

2/81

IN THE PRIVY COUNCIL

No. 13 of 1980

O N A P P E A L
FROM THE COURT OF APPEAL OF THE CROWN
COLONY OF HONG KONG

B E T W E E N :

THE ATTORNEY GENERAL

Appellant

- and -

HO PUI-YIU

Respondent

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.
Hale Court
Lincoln's Inn
London WC2A 3UL
Appellant's Solicitors

BOWER COTTON & BOWER
4 Breems Buildings
Chancery Lane
London EC4
Respondent's Solicitors

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whether in a prosecution for an offence contrary to Section 10(1)(b) of the said Ordinance the prosecution must adduce evidence to prove the value of pecuniary resources of property alleged to be in the control of the accused as at the date laid in the charge; or whether it is sufficient for the prosecution to adduce evidence of the acquisition cost of such pecuniary resources or property for the purpose of proving disproportion.

4. The Respondent was charged with the following offence - 10

Statement of Offence

p.1, 1.11
to p.2,
1.18

Being a Crown Servant in control of pecuniary resources or property disproportionate to his then present or past official emoluments, contrary to Section 10(1)(b) of the Prevention of Bribery Ordinance, Cap. 201, Laws of Hong Kong.

Particulars of Offence

HO PUI YIU, Lawrence, a Crown Servant, was on the 3rd December, 1973 in control of pecuniary resources totalling \$15,516.09 and property, namely:- 20

- (i) Flat D, 15th floor, Shung Chi House, Bailey Street, Hunghom, Kowloon;
- (ii) One Volkswagen motor car, registration number BC1218;
- (iii) One fifth interest in the following:-
 - 2,000 shares of Reality Development Corporation Ltd.
'A'
 - 2,000 shares of Madison Securities Ltd;
- (iv) 44 shares of Hong Kong & Shanghai Banking Corporation;
- (v) 400 shares of China Light & Power Co. Ltd;
- (vi) 1,200 shares of Hutchison International Ltd; 30
- (vii) 500 shares of Hong Kong Land Co. Ltd.;
- (viii) 1,000 shares of the Yangtzekiang Garment Manufacturing Co. Ltd.;
- (ix) 100 shares of Hong Kong Telephone Co. Ltd.;

which pecuniary resources and property were disproportionate to his then present or past official emoluments.

5. At the trial of the Respondent which began before Garcia, D.J. on 28th March 1978 the prosecution adduced evidence, inter alia, to establish

p.4,1.26 to
p.6, 1.24

(1) the Respondent's total net emoluments for the period from 1st November 1956 (being the date when the 40

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Respondent first became a Crown Servant) to 3rd December 1973;

(2) the Respondent's total net emoluments for the period from 2nd June 1972 to 3rd December 1973; and p.6, 11.25 - 30

(3) that on 3rd December 1973 the Respondent was in control of pecuniary resources and property acquired and paid for as follows:-

	<u>Item</u>	<u>Date of Acquisition</u>	<u>Payment</u>	
10	(a) Bank accounts in credit		¥15,516.09	p.9, 11.4 - 7
	(b) Flat D, 15th Floor, Shung Chi House	up to 3.12.73	¥63,788.20	p.10,11.27-28
	(c) Volkswagen car	15.2.73	¥8,710.00 after deducting "Trade in" allowance	p.10, 1.30 to p.11, 1.22
20	(d) 1/5th interest in "share syndicate"	July 1973	¥6,000.00	p.12, 11.8 - 12
	(e) 44 shares of Hong Kong & Shanghai Banking Corporation	February 1973	¥18,032.00	p.13, 11.3 - 17
	(f) 400 shares of China Light & Power Co. Ltd.	January and April 1973	¥22,755.60	p.13, 1.40 to p.14,1.2
30	(g) 1,200 shares of Hutchison International Ltd.	May 1973	¥18,162.00	p.14, 1.41 and p.15, 11.23 - 28
	(h) 500 shares of Hong Kong Land Co. Ltd.	July 1973	¥5,149.50	p.16, 11.12 - 16
	(i) 1,000 shares of Yangtzekiang Garment Manufacturing Co. Ltd.	after mid-1972	¥11,049.50	p.17, 1.35 to p. 18, 1.2
	(j) 100 shares of Hong Kong Telephone Co. Ltd.	after mid- 1972	¥ 9,200.00	p.17, 11.35 - 38 p.18, 11.3 - 4
40	No evidence of the value of the assets numbered (b) to (i) above (hereinafter called "the relevant assets") as at the charge date was put before the Court.			p.42, 11.35 - 38

