Privy Council Appeal No. 8 of 1979

The Attorney General of Hong Kong – – – – *Appellant*

v.

Ip Chiu and Another – – – – – – – *Respondents*

from

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER 1979

Present at the Hearing:

LORD WILBERFORCE
LORD EDMUND-DAVIES
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL
LORD LANE

[*Delivered by* LORD EDMUND-DAVIES]

This is an appeal brought by the prosecution by special leave of Her Majesty in Council from a judgment of the Court of Appeal of Hong Kong, which allowed an appeal by the respondents from their conviction before a magistrate of the Colony of an offence of bribery, for which they were each sentenced to two and a half years imprisonment.

The respondents are police officers and the charge preferred against them originally read in this form:

Charge:	Accepting an Advantage.
Statement of Offence:	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, 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, as an inducement to or reward for or otherwise on account of your abstaining from performing an act in your capacity as public servants, namely taking police action in respect of an alleged dangerous drugs offence.

This wording followed the relevant part of the Ordinance, which is in these terms:

> "*Section* 4. *Bribery*
>
> . . . . .
>
> (2) Any public servant who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his—
>
> (*a*) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
>
> . . . . .
>
> shall be guilty of an offence."

"Advantage" is defined by section 2 of the Ordinance as meaning, *inter alia*,

> "(*a*) any gift, loan, fee, reward or commission consisting of money . . . ."

And section 25 provides that:

> "Where, in any proceedings for an offence under section 4 . . . , 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."

The case for the prosecution may be summarised in this way: Chan Kwan, a drug addict and a former police officer, was living at 246 Hollywood Road with his wife Leung Chun and young son Tam Kam-bor. On 18th October, 1976, he left his home and saw the first respondent sitting in a green car outside. Just as he boarded a bus he saw that the first respondent had been joined by the second. When he alighted from the bus at the end of his journey he saw that the same green car was at the bus stop and the respondents approached him. He was searched by the first respondent, who found nothing illicit, and was then ordered into the car. He reluctantly did so and was driven off to a school compound. During the drive the second respondent told him, "Blockhead, you are selling white powder. We have evidence to prove it", "white powder" being a common local term for heroin. Chan Kwan then admitted that he had sold powder some two months earlier. At the compound the first respondent searched him a second time, but again found nothing. He was then driven to his home so that it too might be searched. This the respondents did, but, although without success, the first respondent wanted to take Chan Kwan off to the police station. Leung Chun pleaded with him that her husband had turned over a new leaf, and the second respondent said, "There must be some way out". She pointed to dollars totalling $1,120 which, as the search had revealed, were in her handbag, whereupon the second respondent said, "It is only a small sum. Sergeant will not take it"; and added that she should try her best to get three or four thousand dollars more. The first respondent said that if they took her husband away he would be beaten to death unless the money was forthcoming. Being scared by the threat, she left the house, borrowed $1,000 from a friend, and on her return handed it to her husband. He then took $1,000 from her handbag and handed $2,000 to the second respondent, who then said to the first, "He's only got $2,000. How about it?" The first respondent replied, "Alright, take him down to the car", and Chan Kwan was then taken away by both respondents.

Chan Kwan testified that his purpose in paying over the money was to stop the respondents "planting" white powder on him, while his wife said that she had borrowed the $1,000 because the respondents would not otherwise abstain from beating up her husband. Having found the payment of $2,000 established, the learned magistrate proceeded:

> " . . . I hold therefore it is a burden on the accused, once payment had been proved beyond doubt, to show that it was for an honest purpose. I am not, however relying on the [section 25] presumption alone in this case, because having reviewed the evidence as a whole I am satisfied beyond all doubt on [Chan Kwan's] evidence 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 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 [Chan Kwan]".

Their Lordships should add that, at the close of the prosecution, the magistrate had rejected a defence submission of "No case", and that thereafter each accused elected not to give or call evidence. For completeness, their Lordships would also add that the magistrate took it upon himself to delete from the "Particulars of Offence" the words

> "as an inducement to or reward for or otherwise"

but they do not propose to enlarge upon that matter since they respectfully share the view expressed by the Court of Appeal that no amendment was called for and that

> "the offence charged after the amendment was the very same as that charged before . . .".

The prosecution now appeal against the quashing by the Court of Appeal of the convictions of the respondents. They did this in consequence of their upholding Ground 4 of the respondents' appeal, viz:

> "That the learned magistrate misdirected himself in law in convicting the appellants on the evidence adduced inasmuch as the same did not support the amended charge particularly having regard to his specific findings . . .".

The key passage in the judgment of the Court of Appeal, delivered by Huggins J.A., must be quoted at length:

> "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. [Defence counsel] 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:
>
> > '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" '.
>
> '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 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 [prosecuting counsel] 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 [sic] 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. [Prosecuting counsel] suggested, on the authority of *So 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".

The main attack launched by the prosecution on the foregoing is that the Court of Appeal "erred in law in holding that the fabrication of false evidence, even if effected during the course of police officers' duties, could never be a part of his duties or be done in his capacity as a public servant, namely a police officer". But the fundamental difficulty confronting the prosecution was and still is that, whereas the accused were charged with corruptly abstaining from "taking action in respect of an alleged dangerous drugs offence", the evidence fell far short of establishing that anything of the sort had happened. If, for example, the police officers had adverted to the admitted offence of selling heroin two months earlier and had threatened to launch proceedings in respect of it unless they were bought off, the offence charged could well have been made out. But the fear of "planting" could relate only to the future, and, like the threat of a beating up, could not be related to any "*alleged* dangerous drugs offence."

