FACC 15/2016

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO.15 OF 2016 (CRIMINAL)
(ON APPEAL FROM THE COURT OF APPEAL
CACC No. 444 of 2014)

BETWEEN

CHAN KUI YUEN, THOMAS	Appellant (D4)
and	
HKSAR	Respondent

THE SUPPLEMENTAL CASE FOR THE APPELLANT (D4)

Introduction

1. The Respondent has seriously misstated the Appellant's position and argument. At paragraph 17 of the Respondent's Printed Case ["R's Case"] it is stated that,

"The Appellants are contending therefore that the Court should decide that the criminal law does not prohibit the bribing of Hong

Kong public officials to secure their general goodwill, provided that the bribe is paid before the official assumes office".

2. The Appellant makes no such argument, which argument would be facile. If the payments in this case amounted to bribes they would contravene the provisions of the POBO and be justiciable. It is common ground that the payments in this case did not contravene the provisions of the POBO.

3. At paragraph 12 of R's Case it is asserted that it is the Appellant's case that conspiracy to commit Misconduct in Public Office ["MIPO"] can only be committed where a person agrees to perform a *"specific"* act in breach of duty.

4. Let it be clear, the Appellant D4 has never made that assertion and has always accepted that the prosecution do not have to allege or prove a specific intended act of misconduct.

5. This appeal, contrary to the Respondent's protestations, relates to the important issue of what exactly a public servant must intend to do having received what would otherwise be a <u>wholly lawful</u> payment prior to taking up office so as to be guilty of a conspiracy to commit MIPO. It is stressed the payment is lawful unless and until it is connected to an intention or an agreement that MIPO will be committed.

6. The Appellant submits that the prosecution in this case created a hybrid offence unknown to law somewhere between the POBO and MIPO. The POBO requires no act of misconduct, only the receipt of a bribe. MIPO requires no bribe, only an act or omission of serious misconduct. The prosecution's hybrid offence requires neither bribe nor misconduct, only a mental state of favourable disposition.

7. The mere mental condition of being favourably disposed to someone is incapable as a matter of law of amounting to a crime. It is mens rea absent actus reus.

The fallacy at the heart of the Respondent's Case

8. The Respondent's Case depends on the assertion that the mental state of being favourably disposed to someone is converted into an act of misconduct by the receipt of monies prior to the recipient becoming a public servant [§§ 41-42 of R's Case]. This is fallacious: the act of receiving the monies occurred prior to taking up public office and thus is incapable of amounting to an act of misconduct in public office. The mental state of being favourably disposed to someone remains throughout only that: a mental state.

9. The Respondent's Case depends on the assertion that having received the payment every act in public office is "*tainted*" or "*irreparably compromised"* so as <u>automatically</u> to be regarded as a breach of duty [§§ 42 and 61 of R's Case]. This is fallacious: MIPO

requires there to be serious misconduct. Conduct, which is perfectly proper, cannot be rendered misconduct by mens rea alone.

10. The prosecution took the exceptional step of defining conspiracy to commit MIPO as including an agreement to remain merely favourably disposed (as opposed to being an agreement to act should that become necessary); because they feared the jury's conclusion that D1 had not agreed to act if necessary, since an act in relation to the West Kowloon project had been necessary and not only had he not acted favourably to SHKP he had actually damaged their interests.

11. The extended definition of conspiracy to commit MIPO (beyond any reported case anywhere in the common law world) was thus driven by forensic necessity. The conviction of D4 occurred therefore on an extended basis unknown to law.

12. Conspiracy to commit MIPO is an inchoate offence committed upon the entering into of the conspiratorial agreement. The question therefore is what do the conspirators have to have agreed to do before they are guilty of the offence?

13. The Respondent maintains that all that has to be agreed upon is that the forthcoming public servant in return for a pre-office payment will be favourably disposed to those who paid him. The Appellant maintains that this is insufficient, as it does not involve an

agreement to commit a serious act of misconduct upon taking up office.

14. The Appellant maintains that the minimum that is required is that the conspirators agree that in return for the pre-office payment the public servant will perform an act or omission of serious misconduct should such misconduct be necessary, possible or otherwise appropriate.

15. The Appellant maintains that all of the authorities on the topic are consistent with and supportive of the Appellant's case and that there is not a single decision supportive of the Respondent's Case.

16. All the authorities, including R v Clarke and R v Boston, relied on in R's Case concerned **incumbent** public officers, and the misconduct in question was actual in every case. The misconduct was the incumbent public officers' receipt of advantages **whilst in office**. They were classic cases of MIPO. In fact they are also cases where there would have been contravention of s.4 of the POBO should the conduct have occurred in Hong Kong. Favourable disposition was not the identified misconduct in either case.

17. The Respondent's reliance on Chung Fat Ming actually begs the question rather than answers it. Chung Fat Ming is an authority purely in relation to the statutory interpretation of s.4 of the POBO and does not involve any common law principles. It does not

relate to the offence of MIPO. If s.4 of the POBO applied to the payment in this case there would be no need to refer to Chung Fat Ming at all. It is not understood on what basis an authority in relation to the meaning of s.4 of the POBO is capable of defining the common law offence of MIPO.