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- p.19, 11.12
- 20 and
p.33, 11.9
- 31
6. At the conclusion of the prosecution's case at the trial, it was submitted on behalf of the Respondent inter alia, that there was no case for the Respondent to answer in that the alleged disproportion between his total emoluments and the relevant assets could only be proved by the comparison of two figures both of which had to be quantified in dollars and cents and ascertained by reference to a common date, that is to say, the charge date. As the prosecution had chosen not to adduce evidence of the value of the relevant assets as at the charge date, it had failed to prove disproportion which is a necessary ingredient of an offence under Section 10(1)(b) of the said Ordinance. Such evidence was in fact available to the prosecution as all the shares concerned were of publicly quoted companies in Hong Kong; and no reason was given by the prosecution for its exclusion. In those circumstances, the only inference to be drawn is that the prosecution wished to be in a better position to prove "disproportion". 10
7. The learned trial judge rejected the said submission. The trial concluded on 28th April 1978 and the Respondent was convicted of an offence under Section 10(1)(b) of the said Ordinance. In his Judgment the learned trial judge referred to the said submission and relied upon the following dictum in Sturgeon v. The Queen (1975) H.K.L.R. 677 at p.686 as a complete answer to it: 20
- p.19, 11.14
- 20
- p.19, 11.27
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- "the conclusion we have reached is that the calculation is not merely an arithmetical one and the question to be asked is whether that particular defendant could have acquired it with his official emoluments".
8. The Respondent appealed to the Court of Appeal of the Supreme Court of Hong Kong (Briggs C.J., Huggins and Pickering JJ.A.) on the ground, inter alia, 30
- p.38, 11.6
- 13
- "That the learned trial judge erred on a point of law in holding that the prosecution need not adduce evidence as to the value of the assets at the charge date as opposed to the values at the dates of purchase to prove that the assets at the charge date were disproportionate to the official emoluments received by the (Respondent) from the commencement of Government Service up to the charge date."
- p.40, 1.4
to p.43,
1.4
9. The Court of Appeal gave judgment allowing the appeal. The judgment of the court was delivered by Pickering J.A., who rejected the approach urged by the Appellant that it was for the prosecution to prove control at the charge date 40
- p.40,1.39 -
p.41,1.5
- but that to ascertain whether or not there was disproportion one must look at the emoluments and draw a line as at the acquisition date, saying:
- p.41,11.5 -
12
- "In our view this approach flies in the face of the wording of the charge which alleges disproportion not at the acquisition date but at the charge date and to convict on the basis of the value at the acquisition date is to convict of something which was never charged. Common sense requires that if the official emoluments are to be valued as as the date of 50

the charge (as is accepted) the property must be valued as at the same date."

10. The Court of Appeal also referred to the dictum of the Full Court in the case of Sturgeon v. The Queen (1975) H.K.L.R. 677 at p. 686 relied upon by the learned trial judge as set out in paragraph 7 above and pointed out in effect that the learned trial judge had misunderstood the dictum; that the paragraph from which that passage was taken had nothing whatever to do with the valuation of property or the assessment of official emoluments, since in the earlier part of the judgment it had already been clearly assumed that the material date for the assessment of the official emoluments and for the valuation of the assets was the date of the charge; and that the point there being made was that the same arithmetical proportion would not necessarily be held to be disproportionate in every case. It was held further that whether or not there was any ambiguity in the passage in Sturgeon v. The Queen (1975) H.K.L.R. 677 at p.686, the following passage in the later case of Mok Chuen v. The Queen (1977) H.K.L.R. 605 at p.607 was explicit:

p.19, 11.28 -
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p.41, 11.25 -
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p.42, 11.29 -
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"The exercise required is that of considering the total assets as at the charge date, comparing them with total official emoluments and then examining any explanation put forward in regard to any disproportion found to exist ..."

