

HONG KONG / JUDGMENT

ATTORNEY GENERAL v. LAU KAI CHEUNG

COURT

Court of First Instance

DECIDED

24 April 1984

CASE / FILE NUMBER

HCMA153/1984

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bjbj HCMA000153/1984 MAGISTRACY APPEAL NO. 153 OF 1984 Case stated - Objectionable Publications Ordinance - non - illustrated Chinese language publications - certified translation in English of the whole article is not required - certified extracts of the article may be relied upon - if defence of public good raised under Section 4(3) onus is upon the defendant on a balance of probabilities. MAGISTRACY APPEAL IN THE HIGH COURT OF JUSTICE NO. 153 OF 1984 APPELLATE JURISDICTION BETWEEN:- The Attorney-General Appellant and LAU Kai-cheung Respondent

Coram: The Honourable Mr. Justice Jones in Court. Date of hearing: 11th April 1984 Date of delivery of judgment: 24th April 1984 Mr. J. McNamara (Legal Department) for Appellant. Mr. John Mullick (K. Y. Woo & Co.) for Respondent.

JUDGMENT

This is an appeal by way of case stated from a decision of a magistrate sitting at the San Po Kong Magistrates court who dismissed two informations preferred by the Attorney -General against the respondent for publication of objectionable articles for gain contrary to Sections 4(1)(a) and 4(2) of the Objectionable Publications Ordinance Cap. 150. The facts proved or agreed were as follows:- " On the 24th of March 1983, decoy police purchased publications from two branches of the Shum Kee Bookstore , namely- 179 Temple Street, Ground floor, Kowloon and 2-H Saigon Street, Ground floor, Kowloon. Police then executed two search warrants on each of these bookstores and seized 23 individual publications totalling 119 books or booklets. All the books are non-illustrated Chinese language publications. Each has a pictorial cover depicting a naked or partly clothed female. The respondent is the owner and manager of these bookshops.". The respondent was charged with three offences, the first in respect of books seized at Temple Street, and the second and third for books seized at Saigon Street. The magistrate ruled at a preliminary hearing that all the books must be translated into English. I was informed that if all the books

seized in this case were to be translated it would take a team of translators in the Chinese Language Division about 50 months to complete. At the hearing on the 9th December 1983 a complete translation was produced by the Attorney-General of one book, "The Fallen Chicken" which was the subject matter of the third charge. The respondent pleaded guilty to this charge and was fined \$750. The Attorney-General sought to proceed on the other two charges by relying on the production of extracts of five specific publications, viz.:-

- (i) 'A Wanton Girl Frolicking in Spring' (ii) 'The Sexual Adventures of a Virgin Girl' (iii) 'A Love Affair with a Spirit' (iv) 'A widow's Clandestine Love Affairs'
- (v) 'Perverse Love' The Attorney-General also made an application to call a Senior Chinese Language Officer of the Home Affairs Department to give expert evidence that he had read all the books from which the extracts had been taken and that in his opinion the tone and character of the extracts were similar to that of the whole books from which they came. The magistrate refused both applications and dismissed the two charges. The following questions of law have been stated by the magistrate for determination:- "(i) Whether I was correct in law in ruling that the appellant could not proceed by using certified translations of extracts but rather was obliged to obtain a certified translation of the whole of each book specified as the subject matter of Charges A. and B? (ii) Whether I was correct in law in ruling that the appellant was not permitted to lead evidence of the expert opinion of the Senior Chinese Language Officer as to the relationship between the five specific certified extracts and the books from which they came but rather was obliged to obtain certified translations of the whole of each of the five specific books? Section 3(1)(a) of the Objectionable Publications Ordinance defines "objectionable article as any article which consists of or contains matter of an indecent, obscene or revolting nature. Mr. McNamara who appeared for the Attorney-General submitted that if any part of an article is found to be obscene the whole of the article becomes objectionable. Mr. Mullick for the respondent submitted that it has been the practice for the court to look at the whole of a publication before deciding whether it is obscene see *Thomson v. Chain Libraries Ltd.* (1954) 2 All E. R. 616, *R v. Martin Secker Warburg Ltd.* (1954) 2 All E. R. 683, *R v. Reiter* (1954) 2 Q.B. 16, *R v. Mirchandani* (1977) HKLR 523. Nevertheless a publication was held to be an obscene publication even if only a part of it was obscene see *Paget Publications Ltd. v. Watson* (1952) 1 All E.R. 1256. In a case that involved photographs *The Attorney-General v. Yeung Kam Tsuen and another* (1962) HKLR 663, Hogan, C. J. at page 667 said:- "Each photograph must receive individual attention and consideration, due regard being paid to the context and circumstances in which the photograph appears.". However, in neither of the Hong Kong decisions did the court have in mind the issue that has been raised in the instant case. Mr. Mullick said that it would be unfair for the Attorney-General to be able to select extracts in isolation which may be objectionable. The law in England is now based on the Obscene Publications Acts of 1959 and 1964. Section 1(1) of the 1959 Act defines the test of obscenity as follows:- " 1. (1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely,

having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it". Mr. Mullick referred to the definition of obscenity in Canada where Section 150(8) of the Criminal Code provides:- " . any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects . shall be deemed to be obscene.". The object of the legislation in Hong Kong is:- "To prohibit publications of an indecent, obscene or revolting nature or which are harmful to juveniles.". Section 19 of the Interpretation and General Clauses Ordinance Cap. 1 provides that an ordinance shall be given a fair large and liberal construction and interpretation to ensure the attainment of the object of the ordinance according to its true intent meaning and spirit. The position in England and Canada is of no assistance in this case for the wording of the Hong Kong ordinance is in different terms. The court is not concerned to look at the article as a whole nor with a consideration of the dominant characteristics of the publication. I agree with the interpretation sought by Mr. McNamara that if any part of the article is found to be obscene, a conviction will be entered. However, if an article is found to be objectionable a defence is afforded by Section 4(3) if it is proved that publication was justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of any other object of general or public concern. The onus of establishing this defence is placed upon the defendant on a balance of probabilities. The effect of the magistrate's ruling would enable persons who chose to publish objectionable articles for gain to defeat the intention of the legislature by printing lengthy books which would render a conviction well nigh impossible if a full translation was required. Apart from anything else to require a translation of the whole book neither accords with common sense nor with justice. If the defence of public good is raised a full translation would be required, but the onus in that event will fall upon the defendant. As a result in my judgment there is no necessity for the Attorney-General to have the whole article translated. The answer to the first question in the case stated is therefore 'no'. Accordingly it becomes unnecessary to answer the second question. I direct that the case be remitted to the magistrate to hear the two charges that were dismissed based upon the extracts of the books that have been translated. (B.L. Jones) Judge of the High Court PAGE

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