

HONG KONG / JUDGMENT

HKSAR v. CHAN SHING KONG AND ANOTHER

COURT

Court of First Instance

DECIDED

26 July 2010

CASE / FILE NUMBER

HCMA258/2010

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bjbj HCMA 258/2010 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 258 OF 2010 (ON APPEAL FROM TWCC 3034/2009)

BETWEEN HKSAR Appellant and CHAN SHING KONG 1st Respondent WONG CHI KUI, JACKIE, previously known as WONG TAK HONG 2nd Respondent

Before: Deputy High Court Judge Stuart-Moore Date of Hearing: 7 July 2010 Date of Judgment: 26 July 2010

J U D G M E N T

Background

Chan Shing-kong (1st Respondent) and Wong Chi-kui, Jackie (2nd Respondent) were jointly charged under sections 9(2)(a) and 12(1) of the Prevention of Bribery Ordinance, Cap. 201, (the Ordinance) with offering an advantage to an agent. The particulars of the charge, as amended, were as follows: CHAN Shing-kong and WONG Chi-kui, Jackie, previously known as WONG Tak-hong, respectively a Director cum Shareholder and the Marketing Manager of Ming Shing Company Limited, on an unknown date between the 1st day of January 2008 and the 30th day of June 2008, in Hong Kong, without lawful authority or reasonable excuse, offered an advantage, namely a gift, loan fee, reward or commission consisting of \$1,200.00 Hong Kong currency to CHAN Oi-lan, an agent, namely an employee of Kings Toys Limited, as an inducement to or reward for or otherwise on account of the said CHAN Oi-lan doing or having done an act in

relation to her principal s affairs or business, namely placing orders with the said Ming Shing Company Limited. The case (TWCC 3034/2009) was heard over the course of six days before John Glass, Esquire, a magistrate sitting at Tsuen Wan Magistrates Court before it was adjourned for the delivery of verdicts on 10 February 2010. However, on that date, the magistrate made what he described as a

determination

when he decided that he had no jurisdiction to deal with the charge. By this, he meant that in his opinion the offence had been committed in the Mainland so that it fell outside the jurisdiction of Hong Kong. Accordingly, he decided to adjourn the proceedings sine die pending the outcome of an appeal by way of Case Stated which the prosecutor at trial had indicated it was his intention to pursue. Meanwhile, the Respondents have remained on bail. Ms Louisa Lai, on behalf of the Secretary for Justice (the Appellant), has duly appealed by way of Case Stated, pursuant to section 105 of the Magistrates Ordinance, Cap. 227, against the course adopted by the magistrate. Section 105 provides as follows:

105. Application to state case on point of law Within 14 clear days after the hearing and determination by a magistrate of any complaint, information, charge or other proceeding which he has power to determine in a summary way, either party thereto or any person aggrieved thereby who desires to question by way of appeal any conviction, order, determination or other proceeding as aforesaid on the ground that it is erroneous in point of law, or that it is in excess of jurisdiction, may apply in writing to the magistrate to state and sign a case setting forth the facts and the grounds on which the conviction, order or determination was granted and the grounds on which the proceeding is questioned, for the opinion of a judge. In the case of any determination which a magistrate has power to determine in a summary way and which relates to or is connected with an offence the Secretary for Justice shall notwithstanding that he may not be deemed to be a party, have a similar right to apply for a case to be stated as that hereinbefore afforded to the parties and upon the exercise of such right by the Secretary for Justice the complainant or informant shall cease to be a party to any future proceedings. A point taken by both Respondents is that as there was no actual determination of the charge by the magistrate, in the sense that no verdict was ever recorded, the appeal should be dismissed for want of jurisdiction. Ms Lai, on the other hand, argued that the magistrate had, by adjourning the trial, taken the course recommended by the Court of Final Appeal in *Secretary for Justice v Yau Yuk Lung* [2007] 10 HKCFAR 335 for cases of constitutional importance. She contended that a magistrate s decision that the courts of Hong Kong have no jurisdiction to deal with a charge is, in common with issues concerning a charge which is found to be unconstitutional, of the gravest importance and should generally call for examination by the higher courts before a final determination is reached. The factual background The facts, as found proved by the magistrate, were reasonably straightforward. These are set out in the Case Stated (at para. 8) as follows:

