

HONG KONG / JUDGMENT

HKSAR v. F.S.L.

[2026] HKCFA 13**COURT**

Court of Final Appeal

DECIDED

14 April 2026

BEFOREChief Justice Cheung, Mr Justice Ribeiro PJ,
Mr Justice Fok PJ, Mr Justice Lam PJ and
Lord Hoffmann NPJ**CASE / FILE NUMBER**

FACC5/2025

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FACC No. 5 of 2025

[2026] HKCFA 13**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO. 5 OF 2025 (CRIMINAL)
(ON APPEAL FROM CACC NO. 174 OF 2022)****BETWEEN****HKSAR****Appellant****and****F.S.L.****Respondent****Before:**Chief Justice Cheung, Mr Justice Ribeiro PJ,
Mr Justice Fok PJ, Mr Justice Lam PJ and
Lord Hoffmann NPJ**Date of Hearing:**

13 March 2026

Date of Judgment:

14 April 2026

JUDGMENT

Chief Justice Cheung:

I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Ribeiro PJ:

I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Fok PJ:

A.

Introduction

This appeal arises out of the respondent's convictions for offences under s.146 of the Crimes Ordinance (Cap.200). It involves a question of law regarding the mental element of the offence of gross indecency towards a child under 16 on which, as a result of the decision of the Court of Appeal in this case, there are now diverging views between two decisions of that court. The appeal also affords the opportunity for this Court to consider issues concerning the nature and scope of the offence under s.146.

The respondent (defendant at trial) had appealed to the Court of Appeal against his convictions in the Court of First Instance on grounds that included the contention that the judge misdirected the jury in instructing them that an intention to derive sexual gratification was relevant to determining whether the acts engaged in amounted to gross indecency but that it was not necessary for the prosecution to prove that the respondent intended to derive such gratification in order for them to convict.

The Court of Appeal agreed with the respondent and held that there was a material misdirection of the jury as contended. However, on the evidence, the Court of Appeal was satisfied that there was ample material on which a reasonable jury properly directed would inevitably have found that the respondent did intend to derive sexual gratification from the acts he had committed and incited, so that it was appropriate to apply the proviso in s.83(1) of the Criminal Procedure Ordinance (Cap.221) and to dismiss the appeal.

The appeal to this Court is brought by the prosecution who contend that the Court of Appeal erred in requiring, as an element of the offence, an intention to derive sexual gratification.

B.

The background and proceedings below

The respondent, a former police officer, was convicted after trial before Alex Lee J sitting with a jury of two counts of committing an act of gross indecency towards a child under the age of 16 (Counts 1 and 4) and two counts of inciting a child under the age of 16 to commit an act of gross indecency towards him (Counts 2 and 5). He was sentenced to a total of 4 years' imprisonment in respect of the four counts on which he was convicted, which he has now fully served.

The facts, in summary, were that on a date in 2016, while at home alone with his then 10-year-old son ("X"), who has autistic spectrum disorder, the respondent played an explicit pornographic video on the television for him and X to watch together and, while watching the video, the respondent exposed himself and masturbated in front of X (Count 1). On the same occasion, the respondent asked X if he would also do it, in response to which X removed his trousers and masturbated in front of the respondent (Count 2).

On a subsequent date in 2018, the respondent similarly made X watch pornographic videos when they were alone together at home. The respondent masturbated in front of X (Count 4). He also asked X to masturbate in front of him and, when X showed reluctance to do so, the respondent threatened X with a rattan cane, forcing X to comply with his request and to masturbate in front of him (Count 5).

The respondent did not testify at trial or call any witnesses. His defence was simply that the events in question did not happen. By their verdicts (by a majority of 7 to 2) on the charges on which he was convicted, the jury evidently did not accept that defence.

