

Yip Chiu Cheung

Appellant

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
16TH JUNE 1994

Present at the hearing:-

LORD JAUNCEY OF TULLICHETTLE
LORD GRIFFITHS
LORD BROWNE-WILKINSON
LORD MUSTILL
LORD SLYNN OF HADLEY

[Delivered by Lord Griffiths]

On 27th March 1991 the appellant was convicted of conspiracy to traffic in heroin and sentenced to 15 years imprisonment. His appeal was dismissed by the Court of Appeal on 15th May 1992 and he now appeals from that decision.

The indictment charged the appellant as follows:-

" STATEMENT OF OFFENCE

Conspiracy to traffic in a dangerous drug, contrary to Common Law and section 4 of the Dangerous Drugs Ordinance, Cap. 134.

PARTICULARS OF OFFENCE

YIP Chiu-cheung, between the 19th day of August, 1989 and the 15th day of November, 1989 in Thailand and Hong Kong, conspired with Philip Needham and another person unknown to traffic in a dangerous drug, namely salts of esters of morphine commonly known as heroin."

The relevant provisions of the Dangerous Drugs Ordinance, Cap. 134, are as follows:-

"2(1) In this Ordinance, unless the context otherwise requires -

'Director' means the Director of Health, Deputy Director of Health or an assistant director of health;

'export' means to take or cause to be taken out of Hong Kong or any other country, as the case may be, by land, air or water;

'trafficking', in relation to a dangerous drug, includes importing into Hong Kong, exporting from Hong Kong, procuring, supplying or otherwise dealing in or with the dangerous drug ..., and 'traffic in a dangerous drug' shall be construed accordingly;

'unlawful' or 'unlawfully', in relation to trafficking in or manufacturing or storage of a dangerous drug, means otherwise than under and in accordance with this Ordinance or a licence issued thereunder.

...

4(1) Save under and in accordance with this Ordinance or a licence granted by the Director hereunder, no person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Hong Kong -

- (a) traffic in a dangerous drug;
- (b) offer to traffic in a dangerous drug or in a substance he believes to be a dangerous drug; or
- (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug or in a substance he believes to be a dangerous drug."

The prosecution case was based primarily on the evidence of Philip Needham who was an undercover drug enforcement officer of the United States of America and named in the indictment as a co-conspirator. The other conspirator, referred to in the indictment as a person unknown, was introduced to Needham by the appellant under the name of Hom.

In outline Needham's evidence was that he had a series of meetings in Thailand with the appellant, at one of which Hom also took part, at which it was arranged that Needham would act as a courier to carry five kilos of heroin from Hong Kong to Australia, travelling by air.

The arrangement was that Needham would fly to Hong Kong on 22nd October under the name of Larsen, where he would be met by the appellant. He would then stay at the Nathan Hotel in Kowloon for a few days and then fly on to Australia with five kilos of heroin supplied by the appellant. For this service he would be paid US\$16,000. In

fact Needham did not fly to Hong Kong on 22nd October because the flight was delayed and he missed the rescheduled flight. Needham said he had no way of contacting the appellant in Hong Kong and had been advised by the Hong Kong authorities that the Nathan Hotel would be a dangerous place for him to stay. Needham therefore proceeded no further with the plan, and did not go to Hong Kong.

The appellant was arrested in Hong Kong on 15th November, a piece of paper with the name Larsen was found in the appellant's possession and it was admitted that he had come to the airport to meet Needham's flight on 22nd October.

Needham said that throughout his dealings with the appellant and Hom he kept the authorities in Hong Kong and Australia informed of the plans and they agreed that he would not be prevented from carrying the heroin out of Hong Kong and into Australia. It was obviously the intention to try to identify and arrest both the suppliers and the distributors of the drug.

The defence was that there had been no arrangement to carry any drugs, and the appellant was to assist Needham to buy travellers cheques that had been reported lost. He agreed that on one occasion Hom had been present when he met Needham.

In his summing up the judge directed the jury that, if they accepted Needham's evidence, it was open to them to convict the appellant of a conspiracy with Hom, and if they were sure that Needham had intended to carry the heroin out of Hong Kong he was in law a co-conspirator and they could convict the appellant of a conspiracy with Needham.