- (a) CHAN Oi-lan (PW1) was employed in Hong Kong as the purchasing manageress of a Hong Kong registered company (Kings Toys Limited, hereinafter called). She had contacts with a Mr James WONG and a Mr CHAN both of whom were working for a Hong Kong registered company named Ming Shing Company Limited (Ming Shing). James WONG and Mr CHAN were respectively the 2nd and the 1st Respondents. Ming Shing supplied plastic raw materials to KTL. PW1 spent part of her time in Hong Kong and part in mainland China.
- (b) PW1 s initial contact with the 2nd Respondent was in Hong Kong around the end of January 2008 when PW1 approached the 2nd Respondent by telephone for rebates. No agreement was made, as the 2nd Respondent did not answer her request. In a later telephone call in February 2008, PW1 again requested the 2nd Respondent to pay rebates and it was agreed that they would meet later in China. Quotations for the supply of goods by Ming Shing had been generally discussed before this China meeting.
- (c) A few days later PW1 met the 2nd Respondent, the 1st Respondent and another male in a caf in Dongguan, China where the matter of rebate was discussed in detail. The meeting lasted over an hour and agreement was reached upon the amount of rebate that PW1 would receive and how it would be paid. It was agreed that the amount of rebate would be based on the amount of goods ordered with a tax calculation taken into account.
- (d) PW1 knew the amount of goods she had to order in this caf meeting, and she knew the amount of rebate she would receive was HK\$11,050 for the goods in that order. It was also decided that PW1 would place the order after the meeting. A purchase order was therefore issued by PW1 s company in Hong Kong on 27 February 2008. It was for the supply of goods by Ming Shing to Hong Kong and payment was to be made by cash on delivery. PW1 later received the first instalment of the agreed rebate in another meeting in China and she received the second instalment of rebate in cash at the end of March 2008 in her Hong Kong office when the 2nd Respondent brought it to her and handed it to her in an envelope. A Customs fine on this transaction was also paid at the same time by a cheque issued by Ming Shing and payable in Hong Kong. There was no evidence that the agreed terms had been varied at any time before the second payment was made in Hong [Kong]. It was the second instalment , referred to in subparagraph (e) above, that formed the subject matter of the charge. I should perhaps also mention that there was a minor error of fact in subparagraph (d) as the purchase order was not issued by PW1 s Company in Hong Kong but was issued by a Mainland subsidiary company. However, it is accepted that this had no effect on anything which is relevant to these proceedings. No Case to Answer Submission In the course of the trial, it was submitted for the Respondents, on whose behalf no evidence was called, that the offence of offering an advantage to an agent had taken place outside Hong Kong s jurisdiction because the heart of the offence was the offer to give a rebate which, on PW1 s evidence, was done in the Mainland. The prosecution at trial, and the Appellant in these proceedings, have at no stage suggested that the magistrate would have jurisdiction over the case if the offence was committed in the Mainland. Indeed, it was accepted from the outset that the first payment of a rebate , which took place in the Mainland, could not be the

subject of any charge in Hong Kong. It was the second payment alone which was covered by the present charge as the \$1,200 was paid to PW1 by the 2nd Respondent, on behalf of himself and the 1st Respondent, in PW1's office in Hong Kong. It was submitted that the legal basis for saying that the offence was committed in Hong Kong lay in the interpretation of the phrase offers an advantage in section 2(2)(a) of the Ordinance which reads:

- (2) For the purposes of the Ordinance
 - (a) a person offers an advantage if he, or any other person acting on his behalf, directly or indirectly gives, affords or holds out, or agrees, undertakes or promises to give, afford or hold out, any advantage to or for the benefit of or in trust for any other person; [Emphasis added] The magistrate fully appreciated the wide terms of this interpretation and made reference in the Case Stated to the way that the Appellant laid emphasis on the word gives as one of a number of alternative ways in which the offence of offering an advantage could be committed, as opposed to agrees to give which would have referred to the events in the Mainland. The magistrate ruled that there was a case to answer for both Respondents at the conclusion of the prosecution's case, having found that: it would be as a matter of public policy outrageous for an offence involving an offer to pay illegal commissions made abroad when the whole or part of such commission were paid, or to be paid, in Hong Kong to escape the jurisdiction. (Case Stated para. 14) It may be that the magistrate formulated this statement from similar words used by Roberts CJ in *Attorney General v Yeung Sun-shun and Anor* [1987] HKLR 987 where the Court of Appeal was dealing, amongst other issues, with whether the courts in Hong Kong had jurisdiction to try a conspiracy entered into outside Hong Kong where the only acts within the jurisdiction in furtherance of the conspiracy were carried out by an innocent agent of the conspirators. Roberts CJ, (at p. 997) said: As a matter of public policy, it would surely be outrageous if, a conspiracy having been hatched abroad, a conspirator could not be tried because the only acts within the jurisdiction were committed by an innocent agent. The magistrate went on to deal with another aspect of the argument before him, finding that the law of jurisdiction was no longer governed by the gist theory but had moved to the substantial activities theory. Accordingly, at that stage, he found that he had jurisdiction over the case having regard to PW1's evidence to the following effect:
 - (a) PW1 was employed in Hong Kong as a purchasing manageress; PW1's employer was a Hong Kong registered company; PW1 spent half of her time in Hong Kong; PW1's initial contact with the 2nd Respondent was in Hong Kong; Both Respondents worked for a Hong Kong registered company; PW1 travelled back to Hong Kong after the Dougguan caf meeting where the offer was made; the purchase order was issued from Hong Kong to supply goods to China; the payment of the goods was to be made in Hong Kong; the Customs fine was to be paid in Hong Kong; a cheque was issued and paid in Hong Kong; the second payment of commission was made in Hong Kong; and the civil action between PW1 and KTL took place in Hong Kong. The Magistrate's change of mind On such a basis, it appears that the magistrate would, in all probability, have convicted. However, after closing submissions, he

adjourned the proceedings for verdicts to be delivered at a future date and it seems that he then had a change of mind. This is expressed in the Case Stated in these terms: When considering the case for verdict, I also reviewed my earlier decision upon jurisdiction and determined that Hong Kong courts had no jurisdiction over the said charge. I then, following the direction laid down by the Court of Final Appeal in *Secretary of Justice v Yau Yuk Lung & Lee Kam Chuen*, FACC 12 of 2006 (para. 70 page 27), drew my determination to the attention of the parties, as I had in mind that the prosecution might wish to case state me upon this important determination on jurisdiction and I wished to hear the parties on that aspect. I also had in mind my power and duty to amend the charge under S.27 Magistrates Ordinance (Cap. 227) given my findings on the facts and I wished to hear the parties on this aspect before deciding upon such a course of action. As there was subsequently an application for a case stated to be made I adjourned the matter sine die and did not proceed further. (Case Stated para. 16) The principal reasons for this change of direction were expressed as follows:

- (b) I also found that the Prosecution s argument was rather artificial as I found its argument in essence was that the second instalment of an agreed payment constituted a separate offence. I further found that Section 9(2)(a) of the Prevention of Bribery Ordinance, Chapter 201 could not have been intended by the Legislature to be used in this way, that is, by breaking up parts of the offence and by suggesting that there had been an independed offer at the time of each payment to PW1.
 - (c) I found that the real offence was the original offer made by the 2nd Respondent and the 1st Respondent in China to pay PW1 a rebate on the purchase order. In *HKSAR v So Kam Tim* ([1997]4 HKC 1), the Court of Appeal made it very clear at page 6, paragraph C, that the gravamen of the S. 9(2)(a) offence was the making of the offer to pay the corrupt reward and that the offence was committed and completed once the offer was made regardless of whether or not the corrupt agreement was honoured by the offeree, and that whatever intent he subsequently forms on the offeree s action or inaction will be immaterial. The guilty intent of the offeror was to be judged independently as at the time of making the offer
 - (d) Upon revisiting the matter, I also took the view that I was wrong in finding that the presumption against a legislative intention to make acts done abroad offences triable by Hong Kong courts had been rebutted by public policy. I found that given the absence of any express provision in section 9(2)(a) of the Prevention of Bribery Ordinance, Chapter 201 dealing with jurisdiction, that section 9(2)(a) could never have been intended by the Legislature to cover conduct taking place outside Hong Kong (Case Stated para. 17) With these considerations in mind, the magistrate set out four questions for the opinion of a judge: Four questions in the Case Stated Questions this Court is Asked to Answer
18. The question of law arising from the above statement for the opinion of this court therefore are:-

- (1) Did I err in finding that section 9(2) of the Prevention of Bribery Ordinance, Chapter 201 has no extra- territorial effect, that is, it does not apply to conduct taking place outside the territorial jurisdiction of the Hong Kong Special Administrative Region?
- (2) If the answer of this Court to Question (1) above is in the negative, did I err in finding that an offence under section 9(2) of the Prevention of Bribery Ordinance was completed as per the principles stated in HKSAR v So Kam Tim, [1997] 4 HKC 1, and no offence is triable under section 9(2) of the said Ordinance, once an agreement for offering advantage was formed outside the territorial jurisdiction of the Hong Kong Special Administrative Region and despite the fact that pursuant to the agreement or any subsequent variation thereof, payment of the advantage or a part thereof was subsequently made within the territorial jurisdiction of the Hong Kong Special Administrative Region and that the quid pro quo of the offer of advantage involved conduct affecting companies registered in and commercial transactions taking place in the Hong Kong Special Administrative Region?
- (3) Did I err in inviting the Prosecution to appeal my determination in the aspect of the jurisdiction of the case instead of complying with section 19(2) of the Magistrate Ordinance, Cap. 227; namely- The magistrate, having heard what each party has to say and the witnesses and evidence so adduced, shall consider the whole matter and determine the same, and shall convict or make an order against the defendant or dismiss the complaint or information, as the case may be?
- (4) Did I err in adjourning the criminal matter sine die without discharging the defendants and at the same time imposing bail conditions upon them? Discussion Question (1) The magistrate dealt for some considerable time, in passages to which I have not referred, with a well-established presumption, when construing an offence created by statute that, in the absence of clear words to the contrary, it was to be taken that it was not intended that conduct outside the territorial jurisdiction of Hong Kong should be subject to trial in Hong Kong. I have not gone into any of the matters advanced in the Case Stated on this topic as, with respect, they had, as all counsel in these proceedings have accepted, no relevance to the arguments being presented at trial. The sole issue to be decided was whether the evidence established that the offence charged was committed in Hong Kong having regard to the wide interpretation given to the expression offers an advantage . As it has never been suggested by anyone that section 9(2) of the Ordinance has any application to conduct taking place outside the territorial jurisdiction of Hong Kong, the answer to the 1st Question posed is plainly as there was no error on the magistrate s part in so finding. Question (2) The answer to the 2nd Question raised in the Case Stated depends to a large extent on a proper understanding of the judgment given by the Court of Appeal in So Kam Tim [1997] 4 HKC 1 which Ms Lai submitted had been misunderstood by the magistrate. I do not propose to dwell upon the argument on this aspect as the Appellant s submissions clearly had merit. In So s case, the applicant faced 14 counts of offering an advantage to an agent, contrary to section 9(2)(a) of the Ordinance. In essence, the applicant was said to have agreed with the foreman of a company to pay a reward for obtaining subcontracting work. The charges

