Privy Council Appeal No. 32 of 1991

(1) Chan Kai
(2) Kong Kwai-wing
(3) Chan Man-kwan
(4) Pang Chi-sum and
(5) Ng Kum-lau *Appellants*

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 3RD FEBRUARY 1992, DELIVERED THE 13TH FEBRUARY 1992

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ROSKILL
LORD ACKNER
LORD LOWRY
LORD BROWNE-WILKINSON

*[Delivered by **Lord Lowry**]*

This is an appeal by special leave of Her Majesty in Council from the majority judgment of the Court of Appeal of Hong Kong delivered on 13th December 1989, whereby it was ordered that certain applications of the appellants for leave to appeal in respect of convictions for blackmail be dismissed.

The only question in the appeal was whether the prior consent in writing of the Attorney General is required before a person can be charged with the offence for which office-bearers and managers of a society can be made liable by virtue of section 26(1) of the Societies Ordinance Cap. 151 ("the Ordinance").

At the conclusion of the hearing, which took place on 3rd February 1992, their Lordships announced that they would humbly advise Her Majesty that the appeal ought to be allowed and the convictions quashed for reasons to be given later. This they now do.

Section 35 of the Ordinance provides:-

"Except in the case of persons charged under the provisions of sections 19, 20, 24 and 25 and of persons arrested under the provisions of sections 33 and 34(5), no person shall be charged with an offence under this Ordinance or any rule made thereunder unless the prior consent in writing of the Attorney General has been obtained."

Section 26 provides:-

" (1) Where any offence punishable with a fine or imprisonment has been committed, whether or not any person has been convicted in respect thereof, and such offence has been committed or purports to have been committed in the name or on behalf of any society, every office-bearer of such society and every person managing or assisting in the management of such society at the time of the commission of such offence shall be deemed to be guilty of such offence and shall be liable to the punishment prescribed by law therefor, unless he establishes to the satisfaction of the court that the offence was committed without his knowledge and that he had exercised all due diligence to prevent the commission of the offence.

(2) Any office-bearer and person managing or assisting in the management of such society shall be liable to be prosecuted under this section, notwithstanding that he may have taken part in the commission of the offence.

(3) In any prosecution under subsection (1) of an office-bearer or any person managing or assisting in the management of a society, any document found in the possession of an office-bearer or such society or of a person assisting in the management of such society or of a member of such society or in any place or premises owned, occupied, used or controlled by such society, or of which such society is the lessee, shall be prima facie evidence of the contents thereof for the purpose of proving that anything has been done or purports to have been done by or on behalf of such society."

In count 1 of the indictment all the accused, including the appellants, were charged with:-

"Blackmail contrary to section 23(1) of the Theft Ordinance, Cap. 210 and section 26(1) of the Societies Ordinance, Cap. 151."

And in the particulars of the offence it was alleged that the accused were on 13th January 1987 office-bearers of an unlawful society, the Sun Yee On Triad Society ("the Society"). Then, having described the demand for money with menaces which a certain Tsui Po-Wah had allegedly made of a restaurant manager on 13th January 1987 in the name or on behalf of the

Society and his subsequent conviction and sentence for that offence on 20th May 1987, the particulars concluded:-

> " And whereas, by virtue of section 26 of the Societies Ordinance, Cap. 151 if any offence punishable with a fine or imprisonment has been committed, and such offence has been committed or purports to have been committed in the name or on behalf of any society, every office bearer of such society and every person managing or assisting in the management of such society at the time of the commission of such offence shall be deemed to be guilty of such offence.
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> Therefore, CHAN Kai, KONG Kwai-wing, HEUNG Way-yim, CHAN Kin-chung, HEUNG Chin-sing, CHEUNG Leung-sing, CHAN Man-kwan, PANG Chi-sum, WONG Ko, Wong Yan and NG Kam-lau, now stand charged with having, on the 13th day of January, 1987, at the Fu Along Restaurant, 3/F. Fu Shin Commercial Complex, Fu Shin Estate, Tai Po, New Territories, Hong Kong, together with TSUI Po-wah and 'Ah Ming' and other persons unknown, with a view to obtaining a gain for themselves, made an unwarranted demand in the name or on behalf of the Sun Yee On Triad Society for $3,000 Hong Kong currency per month, from FUNG Tsang-keung, with menaces."