18. The Respondent makes the surprising submission that the Appellant is conceding that mere favourable disposition in relation to the performance of the public servant's normal duties would be sufficient to amount to MIPO [§§ 58 – 63 R's Case]. In a bribery case the offence is committed when the advantage is received on account of the performance of the usual duties of the public servant. This is because it is a crime to receive an advantage for doing that which the public servant is required to do anyway and for which he has ordinarily already been paid.

19. The Appellant's point in paragraphs 58 – 63 is that McMullin J. was making it clear that the "act" that the postman must have performed for him to be guilty were the acts of collecting and delivering letters; as opposed to Leonard J.'s suggestion that the "act" he must have performed was the mere act of being favourably disposed.

20. It follows that no concession is made at all. Mere favourable disposition is not an act; it is a state of mind. In so far as Leonard J. intended to say that mere favourable disposition is an 'act', which

it is submitted he did not intend to say; such act would be incapable of amounting to serious misconduct for the purposes of MIPO. In any event Leonard J.'s solitary sentence is incapable as a matter of law of defining the offence of MIPO.

21. The Respondent's suggestion that every act of the public officer is "*tainted*" or "*irreparably compromised"* by holding a favourable disposition giving rise to an automatic breach of duty, flies in the face of the authorities [R v Llewellyn-Jones, Shum Kwok Sher, AG's Reference (No. 3 of 2003), Sin Kam Wah and Chan Tak Ming[1]]. It has been repeatedly said in those authorities that one must not confuse ***motive*** and ***intent*** with ***misconduct***.[2] Mere improper intent without substantively improper abuse of power or duty does not amount to MIPO. The statements of Widgery J. (as he then was) in Llewellyn-Jones and Sir Anthony Mason NPJ in Shum Kwok Sher leave no room for the Respondent's arbitrary theory of the "*tainting*" of every act, which theory is unprincipled, illogical and unknown to law.[3]

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[1] See paragraphs 38 to 42 of A3's Printed Case.

[2] Which is consistent with the well-established principle that the mere intent to commit a crime *per se* does not constitute the inchoate offence of attempt. Cf. Haughton v Smith (Roger) [1975] AC 476, at pp. 491-2, and HM Advocate v Dick 1901 3F (Ct of Sessions) 59, at p.64. Therefore, a favourable disposition, which is bound to be a lesser mental status than an actual intent, *a fortiori* cannot be regarded as MIPO.

[3] In addition to "*tainting",* the Respondent's submissions also contain numerous "poetic" terminologies, e.g. "*betrayal*", *"sale of…loyalty* (see § 35) and "*sold his impartiality*", which lacks the rigour required for the present appeal and does not assist the Respondent's argument whatsoever.

Policy

22. The Respondent's submissions under the guise of an "interpretation" of Chung Fat Ming in fact amount to the creation of a new offence. The suggestion that this is required in order to catch those who accept general sweeteners before assuming public office, even if that were right, which it is not; is incapable of justifying the creation of an offence by the courts.

23. Sir Anthony Mason NPJ made this clear in Shum Kwok Sher:

"*98. ...it was not for this Court to create a new offence as an answer to a perceived problem of imprecise definition of accessibility. That said, it is well established that, by employing accepted and traditional judicial techniques, a court is entitled, indeed bound, to clarify the existing law where clarification is needed so long as, in doing so, the court does not extend the boundaries of criminal liability. To do so would create retrospective criminal liability and offend the provision of art. 12(1) of the Bill."*

24. Firstly, no extension of the law is required. A person who accepts a large amount of money shortly before taking up office, in suspicious and hidden circumstances and who does not disclose it can be inferred to have done so in return for an agreement that he would act so as to commit MIPO should that become necessary. If

there is a legitimate reason for its receipt he would rightly be acquitted. There is simply no need for the Respondent's hybrid offence.

25. Secondly, there is no existing offence of being favourably disposed to someone whilst in public office having previously received an advantage from that person. The Respondent's position thus requires the creation of that offence. Even if the court had power to do it, which it does not, it should not do so. To allow favourable disposition, however induced, to become the conduct element of MIPO would create a thought crime with disturbing consequences.

26. The Appellant has consistently submitted that the true position in law is that the conspiracy must include an agreement that the public officer will commit serious misconduct in public office. Once that is established the offence is committed such that it does not matter in law that the public servant in fact did not commit any actual misconduct. He may not have been able to. It may not have been necessary. Such matters are evidential.

Conclusion

27. For all the reasons stated in the 3rd Appellant's Printed Case as well as herein above, it is respectfully submitted that the Court should allow the appeal and the 3rd Appellant's conviction on Count 5 should be quashed accordingly.

Dated 24 March 2017

Ian Winter Q.C.

Selwyn Yu S.C.

Isaac Chan