

The Attorney-General of Hong Kong

Appellant

v.

Daniel Chan Nai-Keung

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 22ND JUNE 1987

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD ELWYN-JONES
LORD BRIGHTMAN
LORD GRIFFITHS
LORD MACKAY OF CLASHFERN

[Delivered by Lord Bridge of Harwich]

The respondent was charged with the theft of a quantity of textile export quotas. He was tried and convicted in the Kowloon District Court by Judge Blackwell sitting without a jury. The judge gave the reasons for his verdict in writing on 3rd April 1985. An appeal against conviction was allowed by the Court of Appeal of Hong Kong (McMullin V-P., Silke and Kempster JJ.A.) in a judgment delivered by Silke J.A. on 6th November 1985. The Attorney-General of Hong Kong now appeals to Her Majesty in Council by special leave.

The law of theft in Hong Kong is governed by the Theft Ordinance 1970 which, so far as relevant to any point arising in this appeal, is identical to the English Theft Act 1968. Logically the first point for consideration is whether export quotas, under the system operated by the Hong Kong Department of Trade and Industry, are capable of being stolen as falling within the definition of "property" which, by section 5(1) of the Ordinance, includes:-

"... money and all other property, real and personal, including things in action and other intangible property."

This point was not raised in the courts below for the good reason that the Court of Appeal of Hong Kong were bound by their own earlier decision in *The Queen v. Lo Yau Wai* (12th March 1985, unreported) that export quotas were property within the definition. Their Lordships gave leave to the respondent to raise the point before the Board.

The export of goods from Hong Kong is controlled by regulations made under the Import and Export Ordinance 1970. The Import and Export (General) Regulations 1972 prohibit the export of certain classes of goods, including textiles, without a licence. But where the overall quantity of a class of goods which Hong Kong may lawfully export to a particular destination, in this case textiles exported to the United Kingdom, is restricted, there is superimposed on the legislative control by licence an administrative system of quota allocations operated by the Department of Trade and Industry. Each exporter will be allocated a quota representing the maximum quantity of each category of textile goods for which he may expect to be granted an export licence in the year. Unless registered as the holder of an appropriate quota, an exporter will not obtain an export licence. Although quota allocations may vary from year to year, the quota allocation for an ensuing year in a particular category will depend primarily on performance in the previous year. Export quotas are registered with the Department of Trade and Industry but are transferable, subject to the Department's approval, and there is a flourishing market recognised by the Department in which quota brokers operate and in which quotas are freely bought and sold. Transfers are of two kinds, temporary and permanent. If a quota holder cannot utilise his full quota for a particular category of goods in a particular year, he may sell it to another on terms that this will not affect his quota allocation for the ensuing year; this is a temporary transfer. But on a permanent transfer the buyer acquires the benefit both of the quota for the current year and, to use the language of the official form issued by the Department of Trade and Industry to effect and record such a transfer, "any quota entitlement for a succeeding restraint period [resulting] from shipment performance against this quota". In summary, to be registered as the holder of an appropriate quota is a prerequisite to obtaining an export licence; it confers an expectation that, in the ordinary course, a corresponding licence will be granted, though not an enforceable legal right. In their Lordships' opinion the definition of "property" in the English Theft Act and the Hong Kong Theft Ordinance was intended to have the widest ambit. It would be strange indeed if something which is freely bought and sold and which may clearly be the subject of dishonest dealing which deprives the owner of the

benefit it confers were not capable of being stolen. Their Lordships have no hesitation in concluding that export quotas in Hong Kong although not "things in action" are a form of "other intangible property".