related to each of the payments pursuant to an agreement to pay an 8% kickback on the subcontracting work passed to the applicant's company. It was accepted in that case that there was no direct evidence as to the way the contracts came to be awarded by the principal contractor to the applicant's company or whether the foreman had influenced the principal contractor in awarding the subcontracts. On appeal, one of the grounds advanced on the applicant's behalf, which in due course failed, was that the foreman had to be proved to have actually caused the subcontracts to be awarded to the applicant's company. However, it was against that background that the Court of Appeal stated that the gravamen of a s. 9(2)(a) offence lies in the making of an offer to pay a corrupt reward, and the offence is committed once the offer is made. This phraseology was closely followed in the 2nd Question posed in these proceedings where the magistrate used similar words to support a line of argument advanced on behalf of the Respondents that the real offence had been completed outside the jurisdiction because the guilty intent of the offence was to be judged independently at the time of making the offer. Ms Lai's argument, which I consider, with respect, was plainly correct, was that the whole focus of the appeal in So's case was whether the foreman had to be proved to have caused the award of the subcontracts to the applicant's company and not whether, after the initial offer of kickbacks by the applicant to the foreman before the award of any subcontract, the subsequent payments by the applicant to the foreman as rewards for the subcontracts could be prosecuted. In any event, as Ms Lai submitted, when the convictions of the applicant in that case were upheld, the Court of Appeal had effectively endorsed the view that counts for the subsequent payments of money, pursuant to an existing agreement to pay kickbacks, were properly laid. As such, therefore, So's case actually provided authority for the point at issue, namely, that the later payment of bribe money, which an offeror had earlier agreed to give, could be made the subject of a charge of offering an advantage under section 9(2)(a) of the Ordinance. Finally, in this context, Ms Lai pointed out that despite the magistrate saying in paragraph 8(f) of the Case Stated (see: para. 5 above) that there was no evidence that the agreement terms had been varied, plainly they had been varied for the final payment to have been made in Hong Kong instead of the Mainland. One of the reasons that the magistrate seems to have allowed himself to find that the alleged bribery in the present case was outside Hong Kong's jurisdiction was, as it is expressed in the Case Stated: The 2nd Respondent further submitted that section 9(2) of the Prevention of Bribery Ordinance, Chapter 201 was not a result crime and the gist or the substantial activity of the offence was the offer but not the payment of advantage. The offer was made in China. (Case Stated para. 13) Again, I do not need to dwell upon this point although both Respondents placed some reliance on it. Ms Lai succinctly summarised the present state of the law in regard to where, in terms of location, an offence could be said to have been committed by reference to *R v Smith (Wallace Duncan)* (No. 4) [2004] QB 1418. In that case, the English Court of Appeal decided to follow the judgment in *R v Smith* (No. 1) [1996] 2 Cr App R 1 rather than *R v Manning* [1999] QB 980 having also considered the judgment in *R v Harden* [1963] 1 QB

8. Lord Woolf CJ at 1432E said: In *R v Smith* (No 1), as in *R v Manning*, the courts were concerned with the effect of the decision of this court in *R v Harden* [1963] 1 QB
8. *R v Harden* was a case involving the obtaining of cheques by false pretences where the cheques had been posted from Jersey. . On this approach obtaining offences can be described as result crimes ; that is crimes that are not complete until the specified result is achieved, and crimes where the location of the result determines the jurisdiction over the crime. This is also called the terminatory theory in some of the authorities. The judgment then devotes itself to what appears to have been the main issue examining whether on the facts the posting of the cheques was to be treated as their being received by the appellant. On this issue involving questions of agency the court came to the conclusion that as the parties to the transaction contemplated that the cheques should be sent by post the offences were complete at the time of posting the cheques. So there was no jurisdiction. From a jurisdictional point of view it is unsatisfactory for a question of jurisdiction to be determined by an artificial concept designed for resolving contractual disputes. Lord Woolf CJ went on (at 1433A) to deal with what he termed the Rose LJ approach saying that Rose LJ in *R v Smith* (No 1) had examined the correctness of the Court of Appeal s reasoning in *R v Harden* and, having done so, Rose LJ had concluded: that the gist of . obtaining property by false pretences lies in the act of obtaining was unimpeachable and clearly applies to the offence of obtaining by deception . this passage was criticised in argument but it can be explained in the context of the judgment as a whole as the acceptance by Rose LJ that while *R v Harden* establishes one basis of jurisdiction, as Lord Diplock had previously pointed out in *R v Treacy* [1971] AC 537, there is no reason in principle why the terminatory theory should have the effect of excluding the initiatory theory as an alternative ground of jurisdiction : see [1996] 2 Cr App R 1, 18B. Lord Woolf CJ went on to cite the following passage from *R v Smith* (No 1) (at 1433F): The reliance of international banking on ever developing and advancing communications technology has added new weapons to the armoury of fraudsters, especially those whose purpose it is to perpetrate fraud across national boundaries. If the issue of jurisdiction in cases of obtaining is to depend solely upon where the obtaining took place it is likely that the courts, and especially juries, will be confronted with complex and, at times, obscure factual issues which have no bearing on the merits of the case. This court must recognise the need to adapt its approach to the question of jurisdiction in the light of such changes. Shortly after this (at 1433H), Lord Woolf CJ repeated the reference made by Rose LJ to La Forest J s judgment in *Libman v The Queen* [1985] 21 DLR (4th) 174 at 221 which was cited in *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225. The passage reads: . The English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single situs of a crime by locating where the gist of the crime occurred or where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal law where a substantial measure of the activities constituting a crime take place in England, and restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be

dealt with by another country. [Emphasis added] All in all, following what was said in Smith (Wallace Duncan) (No. 4), it is clear that the Common Law has evolved and developed, in line with common sense and modern day reality, from the time when R v Harden (above) was decided along very narrow lines. It follows, therefore, that there will be jurisdiction to try a case in Hong Kong where a substantial measure of the activities constituting a crime have taken place within Hong Kong even if other activities connected with that same crime have occurred beyond the borders of its jurisdiction. In the present case, the magistrate was satisfied that a series of events, culminating most significantly in the payment of the sum of money itemised in the charge, had taken place in Hong Kong. In my opinion, this amply demonstrated that substantial activity had taken place within the jurisdiction. Accordingly, it is my view that the magistrate erred when finding that the offence fell outside Hong Kong's jurisdiction and I would answer to the 2nd Question posed. 3rd Question At the adjourned hearing on 10 February 2010, the magistrate referred to Secretary for Justice v Yau Yuk Lung [2007] 10 HKCFAR 335 which provides a specific procedure in cases of constitutional importance for an appeal by way of Case Stated before a final determination is made by a magistrate. In the present case, once the magistrate had announced his conclusion that this offence had been committed outside the jurisdiction of Hong Kong, the prosecution indicated that they would appeal by way of Case Stated and the matter was then adjourned sine die. The Respondents in these proceedings, although not apparently in the court below, submitted that the magistrate ought to have followed the procedure laid down in section 19(2) of the Magistrates Ordinance, Cap. 227, namely: . having heard what each party has to say and the witnesses and evidence so adduced, shall consider the whole matter and determine the same, and shall convict or make an order against the defendant or dismiss the complaint or information, as the case may be. If the magistrate had followed the normal procedure, he would clearly have acquitted having found that he had no jurisdiction over the case and it would then, and only then it was submitted, have been appropriate for the Appellant to have invited the magistrate to state a case. Ms Lai, on the other hand, submitted that the course adopted by the magistrate was appropriate because, like issues concerning the unconstitutionality of a statutory provision, a finding that the Hong Kong courts had no jurisdiction to deal with a particular charge was a matter of the gravest importance calling for examination by a higher court. In Yau's case, the respondent was charged with an offence contrary to section 118F(1) which criminalised homosexual buggery otherwise than in private. The Respondent challenged the constitutionality of this provision and the magistrate who, as it happens, was the same magistrate who tried the present case, dismissed the charge on this ground. When giving judgment in the Court of Final Appeal in that matter, Ribeiro PJ, with whom the other members of the court agreed, said (at p. 361-2, paras 70-71):

