

IN THE PRIVY COUNCIL

No. 17 of 1978

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

LAI MAN YAU

Appellant

- and -

THE ATTORNEY GENERAL

Respondent

CASE FOR THE RESPONDENT

RECORD

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1. This is an appeal by leave of the Supreme Court of Hong Kong given on 22nd December 1977 from an Order of the Court of Appeal of Hong Kong (Briggs C.J., Huggins and Pickering J.J.) dated the 23rd day of November 1977, dismissing with costs the Appellant's appeal from an Order of Cons J. in the High Court of the Supreme Court of Hong Kong dated the 11th day of July 1977 whereby it was ordered that the declarations sought by the Appellant be refused.

P. 57

PP. 51 and 52

P. 33

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2. The declarations sought by the Appellant were :-

"(1) A declaration that upon a true construction of section 10(1)(b) of the Prevention of Bribery Ordinance, Cap. 201 of the Laws of Hong Kong, the Plaintiff not being or having been a Crown Servant at any material time is not liable to prosecution under the said section;

P. 8

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(2) A declaration that the Notice dated 1st February 1977 made by the Commissioner under section 14A of the Prevention of Bribery Ordinance Cap. 201 purportedly restraining the Plaintiff from disposing of property specified in the said Notice is null and void and of no legal effect;

PP. 8 and 17

RECORD

PP. 8 and 15

(3) A declaration that an order dated 5th January 1977 made by a Magistrate on the Application of the Commissioner under section 17A of the Prevention of Bribery Ordinance Cap. 201, is null void and of no legal effect."

3. It was conceded throughout by the Respondent that if the Plaintiff was entitled to the first declaration then he was also entitled to the consequential relief of the second and third declarations.

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4. The question for decision involves the construction and application of section 10(1) of the Prevention of Bribery Ordinance, Cap. 201 of the Laws of Hong Kong (called hereafter "the Ordinance"). Section 10(1) provides as follows:-

" 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

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(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."

5. The following facts in this case were not in dispute :

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- (a) The Appellant was born in Hong Kong on 20th May, 1918;
- (b) He joined the Royal Hong Kong Police Force as a constable on 13th July 1936 and resigned as a staff sergeant class II in July 1969;
- (c) Until the Appellant resigned in July 1969 as set out above he was a Crown Servant;
- (d) Since his resignation in July 1969 the Appellant has not been a Crown Servant.

6. The point raised by this appeal is whether the Appellant may be prosecuted under section 10(1)(b) of the Ordinance although he ceased to be a Crown Servant before the Ordinance was enacted in December 1970 and before its commencement date on 14th May 1971.

7. In outline, the submissions made on behalf of the respective parties were :

(a) The Appellant

- 10 (i) Section 10(1) should be interpreted to exclude persons such as the Appellant who ceased to be Crown Servants before the Ordinance came into effect on the 14th of May 1971;
- (ii) To include the Appellant would be to apply section 10(1) retrospectively;
- 20 (iii) A criminal statute is not to be construed as having retrospective application unless it clearly says so;
- (iv) Section 10(1) is not expressed to be retrospective; and
- (v) If the Court decided the Appellant did not fall within section 10(1) it should exercise its discretion and grant the declarations sought.

(b) The Respondent

- 30 (i) A prosecution of the Appellant would not involve applying the section retrospectively. All the Crown has to prove is that the Appellant is someone who, "having been a Crown Servant", was on some date subsequent to the commencement of the Ordinance "in control of pecuniary resources or property disproportionate to his present or past official emoluments."
- (ii) It would be wrong to interpret the words "any person who, being or having

RECORD

been a Crown Servant" as meaning :
"Any person who, being a Crown Servant
or having been a Crown Servant at a time
after the enactment of the Ordinance."

(iii) In any event, the Court in the exercise
of its discretion should refuse the
declarations as the submissions on behalf
of the Appellant were properly matters
for the criminal court which would try
the Appellant for an alleged offence
under section 10(1)(b) of the Ordinance.

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PP. 29-31 8. In his judgment on the 11th of July 1977, Cons
J. held that :

P.30 lines (a) Section 10(1) of the Ordinance does not have
21-25 retrospective effect.

