Privy Council Appeal No. 13 of 1980

The Attorney General – – – – – – – – *Appellant*

v.

Ho Pui-yiu – – – – – – – – – *Respondent*

FROM

COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF OF THE PRIVY COUNCIL, DELIVERED THE 12TH JANUARY 1981

Present at the Hearing:

LORD WILBERFORCE
LORD ELWYN-JONES
LORD KEITH OF KINKEL
LORD ROSKILL
LORD BRIDGE OF HARWICH

[*Delivered by* LORD KEITH OF KINKEL]

This is an appeal by the Attorney General, with special leave, from a judgment of the Court of Appeal of Hong Kong, whereby that Court allowed the respondent's appeal against his conviction in the Victoria District Court of an offence under section 10(1)(*b*) of the Prevention of Bribery Ordinance, Chapter 201 of the Laws of Hong Kong.

Section 10(1) enacts:—

> " Any person who, being or having been a Crown servant—
>
> (*a*) maintains a standard of living above that which is commensurate with his present or past official emoluments; or
>
> (*b*) is in control of pecuniary resources or property disproportionate to his present or past official emoluments,
>
> shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence."

The respondent was for many years in the revenue service of the Hong Kong government, latterly as acting Assistant Superintendent of the Customs and Excise Service. On 29th September 1977 he was charged as follows:

" *Statement of Offence*

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 3rd December 1973 in control of pecuniary resources totalling $15,516·09 and property namely:

[There followed a list of assets comprising a flat in Kowloon, a Volkswagen motor car, and a number of blocks of shares]

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

The respondent was tried before Garcia D.J. in the Victoria District Court. The Crown led evidence about his official emoluments throughout his period of government service up to 3rd December 1973, and also about the sums at credit of various bank accounts in his own name or that of his wife as at that date. As regards the items of property specified in the charge, the Crown led evidence indicating that these were owned by the respondent or his wife at 3rd December 1973, but no evidence as to their value on that date. Evidence was led, however, about the dates of acquisition of the various items, and of payment therefor (all these dates being between mid-1972 and December 1973), and also as to the amount of the consideration paid in each case. At the close of the Crown case, it was submitted for the respondent that he had no case to answer, upon the ground *inter alia* that, since there was no evidence about the value of the items of property specified in the charge as at the charge date, there was no basis upon which a disproportion with the respondent's official emoluments could properly be held to exist. The trial judge rejected this submission. After hearing evidence led for the respondent, he examined the evidence as a whole, and concluded that the respondent was in control on the charge date of property amounting to $124,650 of which no satisfactory explanation had been given. He went on to find that the total amount of unexplained property under the respondent's control on the charge date was disproportionate to his net official emoluments up to that date. He therefore, on 28th April 1978, convicted the respondent and sentenced him to 15 months imprisonment and a fine of $75,000.

The respondent appealed to the Court of Appeal on a number of grounds including the following:

" That the learned District 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 date 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."

On 22nd January 1979 the Court of Appeal (Briggs C.J., Huggins and Pickering JJ.A.) accepting that ground as valid and finding it unnecessary to deal with the other grounds, quashed the conviction and set aside the sentence. Pickering J.A., delivering the judgment of the Court, said:

" 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 with total emoluments as at the charge date was impossible. On this ground alone the appeal must be allowed."

The appellant argues that the Court of Appeal have fallen into error in that they appear to have laid down a rule of law, unwarranted by the terms of the statute, that in proceedings under section 10(1)(*b*) the prosecution can in no circumstances establish a disproportion in the statutory sense if they do not lead evidence as to the values at the date of the charge of the items of property specified therein as being under the control of the accused. The Court of Appeal have also erred, so it is maintained, in holding the acquisition costs of the various items of property to be irrelevant for the purpose of establishing the requisite disproportion.

In the normal case the nature of the evidence requisite to prove a particular statutory offence is entirely at large. While it is possible that the statute creating an offence might impose some limitation on the nature of the evidence admissible to prove it, that would require to be done by express words or necessary implication. Section 10(1)(*b*) of the Ordinance does not expressly impose any such limitation as is contended for by the respondent. The question is whether it does so by necessary implication.