When the trial commenced in the High Court on 19th October 1987 before O'Connor J. and a jury, the second, third, fourth and fifth appellants pleaded guilty to the offence charged in count 1. On 26th October the first appellant also pleaded guilty. On 11th December counsel for the appellant submitted that, by virtue of section 35, the Attorney General's prior consent in writing was required for a charge on count 1 and that, no such consent having been given, the appellants were entitled to be acquitted on that count, since the prosecution was to that extent a nullity. The trial judge rejected that submission on the ground that the consent of the Attorney General was not required because, in his opinion, the defendants in count 1 were charged, not with an offence under the Societies Ordinance, but with an offence under the Theft Ordinance.

The trial continued on other counts of the indictment until 27th January 1988, when each of the appellants was sentenced to two years' imprisonment on count 1 and to either two or two-and-a-half years' imprisonment on other counts, the latter sentences to be served consecutively to the sentences imposed on count 1.

The appellants contended that in count 1 they had (without the prior consent in writing of the Attorney General) been "charged with an offence under this

Ordinance", to quote the words of section 35, and supported this argument by saying that section 26 of the Ordinance is an "offence-creating section". The Crown, on the other hand, submitted that the appellants were charged with and convicted of blackmail contrary to section 23(1) of the Theft Ordinance and pointed out that "such offence" in section 26(1) of the Ordinance is (in this case) the offence of blackmail. They therefore contended that the offence with which the appellants were charged in count 1 was not "an offence under this Ordinance" but an offence under the Theft Ordinance.

Their Lordships consider that the fallacy of the Crown's argument, which was accepted by the majority in the Court of Appeal, becomes apparent when section 35 is analysed grammatically. In their opinion the words "under this Ordinance" should be construed not as an adjectival phrase qualifying the noun "offence" but as an adverbial phrase modifying the verb "shall be charged". That this is the right grammatical construction becomes clear when one reads section 35 as a whole. The section starts with a reference to "persons charged under the provisions of sections 19, 20, 24 and 25" and the words "charged ... under this Ordinance" constitute a parallel expression; the modification is adverbial in each case.

Their Lordships further consider that this point is confirmed and illustrated when one turns to section 26. Subsection (1) defines a new criminal liability which can be incurred by office-bearers and managers of any society. Admittedly, the liability which is incurred will be in respect of an offence which exists independently of section 26. Subsection (2) provides that "Any office-bearer ... shall be liable to be prosecuted under this section notwithstanding that he may have taken part in the commission of the offence". And subsection (3) provides for the use of documents in evidence "In any prosecution under subsection (1) of an office-bearer ..." (emphasis supplied in each case). The references in subsections (2) and (3) to prosecution "under this section" and "under subsection (1)" must be regarded as references to the enforcement of the new liability created by subsection (1), and the conclusion is unavoidable that a person prosecuted under subsection (1) must have been charged under subsection (1) and therefore charged "under this Ordinance", as provided by section 35. Accordingly, the Attorney General's prior consent in writing was required and any prosecution instituted without that consent was and remains a nullity: *R. v. Bates* [1911] 1 K.B. 964; *Reg. v. Marron* [1981] N.I. 132; *Reg. v. Pearce* (1980) 72 C.A.R. 295. And, since the rule is concerned with jurisdiction, the fact that a defendant may have pleaded guilty makes no difference: *Reg. v. Angel* (1968) 52 C.A.R. 280.

The only hope for the Crown (although, even then, there would have been plenty of scope for argument in favour of the appellants) lay in the proposition that in section 35 the words "under this Ordinance" adjectivally qualify the word "offence", which would lead to the concept of "an offence under this Ordinance" and thereby to a readier (though not concluded) acceptance of the view taken at the trial and in the Court of Appeal. And the best support for that proposition was the observation that the words "with an offence" in section 35 have no useful function if the construction preferred by their Lordships is adopted. To this point there are two answers. The first in by no means decisive, namely, that the expression "charged with an offence" is such a common expression that the draftsman would have been quite likely to use it. The second answer, which in their Lordships' view puts the case beyond argument, is that the grammatical indications jointly provided by sections 26 and 35 are so clear that they irresistibly compel acceptance.

So far as policy is concerned, their Lordships can readily appreciate why the legislature might have considered it desirable to require the Attorney General's consent to the somewhat novel proceedings contemplated by section 26 but, having regard to their clear conclusion as to the meaning of section 35, they do not consider that it is necessary or would be helpful to discuss the policy of the Ordinance in this respect.