, the learned Magistrate plainly was not satisfied that the purpose for which the advantage was given and accepted was that "alleged in the particulars of offence".

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(iii) The evidence of Mr. Biss was hearsay. The only person who could give direct evidence as to what the Respondents said in Chinese or as to the meaning of what they said in English was Mr. Hui the interpreter.

21. The Respondents respectfully submit that this appeal should be dismissed for the following (among other)

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R E A S O N S

(1) BECAUSE it can never be within the capacity of a police officer as a public servant to fabricate evidence or to beat up a person or to harass a person or to threaten to do any of those things.

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(2) BECAUSE the Respondents if guilty of any offence were guilty of blackmail rather than the offence charged.

(3) BECAUSE there was no sufficient evidence to satisfy the learned Magistrate as to any act from which the Respondents allegedly abstained or were to abstain whether as set out in the charge or at all.

(4) BECAUSE the learned Magistrate, not being satisfied as to the act abstention from which was the pretext for the advantage nonetheless (a) held that the Respondents had a case to answer, (b) found them guilty on the charge. 10

(5) BECAUSE the learned Magistrate incorrectly applied section 25 of the Ordinance.

(6) BECAUSE the learned Magistrate wrongly admitted evidence of conversations held with the Respondents through the interpreter.

CHRISTOPHER FRENCH

WILLIAM GLOSSOP 20

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF HONG KONG

B E T W E E N :

THE ATTORNEY GENERAL <u>Appellant</u>

\- and -

IP CHIU and TSUI SHU-HUNG <u>Respondents</u>

CASE FOR THE RESPONDENTS

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