In the judgment of their Lordships the correct test in section 4(2) cases was that propounded by Leonard J. in *Kong Kam-piu v. The Queen* ([1973] H.K.L.R. 120), which was cited with seeming approval by the Full Court in *So Sun-leung v. The Queen* (unreported, Criminal Appeal No. 261 of 1973). It may, their Lordships think, be helpful if they summarise the facts. Two Auxiliary Police Constables on duty went to a church hall where a private dance was being held, and, falsely alleging that a fight had taken place on the premises, threatened to break up the party. When pleaded with by the party organiser, one of the accused said, "You know how to react . . ." and held out his palm. The organiser then proffered $20, but was told "That is insufficient—$30". They did, however, in the event accept $20 and then departed. They were later charged under section 4(2) and convicted by a magistrate of corruptly soliciting and accepting the money as an inducement to abstain from taking action in respect of an offence against public order alleged to have been committed at the church hall. Dismissing the appeal against conviction, Leonard J. said (at p. 126):

> "The point made, somewhat audaciously, by [appellants' counsel] was that since no actual offence against public order was alleged and since no such offence could properly be alleged by the appellants the sums solicited and received could not be said to have been solicited or received by the appellants 'as an inducement to or otherwise on account of their abstaining from performing an act in their capacities as public servants'. To put it another way, if the appellants had acted as found by the learned magistrate they might have been guilty of the offence of demanding with menaces but not of an offence under section 4(2) . . . Indeed, [appellants' counsel] in the course of his argument stated—
>
> > 'I seek to equate this situation with the case of a police officer who by producing a gun in the street gets money from an innocent passer-by.'

> He pointed out that there was nothing in the evidence to suggest anything disorderly about the dance or that the complainants might have thought there was . . . He submitted that as all parties must have known that the appellants had no authority to break up the dance, it followed that it could not be said that they were acting in their capacities as public servants—the threat must have been, and been regarded by all, as a private threat."

After reviewing decisions relating to section 3(1) of an earlier Ordinance, which corresponded roughly with section 4(2), and recalling that the declared object of the later Ordinance was,

> "to make further and better provision for the prevention of bribery and for purposes necessary thereto or connected therewith",

Leonard J., dealing with section 4(2) itself, said, (p. 129)

> "Here the vital words are 'in his capacity as a public servant' . . . It becomes, I consider, clear that the word 'capacity' cannot be intended to bear the narrow meaning which [appellants' counsel] would have me assign to it . . . As I see it the question which one must ask oneself when considering the corruptness 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 the gift has been solicited or given to him in his capacity as a public servant and is a corrupt one . . . The present Ordinance aims at the mischief of a police officer obtaining a gift from a member of the public for forbearing to act in a manner which would be embarrassing to that member of the public whether or not he be entitled *virtute officii* to do the act forborne, provided of course that the embarrassment sought to be avoided by the gift could not equally easily have been caused by the police officer had he not been a police officer."

It has to be said respectfully that the Court of Appeal never really dealt with Leonard J.'s test. Indeed, however unwittingly, they in effect discarded it, for more than once they equated a public servant's "capacity" with his "duty" and thus considerably narrowed the former word, which is the only one contained in section 4(2)(*a*). Accordingly, the observations of Lord Simonds in *Gill v. The King* (1948) A.I.R. (35) Privy Council 128, to which their Lordships' attention was drawn, regarding "any act done or purporting to be done in the execution of his duty as a servant of the Crown" (wording employed in section 270 of the Government of India Act 1935) have no bearing on the interpretation of section 4(2)(*a*). And learned counsel for the present respondents intimated that, while maintaining that the Court of Appeal were right to quash the convictions, he accepted as correct the test propounded by Leonard J., and accordingly found himself unable to support the approach adopted by the Court of Appeal.

Nor can their Lordships, for its acceptance would render section 4 largely ineffective. Indeed that unfortunate tendency has already manifested itself in such later decisions as *Wan Yau-wai* (Criminal Appeal 1978 No. 1218) and *Sin Pak-sang* (Criminal Appeal 1979 No. 428) where, in the light of the observations of the Court of Appeal in the instant case, convictions of section 4 charges were quashed on appeal, notwithstanding that the facts in each pointed strongly to guilt. Not surprisingly, therefore, anxiety was expressed on behalf of the Attorney General that this unfortunate drift would continue unless effectively checked by their Lordships.

This does not, however, lead to the conclusion that the Court of Appeal were in error in quashing the convictions. On the contrary, Leonard J.'s test leads inescapably to the same conclusion. The fatal flaw in the

prosecution's case was that the learned magistrate never found established that which was alleged, namely a corrupt abstention from "taking action in respect of an alleged dangerous drugs offence". The view most favourable to them was that money was paid to the accused to avert "planting" or a "beating up", but those acts could have been perpetrated equally well by a stranger as by a member of the police force. In any event, they cannot conceivably be said to have any relation to the charge preferred.

In the result, while differing from their reasons, their Lordships conclude that the Court of Appeal were right in quashing the convictions of both respondents, and they will accordingly humbly advise Her Majesty that the appeal of the Attorney General should be dismissed.

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