70. In my view, where the prosecution wishes to question a determination of unconstitutionality, the magistrate should generally, before proceeding to consider possible amendment as prescribed by s. 27, accede to an application to state a case pursuant to s. 105 of the Ordinance in respect of that determination, adjourning the proceedings pending the outcome of such appeal. [The terms of section 105 of the Magistrates Ordinance were then set out (see para. 3 above)].
71. Adoption of this procedure enables the question of constitutionality to be examined at the highest levels of court while preserving the position in the magistrates court. If the magistrate's decision is overturned, the appellate tribunal may remit the case for trial de novo on the original charge before another magistrate. And if the magistrate's ruling is affirmed, the appellate court may either remit the matter to the trial magistrate to consider possible amendment or it may itself effect an amendment pursuant to s. 27 and then remit the matter for trial de novo on the substituted charge. The situation in the present case was very different to the circumstances in Yau's case where the magistrate had heard only legal argument on the issue of constitutionality. This argument, of course, had general application to every offence brought under section 118F(1) of the Crimes Ordinance. In the present case, by contrast, the question of jurisdiction was a matter of mixed law and fact which was case specific. The case had to be decided entirely on its own facts and these facts had no general application to other cases. Accordingly, I am unable to agree with the Appellant that the answer to the 3rd Question should be in the negative. In my opinion, the magistrate did err by inviting the prosecution to appeal before complying with section 19(2) of the Magistrates Ordinance. In these circumstances, I would answer to the 3rd Question posed in the Case Stated. 4th Question The answer to the 4th Question flows from the answer given to the 3rd Question as Ms Lai accepted. If it was wrong to have ended the proceedings before a verdict had been given, it follows that it was also wrong of the magistrate to have adjourned the criminal matter sine die without discharging the defendants and at the same time [to have imposed] bail conditions upon them. If the proper procedure had been adopted, the Respondents would have been acquitted, following the magistrate's eventual ruling on jurisdiction and, pending the undoubted application by the prosecution for the magistrate to state a case which would have followed, the matter should have progressed from there. Accordingly, my answer to the 4th Question must be .

Conclusion

For the reasons I have given, and in the circumstances which had arisen, this was not a proper case in which to appeal by way of Case Stated and accordingly the appeal must be dismissed. However, although what has occurred is unfortunate, it has in the end resulted in no more waste of time and money than it would have done if the correct procedure had been followed by the magistrate. This is because a verdict of not guilty for the reasons given by the magistrate would inevitably have resulted in a prosecution appeal by way of case stated. In normal circumstances, it would have been a simple matter to remit the case to the magistrate for him to complete the trial. However, the magistrate recently retired. Mr Ma and Mr Shaw, for the Respondents, invited

me to consider making arrangements for the magistrate to continue with the case, sitting as a deputy magistrate. I had, at first, believed that this might be impracticable but further enquiries have revealed that this can, and will, be arranged. In these circumstances, having replied to the questions posed by the magistrate, I shall now remit the matter to him so that this trial can be brought to a conclusion. (M Stuart-Moore) Deputy High Court Judge Ms Louisa Lai, Ag. DDPP and Mr Beney Wong, Senior Public Prosecutor of the Department of Justice, for the Appellant Mr Henry Ma, instructed by Messrs Y.L. Yeung & Co., for the 1st Respondent Mr Gibson Shaw, instructed by Messrs Edward Lau, Wong & Lou, for the 2nd 1udk 1udk [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%'#q x}r :TZaG I u3 L+M2 e\O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)` # R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> e\$,s ,wC= GEKD ,wC= iLDZ%\ setup hcma.dot setup Microsoft Office Word Judiciary Hong Kong Title Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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