Privy Council Appeal No. 37 of 1980

Tsang Ping-nam – – – – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 8TH JULY 1981, DELIVERED THE 6TH OCTOBER 1981

Present at the Hearing:

LORD DIPLOCK

LORD EDMUND-DAVIES

LORD ROSKILL

SIR JOHN MEGAW

SIR OWEN WOODHOUSE

[*Delivered by* LORD ROSKILL]

The appellant appeals by special leave from a judgment of the Court of Appeal of Hong Kong (Sir Denys Roberts C.J., McMullin J.A. and Leonard J.) dated 2nd October 1979. By that judgment the appellant's appeal against his conviction on three counts of attempting to pervert the course of justice was dismissed. That conviction had taken place before Bewley D.J. on 9th May 1979. At the conclusion of the arguments before their Lordships' Board, their Lordships stated that they would humbly advise Her Majesty that the appeal should be allowed and the convictions quashed for reasons to be given later. Their Lordships now give those reasons.

Prior to the appellant's arrest on 1st February 1977 in connection with his alleged involvement in grave corruption in the Mongkok Division of the Royal Hong Kong Police Force, he had served as a Police Sergeant in that division. Following his arrest the appellant made three statements under caution to the investigating authorities respectively dated 1st, 2nd and 4th February 1977. He then admitted his part in a corruption conspiracy of a grave character in that division. He also implicated, among many others, three police officers, one an Inspector and the other two Sergeants in that division. On 23rd February 1977 the appellant agreed to make a further witness statement based on those three statements, on condition that, provided he told the truth in that proposed statement, its contents would not be used in any prosecution of himself for any corrupt activities. On 15th April 1977 he made that statement to which he subsequently made certain additions. It is not necessary for their

Lordships to detail the subsequent course of events which led to those three police officers, to whom reference has already been made, and a large number of others being charged on 25th October 1977. They will be found in the long and careful judgment of Bewley D.J.

The Mongkok conspiracy trial, as it became widely known, started in Hong Kong on 17th April 1978. Three days previously a letter addressed to the appellant dated 14th April 1978 was signed on behalf of the Attorney General. It informed the appellant that, on condition that he gave "full and true evidence" in the Mongkok conspiracy trial, "no prosecution will be instituted against you in respect to any offence involving corruption disclosed by you in the course of your testimony in the said proceedings". That letter however was not then given to the appellant. It was only handed to him on 16th June 1978, shortly before he was due to give evidence. He gave evidence in the Mongkok conspiracy trial on 19th and 20th June 1978. He then wholly resiled from all the allegations regarding those three officers. He denied that any of them were true. He also alleged that he had always known the allegations to be untrue but had signed the statements in order to ensure immunity for himself from prosecution and from fear that, were he not to do so, he would be charged with various criminal offences. The learned judge in the Mongkok conspiracy trial gave leave to treat the appellant as a hostile witness and he was cross-examined upon his witness statement. But the appellant throughout that cross-examination maintained his denials. Suffice it to say that those three officers and many others of their co-accused were subsequently acquitted.

Thereafter the appellant was charged with the offences for which he was later convicted and from which the present appeal arises. There were three charges, one in respect of each of the three officers, otherwise the charges were identical. It is therefore sufficient for their Lordships to refer only to one of the charges.

It read as follows:—

"*Statement of Offence*

Attempt to pervert the course of public justice contrary to Common Law.

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-kuen, 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."

It will be observed that no particulars of this count were ever asked for. Their Lordships find this strange, as did Mr. Ognall Q.C. who appeared for the appellant before this Board. Had particulars been sought and ordered, the Crown's dilemma must at once have emerged. The Crown conceded that perjury could not be proved against the appellant for there was no affirmative evidence that the appellant had lied in court let alone any corroboration of any such affirmative evidence. The Crown also conceded that it could not be affirmatively proved that the appellant had given false information to the investigating officers to whom the several statements had been given. But the Crown averred that it was clear that either the appellant had committed perjury or had given false information to the investigating officers and that, whichever was the case, he was guilty of an attempt to pervert the course of public justice by his conduct.

It was this submission which the learned trial judge and the Court of Appeal both accepted though the learned Chief Justice at the conclusion

of the judgment of the Court of Appeal said that its conclusion had not been reached " without some degree of intellectual discomfort". Their Lordships do not find the existence of this discomfort surprising. Had particulars been asked for, the Crown must have given alternative and mutually inconsistent particulars which could not have been allowed to stand as particulars under the same count. If that pleading difficulty had been surmounted by adding in the case of each of the three officers an additional count, their Lordships are of the clear opinion that, at the close of the case for the prosecution, a submission of no case to answer on both of each pair of counts must have succeeded on the ground that the Crown had wholly failed to prove the relevant facts averred in either count.