The trial judge directed the jury in the following terms on the question of an intention to derive sexual gratification from the alleged acts of gross indecency:

"... As far as this case is concerned, with respect to the acts of gross indecency alleged in Counts 1 [and] 4 ..., the prosecution allege that the defendant, while playing pornographic movies for his son, X to watch, exposed his genitals to X and masturbated in X's presence so that X could see it. In considering whether the above acts constitute 'gross indecency', you may take into account the following factors: first, the father-son relationship between the defendant and X; second, X's age at the time; third, whether X consented; and fourth, whether the defendant intended to derive sexual gratification from his acts.

However, with respect to the third and fourth factors – that is, whether X consented and whether the defendant intended to derive sexual gratification from his acts – these are not matters that the prosecution must prove. They are merely factors you may consider in determining whether the defendant's acts constitute 'gross indecency'. Therefore, even if the defendant acted with X's consent, or if the defendant did not derive or intend to derive sexual gratification from his acts, that does not constitute a defence. Ultimately, having taken into account all the circumstances in which these incidents occurred, you must ask yourselves: given today's customs and moral standards, would the defendant's acts be considered grossly indecent by a right-minded member of the public? That is the ultimate question."

In so directing the jury, the trial judge's approach was consistent with the earlier Court of Appeal decision in *The Queen v Jeffrey Savage* which held that sexual gratification was not an essential element of indecency.

The Court of Appeal in the present case held that *The Queen v Jeffrey Savage* (supra) was distinguishable and that, since the defendant in that case had been unrepresented on appeal, the decision was of limited scope and did not constitute a definition of the s.146 offence. Instead, relying on various UK, Australian and New Zealand cases, the Court of Appeal concluded that indecent conduct:

"... must be done with the purpose of obtaining sexual gratification. This is not only the most reasonable interpretation of the existing cases but also consistent with the principle that the scope of criminal liability should not be expanded arbitrarily in the absence of express statutory provisions. As for 'inciting indecency', this court's analysis remains the same as before. That is, since the purpose required for 'indecent conduct' cannot be distinguished based on whether there was physical contact, the purpose required for 'inciting indecency' should naturally not differ from that of 'indecent conduct'."

The Court of Appeal went on to conclude that the trial judge's directions (set out above) were incorrect and that his failure to direct the jury that the offence of inciting indecency required an intent to obtain sexual gratification was also a material misdirection.

However, as already noted, the Court of Appeal concluded that, on the evidence, even if directed that they must be satisfied the defendant intended to obtain sexual gratification from his acts and the acts he incited, the jury would inevitably have convicted on the charges in question and so, applying the proviso, dismissed the appeal.

C.

Leave to appeal

On the prosecution's application, the Court of Appeal certified that a question of law of great and general importance was involved in its decision. On the prosecution's further application to the Appeal Committee for leave to appeal to this Court, the Appeal Committee refined that question of law and granted leave to appeal in respect of it, namely:

"Is sexual gratification on the part of the offender an essential element of the offence of indecent conduct with or towards a child under the age of 16 under section 146 of the Crimes Ordinance, Cap. 200?"

D.

Appeal not academic

A preliminary point that was raised by the Appeal Committee when considering the application for leave to appeal to this Court concerned the interest of the parties in the proposed appeal. Given that there was no challenge to the Court of Appeal's application of the proviso, and the fact that the respondent has fully served his sentence of imprisonment, the outcome of the prosecution's appeal will be of no consequence so far as the respondent's convictions are concerned.

The Court of Final Appeal's jurisdiction is statutory and governed by the provisions of the Hong Kong Court of Final Appeal Ordinance (Cap. 484). There is no express procedure in that ordinance for an appeal by the prosecution akin to a reference to the Court of Appeal on a question of law or an appeal by way of case stated. However, in its criminal jurisdiction, the Court's primary role is to resolve real controversy on points of law of great and general importance and an appeal from a final decision of the Court of Appeal lies at the instance of "any party to the proceedings".

The result of the CA Judgment is that there is now a divergence between the views of the Court of Appeal in *The Queen v Jeffrey Savage* (supra) and of the Court of Appeal in this case regarding the mental element of the offence of gross indecency towards a child under 16. That divergence clearly provides a substantive interest on the part of the prosecution to seek this Court's views to clarify the law on this question, the importance of which is supported by the Appeal Committee's grant of leave to appeal. Moreover, Ms Priscilia Lam SC, who represents the respondent, is instructed to appear by the Director of Legal Aid in this Court and has fully argued the point of law involved in this appeal before us, as indeed she did in the Court of Appeal.