The jury found the appellant guilty, but they were not asked to bring in separate verdicts in respect of conspiracy with Hom and Needham.

The appellant raised a number of grounds of appeal before the Court of Appeal all of which failed, and only one of which is now pursued before the Board, which is that Needham, the drug enforcement officer, cannot in law be a co-conspirator because he lacked the necessary mens rea for the offence.

Before, however, turning to consider this ground of appeal, it will first be convenient to deal with a further ground of appeal arising out of a concession made by the prosecution in the Court of Appeal. The prosecution told the Court of Appeal that, if the appeal succeeded, they would not seek to uphold the conviction by relying upon a conspiracy between the appellant and Hom.

The appellant submitted that this concession was fatal to the conviction, the argument being that the jury might

have convicted only on the conspiracy with Hom and might not have been satisfied that Needham ever had the necessary intent to carry the heroin to make him a conspirator; therefore, it is said, if the conspiracy with Hom is not upheld the conviction cannot stand.

Their Lordships are satisfied that this argument is based on a misunderstanding of the nature of the concession made by the prosecution. There was no attack in the Court of Appeal upon the judge's direction that the jury could on the evidence find a conspiracy between Hom and the appellant. But if the appeal succeeded in establishing that Needham was not in law a co-conspirator, there was no way of knowing whether the jury had convicted on the basis of the conspiracy with Hom or with Needham. In these circumstances the prosecution rightly said they would not seek to rely on the conspiracy with Hom if the conspiracy with Needham failed, because the jury might have founded their verdict on the conspiracy with Needham. If, however, Needham was capable in law of being a co-conspirator with the appellant there was ample evidence to support the jury's verdict of guilty either on the grounds of conspiracy with Hom or Needham or both of them. As, for the reasons that follow, Needham was rightly held to be capable of being a conspirator this ground of appeal fails.

On the principal ground of appeal it was submitted that the trial judge and the Court of Appeal were wrong to hold that Needham, the undercover agent, could be a conspirator because he lacked the necessary mens rea or guilty mind required for the offence of conspiracy. It was urged upon their Lordships that no moral guilt attached to the undercover agent who was at all times acting courageously and with the best of motives in attempting to infiltrate and bring to justice a gang of criminal drug dealers. In these circumstances it was argued that it would be wrong to treat the agent as having any criminal intent, and reliance was placed upon a passage in the speech of Lord Bridge of Harwich in *R. v. Anderson (William Ronald)* [1986] A.C. 27 at pages 38-39; but in that case Lord Bridge was dealing with a different situation from that which exists in the present case. There may be many cases in which undercover police officers or other law enforcement agents pretend to join a conspiracy in order to gain information about the plans of the criminals, with no intention of taking any part in the planned crime but rather with the intention of providing information that will frustrate it. It was to this situation that Lord Bridge was referring in *Anderson*. The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea for the offence. As Lord Bridge pointed out, an undercover agent who has no intention of committing the crime lacks the necessary mens rea to be a conspirator.

The facts of the present case are quite different. Nobody can doubt that Needham was acting courageously and with

the best of motives; he was trying to break a drug ring. But equally there can be no doubt that the method he chose and in which the police in Hong Kong acquiesced involved the commission of the criminal offence of trafficking in drugs by exporting heroin from Hong Kong without a licence. Needham intended to commit that offence by carrying the heroin through the customs and on to the aeroplane bound for Australia.

Neither the police, nor customs, nor any other member of the executive have any power to alter the terms of the Ordinance forbidding the export of heroin, and the fact that they may turn a blind eye when the heroin is exported does not prevent it from being a criminal offence.

The High Court of Australia in *A. v. Hayden* (No. 2) (1984) 156 CLR 532 declared emphatically that there was no place for a general defence of superior orders or of Crown or executive fiat in Australian criminal law. Gibbs C.J. said at page 540:-

"It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer."

This statement of the law applies with the same force in England and Hong Kong as it does in Australia.

Naturally, Needham never expected to be prosecuted if he carried out the plan as intended. But the fact that in such circumstances the authorities would not prosecute the undercover agent does not mean that he did not commit the crime albeit as part of a wider scheme to combat drug dealing.

The judge correctly directed the jury that they should regard Needham as a conspirator if they found that he intended to export the heroin.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed.