

HONG KONG / JUDGMENT

HKSAR v. CHIM PUI CHUNG

COURT

Court of Appeal

DECIDED

24 December 1998

CASE / FILE NUMBER

CACC402/1998

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bjbj IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL 1998, No. 402 (Criminal) hksar v chim pui-chung

Mortimer V-P, Leong and Rogers JJA in Court 24 December 1998

J U D G M E N T

Mortimer V-P (giving the judgment of the Court) : This is an application under s.32(2) of the Hong Kong Court of Final Appeal Ordinance for a certificate that points of law of great and general importance are involved in the decision of this Court. But before dealing with those questions, there are two preliminary matters to which we must advert. Ought the Court as constituted hear this application? First, the solicitors for the applicant wrote to the Court on 22 December, when it was known who was sitting, as follows: We were informed by our counsel that there was evidence at the trial of our client that he had appeared before The Hon Mr Justice Rogers (as he then was) in connection with a petition for winding up of a company known as Mandarin Resources Corporation, the subject matter of Counts 1, 2, and 3 of the criminal trial of Mr Chim and that he had made an admission before the learned judge and that the same admission had been relied upon by the Prosecution and laid before the jury of his criminal trial. In this connection, we wonder if another Justice of Appeal could be available to replace Mr Justice Rogers, JA. We raised this matter with counsel at the commencement of the hearing because there was no good reason that we could see why Rogers JA should not sit. Mr Mullick who appears for the applicant made it clear that there was no objection to Rogers JA. So the Court has remained constituted as it was originally. No doubt this matter was raised because of the events in the Pinochet case in London with which fortunately we are not concerned. The practice directions The second matter is that when the judgment of the Court in this case was delivered on 8 December, no application for a certificate was made on the applicant's behalf immediately after the judgment was given. The practice directions of the Chief Justice make it quite clear that applications for a certificate to the

Court of Appeal that the decision involves a point of law, great and general importance, should be made immediately after the judgment is given from which the appeal is to be brought. There are extremely good reasons for this because there are time limits for an application for leave under s.32(2) of the Ordinance. It is necessary to make the application for leave to the Court of Final Appeal within 28 days and the application for certificate has to be made to this Court earlier. When the application for a certificate is made immediately after the judgment, this Court will then give directions as to when the Court will hear the application. In those circumstances it will nearly always be possible for the Court as constituted to hear the application for a certificate. As this application was not made timeously, it was impossible to reconstitute the same Court. That involved first an unnecessary delay, and secondly involved two members of the Court having to have time to read themselves into the case. I mention these matters so that it may be brought to the attention of those representing applicants of the importance of making applications in accordance with the practice direction. It is no excuse that a written copy of the judgment is not in the hands of solicitors and counsel because they hear the judgment, which in criminal cases is always given in open court, and they are aware of the important points of law which have been raised in the appeal. Of course, it may be necessary to give counsel time to consider the questions once the application is made immediately after the end of the judgment. We turn now to the instant application. The application Two questions are posed as points of law of great and general importance, upon which we are urged to give a certificate. The first is this. It is in two parts:

- (a) is there a duty on the prosecution (arising from either the accused' right to a fair trial under Article 10 of the Hong Kong Bill of Rights, Cap. 383, (HKBR) or Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR) and/or from the various rights of an accused under Article 11(2) HKBR or Article 14.3 ICCPR and/or otherwise) to identify the evidence upon which such an allegation is made, or otherwise to explain or put the basis of its case thereon with proper particularity, in its opening address to the jury, in its cross-examination of the accused and in its closing address to the jury?
- (b) if the answer to (a) is , and if the prosecution fails to fulfil that duty, should the trial judge withdraw the issue of conspiracy with persons unknown from the jury? This question relates to a fair trial. It is one of degree because it is suggested that the allegation should be put in various ways with proper particularity . But was this a question which was decided in the judgment of the Court? The question whether there was sufficient particularity in relation to persons unknown in the indictment was raised on appeal. It was suggested that at various stages of the trial, it was not sufficiently particularised by the prosecution in opening; at the time when an application was made of no case; in the cross-examination; and in the prosecution s final address. All those matters were considered in the detailed judgment of this Court. Perhaps it is sufficient to say that at the conclusion this Court decided that on each of those occasions, the case was made with sufficient and proper particularity so that the applicant had a fair trial. It was summarised in this paragraph although it does not deal with the point precisely as some other paragraphs do: We are satisfied that the jury could have been under no misapprehension either legally or factually as to the correct approach that they should adopt towards count 6. We therefore concluded that no valid criticism of