In these circumstances, there is no question of the appeal being academic or of there not being a proper interest on the part of the parties to the appeal.

E.

Crimes Ordinance (Cap.200), s.146

The section in question provides as follows:

"146.

Indecent conduct towards child under 16

Subject to subsection (3), a person who commits an act of gross indecency with or towards a child under the age of 16, or who incites a child under the age of 16 to commit such an act with or towards him or her or another, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

It shall not be a defence to a charge under this section to prove that the child consented to the act of gross indecency.

(3)

A person who commits an act of gross indecency with or towards a child or who incites a child to commit such an act with or towards him or her is not guilty of an offence under this section if that person is, or believes on reasonable grounds that he or she is, married to the child.”

The section was added to the Crimes Ordinance in 1978 and is modelled on s.1(1) of the Indecency with Children Act 1960, which was introduced on the recommendation of the Criminal Law Reform Commission to fill what was perceived to be a gap in the law. That gap was constituted by the conclusion that, where an adult, without any show or threat of force, invited a child to touch him indecently, there was no indecent assault by the adult on the child.

It is self-evidently the case that the statutory purpose of s.146 is the protection of children under the age of 16 from acts of gross indecency. This statutory purpose is underscored by the fact that consent to the act of gross indecency is no defence to a charge under the section (s.146(2)). The interpretation of the wording of the s.146 offence must, in keeping with the approach to statutory construction generally applied in Hong Kong, be undertaken in the light of that statutory purpose.

E.1

The actus reus elements of s.146

The acts constituting the actus reus elements of the offence under s.146(1) are divided into (1) acts of commission and (2) acts of incitement, so that:

A person [D] is guilty on the commission limb if [D] commits an act of gross indecency with or towards a child under the age of 16; and

A person [D] is guilty on the incitement limb if [D] incites a child under the age of 16 to commit an act of gross indecency with or towards [D] or another. The incitement basis, being an inchoate offence, is made out even if the child under 16 does not actually commit the act of gross indecency incited.

The act committed or incited must be one of gross indecency. What constitutes an act of gross indecency is a question of fact adopting the test of whether it is an act that would be considered grossly indecent by right-minded members of the public applying contemporary customs and moral standards. In this regard, the test of whether an act is one of gross indecency is similar to, and based on, that for indecent assault: see *The Queen v Jeffrey Savage* (supra) and *HKSAR v Choi Wai Lun*.

In *R v Court*, Lord Ackner distinguished three types of assaults. First, there may be assaults that are incapable of being regarded as indecent. Secondly, there may be assaults that are inherently indecent. Thirdly, there may be assaults that are ambiguous and that may or may not be capable of being indecent. Lord Ackner gave as an example of the first type of act the removal of a shoe from a girl's foot. An example of an inherently indecent assault is the removal of a woman's

clothing against her will. Finally, the facts in *R v Court* (supra), namely spanking a girl on the buttocks, provide an example of the type of act that may or may not be indecent, since spanking may be administered as a form of punishment without it being thought indecent.

The jury's acceptance in the present case that the nature of the acts committed and incited were acts of gross indecency is not challenged in this appeal. This is undoubtedly correct, since the act of masturbation (other than for medical reasons) is one of a kind which is inherently grossly indecent.

When the offence is one of commission, the act of gross indecency committed must be one which is done "with or towards" a child under 16. Similarly, in the case of the incitement offence, the act of gross indecency incited must be one which is done or to be done "with or towards" the defendant or another person.

The interpretation of the phrase "with or towards" has given rise to a divergence of judicial opinion in jurisdictions overseas. The question that arises is whether, since they are separate and distinct words, "with" and "towards" prescribe two mutually exclusive and separate offences or whether they simply describe one offence of either committing, or inciting, an act of gross indecency involving a child under 16.