The respondent and a man named Dymock were co-directors of Bauhinia Developments Limited ("Bauhinia"). Dymock held 64%, the respondent 36% of the shares in the company. The business of Bauhinia was the export of textiles. Dymock spent much time away from Hong Kong. The respondent had, as the judge found, a general authority on behalf of Bauhinia to deal in its export quotas. On 30th March 1984 a new company called Hale Textiles Limited ("HT") was incorporated in Hong Kong. The directors and shareholders of HT were the respondent and a man named Chan. Chan also carried on business as the Hale Company. The Hale Company and HT shared office premises and carried on the same business of exporting textiles as Bauhinia. On 9th June 1984 when Dymock was away from Hong Kong and without his knowledge the respondent sold by way of permanent transfer a large number of textile export quotas to the Hale Company. Dymock would not have agreed to any such sale if he had known of it. On 28th June 1984 the respondent resigned as director of Bauhinia. The prosecution called a broker who dealt in quotas to prove that the sales by the respondent to the Hale Company of the Bauhinia quotas were at a gross undervalue. The respondent did not choose to give evidence. The judge found that in selling Bauhinia's quotas to the Hale Company the respondent had acted dishonestly and accordingly convicted him of theft.

The Court of Appeal of Hong Kong quashed this conviction on grounds which, with all respect, their Lordships find difficult to understand. The key passages in the judgment seemed to be the following:-

"It is clear from the evidence that it was the company, Bauhinia Developments Limited, which sold the quotas. The person effecting the sale on behalf of Bauhinia was the Applicant and he was authorised so to do. ... In these circumstances the question is: when, if at all, did the Applicant appropriate the quotas? The answer is that he never did. He was the alter ego of the company, one and part of the same. ... Here the Applicant never assumed the rights of an owner of the quotas. It was Bauhinia which sold those quotas and he was authorised to effect the deal."

If the proposition implicit in this reasoning is that the director of a company who has a general authority to sell the company's property cannot be guilty of theft if he sells the property even dishonestly and in fraud of the company, it is clearly erroneous. Counsel for the respondent did not seek to argue to the contrary.

Under the Larceny Act 1916 in England and the Larceny Ordinance 1935 in Hong Kong the offence would have been fraudulent conversion. Section 20(1)(ii) of the English Act and section 32(1)(ii) of the Hong Kong Ordinance provided:-

"Every person who ... being a director, member or officer of any body corporate or public company, fraudulently takes or applies for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company; ... shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment for any term not exceeding seven years."

In *Attorney-General's Reference* (No. 2 of 1982) [1984] 1 Q.B. 624 it was submitted and apparently accepted by the Court of Appeal that:-

"The effect of sections 1 to 6 of the Theft Act 1968 is that the offence of theft compendiously replaces the whole of the more complex series of offences comprised in the Larceny Act 1916, including fraudulent conversion."

So far, at least, as fraudulent conversion is concerned, their Lordships think the submission is correct. So long as an agent is acting within the scope of his authority in selling the property of his principal, he is not assuming any rights of the owner, but merely exercising rights which the owner has conferred upon him. But an agent authorised to sell can have no authority to sell dishonestly against the owner's interest. Thus, for example, if an agent in purported exercise of his authority dishonestly sells the principal's property to a third party at an undervalue he clearly exceeds his authority and thereby assumes the right of the owner in a way which amounts to an appropriation under the sections which define the offence of theft in the English Act of 1968 and the Hong Kong Ordinance of 1970.

It follows, as their Lordships' think and as counsel for the respondent accepted, that the sole issue is whether the respondent acted dishonestly and against the interests of Bauhinia in selling the export quotas to the Hale Company. Counsel for the respondent argued strenuously that the sentence in the Court of Appeal's judgment "he was the alter ego of the company" must be understood as a rejection of the judge's finding of dishonesty. Their Lordships cannot so read it. The context shows that this sentence was directed to the issue of appropriation, not to that of dishonesty. But, in any event, it was not open to the Court of Appeal to reverse the judge's finding of dishonesty unless it was vitiated by some error of law or unsupported by the evidence.

Most of the argument before the Board has turned upon the question of the admissibility and the effect, if admissible, of the evidence of the quota broker, Madam Chan, called as a witness for the prosecution. She was called as an experienced broker in the quotas market and described as an expert witness. No objection was made by the defence to the reception of her evidence-in-chief. But it is claimed that cross-examination showed that her evidence relating to prices for the relevant quotas prevailing in June 1984 was hearsay.