It is to be observed at the outset that section 10(1)(*b*) does not refer directly, as it might have done, to the value of any property of which the accused may be in control. It is an essential ingredient of the offence thereby created that the accused should, at a particular date, be in control of certain pecuniary resources or property, or both. The amount of the pecuniary resources as at the date in question can obviously be expressed only in terms of money. But the description of other items of property does not require any resort to money terms. All that is needed initially is to look and see what particular items of property are under the control of the accused at the date specified in the charge. Having proved the amount of pecuniary resources and the other assets in the accused's control at that date, the prosecution must go on to prove his total official emoluments up to the same date, and finally it must establish a disproportion between the two. The words " disproportionate to " convey the idea that the acquisition of the total assets under the accused's control at the relevant date could not reasonably, in all the circumstances, have been afforded out of the total official emoluments up to that date. To put it another way, the question is whether such official emoluments were or were not sufficient to finance the acquisitions which resulted in the particular assets being under the accused's control on the relevant date. An answer to that question necessarily involves that the cost of each acquisition should be examined. A mere comparison as at the charge date of the then monetary value of the assets with the monetary total up to that date of the official emoluments could not in itself, in a great many cases, enable a satisfactory answer to be given, because the value of certain types of asset can fluctuate widely from time to time.

The view that evidence of the acquisition cost of particular assets may be relevant to establish disproportion derives support from a consideration of certain other provisions of the statute. In the first place, the provision in the latter part of section 10(1) regarding satisfactory explanation by the accused of how the pecuniary resources or property came under his control plainly contemplates that the circumstances of acquisition should be gone into. That necessarily involves, in the case of acquisitions for value, that the amount of the consideration paid should be put in evidence. If the amount of the consideration is to be relevant for the purpose of showing that any disproportion between assets and emoluments is reasonable, it could hardly be irrelevant for the purpose of proving the existence of an unreasonable disproportion. Then section 14 of the Ordinance, relating to the power of the Commissioner to obtain information where an offence under *inter alia* section 10(1)(*b*) is alleged or suspected, enables him, by subsection (1)(*a*)(i), to require any person to

specify the date upon which he acquired any particular property and, in the event of acquisition by purchase, the consideration paid therefor. This plainly indicates a statutory contemplation that evidence of such consideration may be relevant in proceedings under section 10(1)(*b*).

In the result, their Lordships are of opinion that the terms of section 10(1)(*b*) afford no warrant for the view that any artificial restriction has been imposed as to the nature of the evidence which is admissible and relevant for the purpose of providing an offence thereunder. In particular, there is no rule of law to the effect that evidence of the market value as at the charge date of the assets then under control of the accused must in all cases be led, nor rendering irrelevant evidence as to the acquisition cost of such assets or, where appropriate, as to their value at the date of acquisition. Evidence of the latter could obviously be important where property may have been acquired at an under-value under circumstances of corruption.

Their Lordships were referred to two cases as bearing on the point at issue, one in the Full Court and one in the Court of Appeal of Hong Kong. These are *Sturgeon v. The Queen* (1975) H.K.L.R. 677, and *Mok Chuen v. The Queen* (1977) H.K.L.R. 605. Their Lordships have no reason to suppose that either of these cases may have been wrongly decided, and neither of them touches so closely on the point at issue here as to call for any comment or criticism. Their Lordships were also referred to *The Queen v. Chung Cheong*, an unreported decision of Hooper D.J. given in the Victoria District Court on 22nd December 1977. The transcript of the judgment with which their Lordships were provided contains certain observations which are at variance with the view taken by them, and which must be regarded as erroneous.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed. The case will be remitted to the Court of Appeal to deal with the grounds of appeal which they left undecided. Since the appeal raised a point of principle of considerable importance to the criminal authorities in Hong Kong, there will be no order for costs.

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In the Privy Council

THE ATTORNEY GENERAL

v.

HO PUI-YIU

DELIVERED BY

LORD KEITH OF KINKEL

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