11. The Court of Appeal accordingly allowed the appeal stating, inter alia, that:

"In the present case no evidence was given of the value of the accused's total assets as at the charge date so that comparison of that total value with total emoluments as at the charge date was impossible. On this ground alone the appeal must be allowed, the conviction quashed and the sentence set aside. Moreover, this is not a case where one can say that the values at the charge date must have been greater than those at the dates of acquisition, and accordingly we cannot apply the proviso."

p.42, 1.35 to
p.43, 1.4

12. By an Order in Council dated 11th April 1979, the Appellant was granted special leave to appeal to Her Majesty in Council.

p.50, 1.10 to
p.51, 1.35

13. It is respectfully submitted that on a charge for an offence under Section 10(1)(b) of the said Ordinance, the burden of proof is on the prosecution who has to prove beyond a reasonable doubt:

- (1) that the relevant assets were under the control of the Crown Servant on the charge date; and
- (2) that such assets were disproportionate to his official emoluments at the charge date.

The Respondent will rely on Sturgeon v. The Queen (1975) H.K.L.R. 677 at p.683

14. It is further respectfully submitted that disproportion

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cannot be established in the absence of evidence both as to the value of official emoluments up to the charge date and the value of the relevant assets ascertained as at the same date. No comparison can possibly be made unless both these figures are made available to the court. The decisions sought to be relied by the Appellant in The Queen v. Kan Ping V.D.C. Criminal Jurisdiction Case No. 55 of 1974 and The Queen v. Cheung Shiu-keung (1978) D.C.L.R. 51 are wrong in so far as they purport to hold that evidence of the value of the relevant assets at the charge date is inadmissible.

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15. It is the Respondent's respectful submission that direct evidence of the value of the relevant assets as at the charge date is indispensable in establishing disproportion between official emoluments and assets. The Appellant's contention that disproportion should be established by comparing official emoluments up to the charge date with the acquisition costs of the relevant assets in the control of the accused on the charge date is wrong for the following reasons:-

- (1) it is against the plain language of Section 10(1)(b) of the said Ordinance;
- (2) it is unworkable in cases where the acquisition date or cost of any particular asset is not known to the prosecution, thus rendering a valuation as at that date impossible;
- (3) it is unfair to the accused if, as in the present case, there has been a substantial depreciation in value of the relevant assets between the dates of their acquisition and the charge date; and it is common ground that as from 9th March 1973, the Hang Seng Index (the official index kept by the Hong Kong Stock Exchange) had collapsed from a record high of 1774 to a mere 503 on 3rd December 1973 (being the charge date,) representing a drop of over 70%;
- (4) even if the acquisition of any particular asset was made close to the charge date, the acquisition cost thereof is not and cannot be evidence of the value of the relevant asset on the charge date because:
 - (a) it is common ground that a sharp fall in the stock market had occurred between the date of the acquisition and the charge date;
 - (b) the onus is on the prosecution to prove its case beyond a reasonable doubt (Sturgeon v. The Queen (1975) H.K.L.R. 677 at p. 683); and
 - (c) the prosecution which has the widest latitude in choosing a charge date could have chosen but did not choose a date which was before the date of the sharp fall;

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- (5) where the relevant assets were acquired on different dates as in this case, the financial position of the accused at the date of the acquisition of each asset is not known to the Court because the prosecution did not adduce any evidence of the Respondent's total emoluments at each of such dates;
- (6) it involves a number of calculations and renders the charge bad for duplicity;
- 10 (7) it does not fit into the general framework of Section 10 of the said Ordinance; and
- (8) in any event, that was not the approach adopted by the learned trial judge.

16. The Respondent respectfully submits that it is not open to the Appellant to argue that as there was no direct evidence as to the value of the relevant assets at the charge date, the trial judge was correct in accepting the acquisition costs of such assets as evidence to show disproportion for the following reasons:-

- 20 (a) The prosecution had in its possession, both before and during the trial, evidence of the actual value of the shares alleged to be in the control of the Respondent itemized in paragraph 4(iii) to (ix) above, such evidence being price lists containing the prices of all the shares transacted in Hong Kong on the charge date, including all the shares in question.
- 30 (b) Such evidence was not produced to the court although counsel for the Respondent had previously indicated to counsel for the Appellant that if such documents were sought to be adduced in evidence, they would be agreed by the Respondent.
- (c) The prosecution did not give any explanation as to why such evidence was withheld from the court but chose instead to call evidence of the acquisition costs of the relevant assets, in spite of the clear language of the Full Court in Sturgeon v. The Queen (1975) H.K.L.R. 677 at page 685 and of the Court of Appeal in Mok Chuen v. The Queen (1977) H.K.L.R. 605 at page 607.
- 40 (d) The prosecution wanted to have the best of both worlds by picking a charge date on which it was alleged that the Respondent had the most assets in his control while refusing to quantify those assets as at the charge date, and deliberately falling back on the earlier and higher "value" of the acquisition costs thereof, and was thus able to establish a disproportion between the official emoluments and the relevant assets, when in fact there was no disproportion at all at the charge date, or alternatively, there was a much smaller

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disproportion than found by the learned trial judge.

