

37/81

ON APPEAL
FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

TSANG PING-NAM Appellant

-and-

THE QUEEN Respondent

CASE FOR THE APPELLANT

Record.

1. This is an appeal in forma pauperis, pursuant to grant of Special Leave dated 28th day of July 1980 to the Appellant, from a judgment of the Court of Appeal of Hong Kong (Sir Denys Roberts C.J., McMullin J.A. and Leonard J.) dated the 2nd day of October 1979 dismissing the Appellant's appeal against conviction of three counts of attempting to pervert the course of justice.

206
190-202

2. The first offence with which the Appellant was charged is as follows :

52

STATEMENT OF OFFENCE

Attempt to Pervert the Course of Public Justice, contrary to Common law.

PARTICULARS OF OFFENCE

TSANG Ping-Nam, on a date unknown between 31st January 1977 and 21st June 1978 in this

Colony, attempted to pervert the course of public justice relating to the prosecution of So Siu-Keun, Police Sergeant 6691, of the Royal Hong Kong Police Force, for the offences relating to the involvement of the said So Siu-Kuen in a corruption conspiracy in the Mongkok Division of the Royal Hong Kong Police Force.

The particulars of the other two offences were identical save that they related to the prosecution of Chief Inspector Wong Kam-Tai and Wing Yu-Keung, Police Sergeant 4324.

52

3. The Question raised by this appeal is whether a defendant should be convicted of an attempt to pervert the course of justice where the prosecution only proves :

a) that he has made a witness statement to a law enforcement officer materially implicating named persons in an offence and

b) that at the trial of those named persons he denies that they are involved in the offence, without giving a satisfactory explanation of the conflict.

4. The principal grounds of this appeal are:

i) The making of materially irreconcilable statements as above does not constitute the offence of attempting to pervert the course of justice (the offence being the making of a false statement with intent to pervert the course of justice).

ii) Proof by contradiction does not identify

which of the two statements is false and thus is not sufficient proof of an attempt to pervert the course of justice.

iii) It is contrary to the requirement to give a defendant a fair trial, to punish a witness for retracting a witness statement, which may be false, and which he has previously given to a law enforcement officer.

5. The trial of the Appellant took place between the 23rd April 1979 and the 9th May 1979 before Bewley DJ.

1 - 184

6. The case for the Crown was as follows:

i) The Appellant was arrested on 1st February 1977 by officers of the Independent Commission Against Corruption (ICAC) in connection with his alleged involvement in corruption within the Mongkok Division of the Royal Hong Kong Police Force. (The Appellant was at the time a Police Sergeant in the Mongkok District).

1

ii) The Appellant made three statements under caution dated 1st February 1977, 2nd February 1977 and 4th February 1977 in which he admitted his own part in a corruption conspiracy in the Royal Hong Kong Police Division in the Mongkok District. In these statements he materially implicated, among others, the above named Sergeant So Siu-kuen, Inspector Wong-Kam-tai and Sergeant Wong Yu-kueng.

147-150
150-152
153-156

- iii) The corruption conspiracy amounted to an agreement that in return for bribes police officers would either not raid various sex-joints, gambling stalls tsz stalls and opium stalls or would conduct carefully arranged mock raids on such stalls arresting only minor participants or "actors" employed to look like participants.
- iv) On 23rd February 1977 the Appellant agreed to make a full witness statement to be compiled from his above mentioned statements under caution, on condition that, provided he told the whole truth in the witness statement, it would not be used in any prosecution of himself for any corruption offences.
- v) On 15th April 1977 he duly signed such a witness statement containing 24 numbered paragraphs. 156-166
- vi) On 20th June 1977 he added five further paragraphs to this witness statement clarifying various points in it.
- vii) The Appellant made two further statements clarifying the above statement dated 10th October 1977 and 9th May 1978. 170-172
172-173
- viii) On 16th June 1978 the Appellant was handed a letter dated 14th April 1978 written on behalf of the Attorney General conferring 173

upon him immunity from prosecution for his part in the aforesaid corruption conspiracy on condition that he gave "full and true evidence in the trial of R. v. Edwards and others" hereinafter referred to as "The Mongkok Trial".