any kind has been established on this ground and it must fail. All the matters that were raised by counsel on this point were dealt with and there was in the judgment no decision that proper particularity was not required and certainly no decision of the Court that a conviction could stand if there had been an unfair trial in that regard. With the greatest respect, no point of law of great and general importance is involved in the decision of the Court in this respect. We turn now to the second question which is: Does not the intent, required to prove the offence of making or conspiring to make a false instrument, contrary to Section 71 of the Crimes Ordinance, Cap.200, necessarily include the element of contemplation; that the maker or another should use the false instrument so as to induce a recipient of the same to accept it as genuine? This question also arises out of a point raised at the trial. It was suggested that the judge's directions to the jury on intent on count 6 were insufficient. This Court dealt with the matter in its judgment at p.22: Mr Griffiths does not suggest that standing on its own, this direction is other than impeccable, but contends that the defence advanced by the applicant required a further direction. The basis for the argument is that the necessary intent in forgery under s71 of the Crimes Ordinance (Cap. 200) is, as it was explained by P. Chan J (as he then was) in *R v Chiu Sin-wai* [1996]3 HKC 535. Therefore, he submits that the necessary intent is that the accused intended that he or another person: Should use the false instrument; That it was within his contemplation that he or another person would use it so as to induce a recipient to accept it as genuine; and Thereby cause the recipient to do something to the recipient's prejudice. With respect, however, the introduction of the concept of what was within the accused's contemplation is unnecessary. On the necessary intent, the words of the Ordinance are clear. The section reads as follows:

71. A person who makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice, commits the offence of forgery and is liable on conviction on indictment to imprisonment for 14 years. Same words appear in s1 of the Forgery and Counterfeiting Act 1981 in England and in *R v Campbell* (1985) 80 CrAppRep 47 at 48 Ackner LJ (as he then was) summarised the necessary intention as follows: It is common ground that the intention which the statute requires contains two ingredients. One is the intention that the false instrument shall be used to induce somebody to accept it as genuine and the other is the intention to induce somebody by reason of accepting it to do or not to do some act to his own or any other person's prejudice. It is submitted that the Court in deciding that it was not necessary to direct the jury as to what was within the applicant's contemplation is a point of great and general importance. In support, Mr Mullick refers to and adopts two passages in Archbold 1998 edition at paragraph 17-34 (c) and (d) which refer to the probability of results:

- (c) The probability of the result is an important matter for the jury to consider and can be critical in their determining whether the result was intended,. It will only be necessary to direct the jury by reference to foresight of consequences if the judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some further explanation is necessary to avoid misunderstanding.
- (d) Where such direction is given, probability of a consequence is a factor of sufficient importance to be drawn specifically to the jury s attention and explained. It is necessary to explain that the greater the probability of a consequence the more likely it was that it was foreseen and that if it was foreseen the greater the probability that it was also intended. Mr Mullick submits, therefore, that because the applicant said in his evidence that it never crossed his mind that various people would accept forged documents as genuine and act to their prejudice, the judge ought to have directed the jury that it was necessary for the prosecution to establish that it was within the applicant s contemplation that someone would act to his prejudice. The question again arises as to whether this Court made a contrary decision on the law. In the same passage in Archbold at (a) the learned author said: When a judge is directing a jury upon the mental element necessary in a crime of specific intent (such as murder), he should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury s good sense to decide whether the accused acted with the necessary intent. References in a summing-up to what is in an accused s contemplation, or what he foresees, are matters for the jury s consideration in some cases. These matters may or may not lead them to conclude whether intent has been proved but such references may be unnecessary. The conclusion is that we can find no point of law great and general importance involved in our decision in the second question posed. In those circumstance, we decline to certify either of the points raised. (Barry Mortimer) Vice President (Arthur Leong) Justice of Appeal (Anthony Rogers) Justice of Appeal Mr John Mullick and Mr Richard Wong (M/s Dixon Tang & Co) for Applicant Mr Michael Lunn SC and Ms Catherine Fung, Atg SADPP (DPP) for Respondent PAGE PAGE &`#\$ &`#\$ &P1\$ b xa b xa IN THE HIGH COURT OF THE Erica FY Wong Normal Microsoft Word 8.0 IN THE HIGH COURT OF THE Title _PID_GUID Microsoft Word Document MSWordDoc Word.Document.8

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