Mr. Ognall accepted that the relevant law regarding the offence of attempting to pervert the course of justice was correctly stated by the Court of Appeal (Criminal Division) in *R. v. Rowell* (1977) 65 Cr. App. R. 174. Their Lordships therefore have not found it necessary to consider that decision. But Mr. Ognall urged that an accused person could not be convicted on the basis that one or other of two mutually inconsistent allegations must be true. The Crown must prove any allegation made. Moreover, once the concession was made that perjury could not be proved, as it was, the Crown could not be allowed to circumvent the crucial safeguard to an accused charged with perjury that he must not be convicted solely upon the evidence of one witness as to the falsity of any statement alleged to be false, by charging not perjury but an attempt to pervert the course of justice. Section 43 of the Crimes Ordinance of Hong Kong (Cap. 200) contains the same safeguards in this respect as are provided in section 13 of the Perjury Act 1911.

The prosecuting authorities in Hong Kong have weapons available which are not available to prosecuting authorities in the United Kingdom in the case of alleged corrupt activities by public servants. Thus section 13B of the Independent Commission against Corruption Ordinance of Hong Kong (Cap. 204) provides:

> " Any person who knowingly—
>
> (*a*) makes or causes to be made to an officer a false report of the commission of any offence, or
>
> (*b*) misleads an officer by giving false information or by making false statements or accusations,
>
> shall be guilty of an offence and shall be liable on conviction to a fine of $10,000 and to imprisonment for one year."

Section 39 of the Crimes Ordinance of Hong Kong provides that:

> " Where two or more contradictory statements of fact or alleged fact, material to the issue or matter in question, have been wilfully made on oath by one and the same witness in any judicial proceeding or proceedings, whether before the same court or tribunal or person or not, and whether the respective truth or falsehood of the said statements can be ascertained or not, an indictment may be preferred against him charging him with having wilfully made the said contradictory statements, and on conviction thereof, either in whole or in part, such witness shall be liable to imprisonment for seven years and to a fine."

In the instant case however the requisite affirmative proof was lacking to support a charge under section 13B while, as respects section 39, the crucial statements had not been made on oath. In their Lordships' view, however distasteful it may be to allow a self-confessed corrupt police officer to escape conviction for his gravely corrupt activities, it was wholly illegitimate for the Crown to seek to overcome their difficulties of proof

by charging attempts to pervert the course of justice upon this alternative basis and their Lordships with respect are therefore unable to accept the reasoning which led the learned trial judge to convict the appellant and the Court of Appeal to dismiss his appeal against those convictions.

With commendable frankness, Mr. Scrivener Q.C. for the Crown, accepted that the reasoning of the lower courts could not be supported and their Lordships do not therefore find it necessary to consider the judgments of those courts further.

But Mr. Scrivener sought to uphold the convictions upon a wholly different basis which he claimed had been submitted to the courts below but, as he also claimed, had not been dealt with at all by the learned trial judge and barely touched upon by the Court of Appeal. It was urged that the convictions could be supported on the ground that the gravamen of the offence was the obtaining by the appellant of the immunity for himself by fraud, fraud conceived at the time that the statements were first made and persisted in at least until the immunity was granted. Reliance was placed upon a number of answers given by the appellant in cross-examination at his trial—see pages 38 and 39 of the Record, in support of this allegation. Their Lordships were given a transcript of part of Crown Counsel's opening of the case against the appellant before the learned trial judge. They have read that transcript with care but they are unable to deduce from that which they have read that the case against the appellant was sought to be advanced in this wholly different way from that dealt with in the judgments of the courts below. This is no doubt why the learned trial judge made no reference to the submission in his judgment. In a passage relied upon by Mr. Scrivener entitled " Change of Mind " in the judgment of the Court of Appeal (Record, page 194) the learned Chief Justice does not even refer to the grant of immunity. Moreover their Lordships can find no reference to this submission at any place in the respondent's printed case. Their Lordships would observe that this submission involves an alleged attempted perversion of the course of justice as respects the appellant himself. The counts which the appellant faced alleged attempted perversion of the course of justice relating to the prosecution of the three officers. In these circumstances their Lordships are clearly of the view that to allow the Crown at this late stage to seek to support these convictions upon this ground would be against all principle and their Lordships decline to do so. Had the case against the appellant been advanced on this basis at the trial, the trial might well have taken a wholly different course from that which it in fact took. Their Lordships wish to make clear that they express no view whatever whether, had a charge been initially formulated on the basis now suggested by Mr. Scrivener, it might have succeeded.

It was for these reasons that their Lordships have humbly advised Her Majesty that the appeal should be allowed and the appellant's three convictions quashed.

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In the Privy Council

TSANG PING-NAM

v.

THE QUEEN

DELIVERED BY
LORD ROSKILL

Printed by HER MAJESTY'S STATIONERY OFFICE
1981