P.30 lines (b) There was no retrospective element involved
27 & 28 in the present circumstances.

P.30 lines (c) It is immaterial when the properties alleged
28-32 to be acquired were acquired : it is control
at the date of the charge which must be
shown by the Crown and that date must be
subsequent to the 13th of May 1971.

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P. 31 lines (d) Had he accepted the submissions on behalf of
3-17 the Appellant he would have granted the
declarations.

PP. 35 & 36 9. By a notice of appeal dated the 19th of July
1977 the Appellant appealed to the Court of
Appeal of Hong Kong.

10. The appeal came before Briggs C.J., Huggins
and Pickering, JJ.A. Judgments were delivered
on 23rd November 1977. The appeal was unanimously
dismissed with costs.

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PP. 37-42 11. The first judgment was delivered by Briggs
C.J. who held that :-

P. 39 lines (a) The language used in an Ordinance must be
6-8 used and construed in its natural and
ordinary sense.

P.39 lines (b) The Appellant comes within the phrase
9-25 "having been a Crown Servant" in Section

RECORD

10(1) of the Ordinance.

- (c) To prosecute the Appellant under Section 10(1)(b) of the Ordinance does not involve applying it retrospectively.

P. 40 lines
10-36
PP. 41 & 42

12. Huggins J.A. also rejected the contentions of the Appellant. He held that :-

- 10 (a) There was no retrospective element involved in the circumstances of this case, on the basis that the two elements (a) of having been a Crown Servant and (b) of controlling pecuniary resources or property, could both exist at a date subsequent to the 13th May 1971. He derived some support from Regina v. The Inhabitants of St. Mary Whitechapel (1848) 12 A and E 120 although that case did not concern a penal statute.

P.44 lines
34-37
P.45 lines
1-4

- 20 (b) The contention that the intention of the Legislature was only to include people who had ceased to be Crown Servants after the Ordinance commenced was wrong; The intention was to cast the net very wide. It would be wrong to limit the words "or having been" by the addition of the words "since the coming into force of this Ordinance."

P.45 lines
25-33

13. Pickering J.A. although "Not without some initial hesitation" held that :-

P.47 line 14

- 30 (a) The wider and literal interpretation of section 10(1) "is the only one genuinely consistent with the intention of the legislature".

P.47 lines
18 & 19

- (b) "It would seem to be wholly illogical for the legislature to provide that a former Crown Servant in a similarly embarrassing position should not be equally guilty of an offence merely because he had ceased to hold office under the Crown before the sub-section was enacted."

P.48 lines
12-15

- 40 (c) Section 19 of the Interpretation and General Clauses Ordinance, Cap. 1 of the Laws of Hong Kong which says "An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal

P.48 lines
18-24

RECORD

construction and interpretation as will best ensure the attainment of the Ordinance according to its true intent, meaning and spirit" assisted the Crown rather than the Appellant.

15. The Respondent with submit that the judgment at first instance and the judgments of the Court of Appeal are correct and that on the admitted facts the Appellant is a person capable of coming within the scope of section 10(1)(b) and that accordingly the declarations sought were rightly refused.

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16. The Respondent submits that this appeal should be dismissed with costs for the following amongst other :

R E A S O N S

(1) BECAUSE, a prosecution of the Appellant under Section 10(1)(b) of the Ordinance does not involve applying that sub-section retrospectively.

(2) BECAUSE, the words "having been a Crown Servant" are clear and unambiguous and cannot be interpreted so as to exclude persons such as the Appellant who ceased to be Crown Servants before the enactment and commencement of the Ordinance.

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(3) BECAUSE, the date when a person ceased to be a Crown Servant is immaterial under section 10(1).

(4) BECAUSE, the judgments given by the learned trial Judge and the Court of Appeal are right.

J.G. WILMERS

G.F. FULLER

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(Counsel for the Respondent)

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CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
Hale Court,
Lincoln's Inn,
W.C.2.

Ref: F/JA/10095
Tel: 242-1031

Solicitors for the Respondent