17. The Respondent further respectfully submits that the acquisition cost of each relevant asset is only material after disproportion has been proved by the prosecution. It is then up to the accused to give a satisfactory explanation. It is respectfully submitted that he can only do so by showing that he had a source of income untainted by corruption which had enabled him to acquire each relevant asset, and in such event, his explanation must deal with the acquisition cost of each asset 10 as only that would be relevant.

p.44, 11.24 -
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18. The submission of the Appellant contained in the second sub-paragraph of paragraph 3 of his Petition for Special Leave to Appeal to Her Majesty in Council is a completely new one in that it was never raised at the trial or even before the Court of Appeal, and is unsustainable for the following reasons:-

- (1) It is common knowledge in Hong Kong that the stock market in Hong Kong plummeted as from March 1973 right through the charge date as set out in paragraph 15(3) above; and it is both misleading and wrong to suggest that the value of the shares in question had remained the same from the respective purchase dates thereof to the charge date. That is why this argument was not raised in the Hong Kong Courts. Indeed, the presumption of continuity has never been successfully raised in any action in Hong Kong, whether civil or criminal, in relation to the value of shares of publicly quoted companies in Hong Kong. 20
- (2) In any event, this submission cannot assist the Appellant 30 because even at the conclusion of the trial, the value of the relevant assets was still not proved beyond reasonable doubt.

19. The Respondent respectfully submits that his contention, which was accepted by the Court of Appeal, is correct because

- (1) it is workable in every case;
- (2) it accords with logic and common sense;
- (3) it is fair on all parties because
 - (a) in a case where the relevant assets have appreciated in value between the acquisition dates and the charge date, no injustice will result to the accused in that: 40
 - (i) as was pointed out by Pickering J.A., such appreciation in value can easily be explained; and
 - (ii) Section 31(1) of the said Ordinance affords a complete safeguard in that the Attorney General should not give his consent to the prosecution in such a situation;

p.42, 11.6 - 10

(b) in a case where the relevant assets have depreciated in value after the acquisition dates, no injustice will result to the prosecution because, in the view of the Court of Appeal, it can pick some other date as the charge date; and

10 (4) it is the proper construction of Section 10(1)(b) of the said Ordinance in that if a Crown Servant's assets have ceased to be disproportionate to his official emoluments on the charge date either because of a diminution of his assets or because of an increase to his official emoluments, he cannot on any view be guilty of an offence under Section 10(1)(b) of the said Ordinance, although he may be guilty of an offence on some earlier date;

20 (5) in the great majority of prosecutions under Section 10(1)(b), both before and after the decision of the Court of Appeal herein, the prosecution has in fact adduced evidence of the value of the assets at the charge date, and such evidence has never been challenged by the defence.

20. The Respondent therefore respectfully submits that this appeal should be dismissed with costs for the following amongst other

REASONS

30 1. BECAUSE, as the Court of Appeal has rightly held, disproportion required to be established by Section 10(1)(b) of the said Ordinance can only be shown by a comparison of the total value of the relevant assets as at the charge date with the total emoluments up the the charge date;

2. BECAUSE the relevant part of the judgment of the learned trial judge was founded upon an erroneous interpretation of the dictum of the Full Court in Sturgeon v. The Queen (1975) H.K.L.R. 677 at p. 686;

3. BECAUSE the approach urged by the prosecution can and does operate unfairly on the Respondent;

40 4. BECAUSE even if the acquisition costs could be relied upon by the prosecution as prima facie evidence of the value of the relevant assets as at the charge date, it still does not help the Appellant as at the conclusion of the trial the requisite disproportion was still not established beyond any reasonable doubt; and

5. BECAUSE the judgment of the learned trial judge was wrong and the judgment of the Court of Appeal was right.

MARTIN LEE

DOREEN LE PICHON

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FROM THE COURT OF APPEAL OF THE CROWN COLONY
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CASE FOR THE RESPONDENT

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