- ix) The Mongkok trial began on 17th April 1978 and the Appellant gave evidence on 19th and 20th June 1978. 80-142
- x) The Appellant admitted his own part in the Conspiracy and implicated various persons who were not Defendants at the trial. He failed to implicate any of the Defendants at the Mongkok Trial in particular he failed to implicate the said Sergeant So Sui-kuen, Inspector Wong Kam-tai and Sergeant Wong Yu-keung.
- xi) The Crown was granted leave to treat the Appellant as a hostile witness and in cross-examination by the Crown, the Appellant stated 104-109
- a) that when he signed the statements dated 15th April and 20th June he knew they contained allegations inter alia that the three above named Defendants were involved in the aforesaid corruption conspiracy; 156-166
- b) That these allegations were false;
- c) That some of the false allegations were invented by the Appellant and that some

were invented by Officers of ICAC;

d) That he signed the aforesaid statements as true because if "he didn't co-operate he would be in much trouble". He would not get the aforesaid letter of immunity. He would be included in the list of Defendants. There would be charges brought against him in respect of various financial assets.

7. At his trial the Appellant gave evidence in line with what he had said in cross examination by the Crown in the Mongkok Trial, namely that the aforesaid witness statement was false, that it was made under duress and that what he said in evidence at the Mongkok Trial was true.

8. On 9th May 1978 Bwley D.J. delivered his judgment in which he rejected the Appellant's evidence that the statements to ICAC were involuntary and found that the information contained in them came from the Appellant alone.

52-57

9. The Learned Judge made no finding concerning the truth or falsity of any of the statements made by the Appellant either to ICAC or in evidence at the Mongkok Trial.

10. The Learned Judge made no finding about the Appellant's state of mind surrounding the witness statements to ICAC. (There was no evidence that when he made the said statement he intended not to repeat it on oath in any subsequent Trial nor that having made the statement he subsequently

decided not to repeat it at any subsequent trial).

11. The Learned Judge found that it was impossible to conclude just how the offence was committed but accepted the Crown's submission that because there was no explanation consistent with innocence the three offences had been proved.

12. The Appellant having been convicted of the three above offences was sentenced to two years imprisonment concurrent on each count.

13. The Appellant appealed to the Court of Appeal of Hong Kong on various grounds, his Appeal was dismissed in a judgment delivered by Sir Denys Roberts C.J. on 2nd October 1979.

14. The Court of Appeal held that the offence of attempting to pervert the course of justice is made out if the Crown establishes

201-202

- a) that a statement was given by a person to a law enforcement officer in relation to criminal activities (other than a statement which implicates himself);
- b) that he subsequently gives evidence which is irreconcilable in one or more material particulars with the statement;

c) he gives no satisfactory explanations of the conflict (e.g. that the statement was not voluntary) notwithstanding that the Crown is unable to prove whether either or both is untrue.

15. The Appellant respectfully submits that the Court of Appeal erred in the above ruling and that the Appellant thereby suffered injustice.

16. On 28th July 1980 the Judicial Committee of the Privy Council granted the Appellant special leave to appeal in forma pauperis against the judgment of Court of Appeal of Hong Kong.

206

17. The Appellant respectfully submits that the judgment is wrong in substance and ought to be reversed and that this Appeal ought to be allowed for the following (among other)

REASONS

(1) The offence does not consist of making materially contradictory statements but consists in making the false statement with the necessary intent.

- (2) Proof by contradiction fails to identify which statement is false.
- (3) It is impossible to identify the particulars of offence with which the Defendant is charged, and even upon conviction the Court was unable to specify what the Defendant had done which amounted to a criminal offence.
- (4) If both the witness statement and the Appellant's evidence at the Mongkok Trial were false, each count was bad in that each amounts to a "rolled up plea" disclosing two offences.
- (5) If the witness statement only was false, that amounted to the offence of giving false information to ICAC, contrary to Section 13 of the Independent Commission Against Corruption Ordinance (Cap.204).
- (6) If the Appellant's evidence at the Mongkok trial was false, to charge the Appellant with the offence of attempting to pervert the course of justice by-passes the statutory protection afforded to a defendant of the requirement of corroboration needed to establish a charge of perjury.

- (7) In the absence of proof that the witness statement was true it is contrary to public policy to convict the Appellant of attempting to pervert the course of justice in that the existence of this offence is
- a) strong persuasion to a witness who had lied to a law enforcement officer to commit perjury at the subsequent trial.
 - b) is in conflict with the letter of immunity if the Appellant lied in his witness statement.
 - c) has a tendency to replace trial by jury upon evidence on oath by trial by statement given to the Police.
 - d) is a barrier to a fair trial in that it may apply pressure to a witness to lie on oath.

John Hazan
Derek Zeitlin

No. 37 of 1980

IN THE PRIVY COUNCIL

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CASE FOR THE APPELLANT

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