The Court of Appeal said about this witness:-

"Whatever knowledge Madam Chan may have had it was clearly not that of an expert and the Judge was, with respect, wrong to treat her as a witness in that category, no grounds whatsoever having been laid to justify such a finding."

Their Lordships find this difficult to follow. Some witnesses may need to establish their expertise by reference to academic or scientific qualifications. But it is difficult to see what better qualification a witness can have to give evidence of prices prevailing in a particular market than experience as a broker in that market. The judgment of the Court of Appeal continues:-

"She had some knowledge of price margins and that which she said about temporary quotas was based upon her own knowledge and dealings. That which she said as to permanent quotas was not."

It is argued for the respondent that there was no material on which the Court of Appeal could make this distinction and that the evidence goes to show that all the prices quoted by Madam Chan were extracted from a record which she admitted had been compiled from information supplied by others.

One of the difficulties of resolving disputed issues of fact in an appellate tribunal in a case where, as here, there was no shorthand note taken of the evidence is that a judge's longhand note is inevitably far from being a complete record. Madam Chan is recorded in evidence as saying:-

"I prepared a list of prices last year. They are all old records. I was asked to find my records for 1984 and have brought them to Court."

Counsel informed the Board that the records were never produced. Presumably this was because neither counsel appearing at the trial ever asked for them.

Madam Chan gave her evidence as to the highest and lowest prices prevailing in 1984 in respect of sales on both temporary and permanent transfers in several

of the categories which had been the subject of sales by the respondent to the Hale Company. The former were, for obvious reasons, much lower than the latter.

The relevant cross-examination, as recorded in the judge's note, is as follows:-

"Q. Prices you have quoted from your records, did you ring every day to enquire about the prices for those categories?

A. It would not be daily because most people are not willing to spend money to purchase permanent quota.

Q. Record is compiled from occasional enquiries?

A. Correct.

Q. Figures are not compiled from your own sales but from ringing up other brokers and what they told you?

A. Correct."

In their Lordships' view the Court of Appeal were entitled to conclude from this material that dealing in quotas by way of permanent transfer was relatively rare and that it was for this reason that Madam Chan had had to rely on other brokers to obtain information of prices payable for permanent transfers and to treat the passage quoted from the cross-examination as an admission, with regard to this part of her evidence only, that it was based on information obtained from other brokers. On this view the evidence of prices payable for quotas in respect of temporary transfers, whether rightly described as "expert" or not, was based on her own knowledge and was admissible.

The charge related to the sale of quotas in seven categories. Madam Chan's evidence of prices prevailing on sales by way of temporary transfer related to four of these seven categories and showed that in all four cases the respondent's sales by way of permanent transfer had been lower, in three out of four cases by a margin of more than 75%, than the lowest 1984 price for the corresponding quota sold by way of temporary transfer. This evidence, taken together with the other circumstances of the transaction, raised a strong inference of dishonesty which the judge was fully entitled to draw in the absence of any explanation from the respondent.

The judge concluded the statement of the reasons for his verdict in the following passage:-

"The whole circumstances of the sale of the quotas namely that such a large number of permanent quotas were sold by the accused to a company the proprietor of which was a co-director of the accused in an incorporated company which shared the same offices as one another; that the sale took place without prior consultation between the accused and Dymock and whilst Dymock was absent from Hong Kong; that the accused sent his letter of resignation from Bauhinia Developments Ltd. to Dymock a few days after the sale of the quotas had been approved by the Department of Trade & Industry; that the price at which the said quotas had been sold was ridiculously low as stated by the expert witness Madam Chan who was found to be an expert having spent the last five years dealing exclusively in textile quotas gave rise to an irresistible inference of dishonesty on the part of the accused."

Their Lordships can find no error of law in this passage. The finding of dishonesty was amply justified and whether or not the judge was correct in describing Madam Chan as an expert witness was immaterial. What mattered was that she gave evidence which was, on any view, admissible and which fully supported her opinion that the prices for which the respondent had sold the Bauhinia quotas were ridiculously low.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed, the order of the Court of Appeal set aside and the conviction restored.