E.2

Do "with" and "towards" constitute separate offences?

As noted, there are differing views as to whether the words "with" and "towards" have separate meanings such that they create two different offences under each limb of s.146, thereby creating four separate offences under the section, two under the commission limb and two under the incitement limb.

The view that the words do not create separate offences was expressed in *DPP v Burgess*, where Lord Parker CJ said:

"In my judgment there are not two offences of gross indecency in section 1 (1) of the Indecency with Children Act, 1960, but one, namely, the committing of an act of gross indecency involving a child, that is to say, one reads 'with or towards a child' as a phrase 'with or towards'; that as it seems to me is the natural meaning because it is impossible in any particular case to say quite definitely: this is a case of gross indecency with, and not a case of gross indecency towards or vice versa. Indeed the case to which this court has been referred of Reg. v. Hall [1964] 1 Q.B. 273, though dealing with a very different situation, really supports this view because it was there held that the word 'with' in this connection does not mean 'with the consent of,' but has a looser meaning of 'against or directed towards.' In other words, as it seems to me, the words 'or towards' may be said to be explaining the word 'with.' That this is the true view is, I think, put beyond all doubt by section 1 (1) itself, because when one gets to the alternative offence of incitement, the incitement is 'who incites a child under that age to such an act with him.' If 'towards him' was a separate offence, one would expect in the case of incitement to have the incitement operating not only in the case of an act with, but in the case of an act towards."

The above passage was cited by Lord Lane CJ with approval in *R v Francis* (discussed further below in the context of the mental element of the offence under s.146). The prosecution in the present case also point to this approach having been adopted in Northern Ireland and also, it is submitted, in New Zealand.

A contrary view has emerged in a number of cases in Australia. In New South Wales, the question of whether an information framed in terms of “with or towards” under s.61N(1) of the Crimes Act 1900 (NSW) (which is in materially the same terms as s.146), was duplicitous was considered in *R v Orsos*. By a majority, the Court of Criminal Appeal concluded that the section created two offences rather than one. Grove J held:

“... I consider that there is a distinction between ‘with’ and ‘towards’. To commit an act of indecency ‘with’ a person involves two participants whereas logically and grammatically one person may commit an act of indecency ‘towards’ another. It is not necessary in this case to define the limits of activity which might be comprehended by the expressions as the question raised is only concerned with whether there is a distinction between them.”

The section therefore in my view establishes different offences and to charge them in a single count would render the count bad for duplicity.”

In *Crampton v The Queen*, the High Court of Australia concluded, applying the majority view in *R v Orsos* (supra) and approving the proposition that the distinction between the words “with” and “towards” in s.61N of the Crimes Act 1900 (NSW) is a real one, that the offence of committing an act of indecency “with” another requires the participation of that other.

More recently, in *Director of Public Prosecutions (NSW) v Presnell*, the Court of Criminal Appeal of New South Wales concluded, also by a majority, applying cases including *Crampton v The Queen* (supra), *R v Orsos* (supra) and *R v Chonka* (supra), that the offence of carrying out a sexual act “with or towards” a child creates two separate offences.

It should be noted, though, that in the leading majority opinion in *Director of Public Prosecutions (NSW) v Presnell* (supra), Dhanji J expressed his conclusion in somewhat qualified terms, as follows:

“Absent the history of the provision, and the context provided by the earlier decisions of this court, the English decisions and the High Court’s decision in Crampton v The Queen, there is a strong argument that the expression ‘with or towards’ as used in s 66DC of the Act creates a single offence. However, nothing in the introduction of s 66DC suggests any intention that the words ‘with or towards’ should take on any different meaning to that which they had previously been given. Having regard to the relatively long history of those words, there is a strong presumption that Parliament did not intend to change their meaning ...”.

It is not strictly necessary to resolve the difference of opinion on this matter since the question of whether s.146 creates two or four offences was not raised in the appeal to the Court of Appeal or considered by that court. Nor does the question have any material bearing on the appeal to this Court. In practical terms, the only real relevance might be whether a charge of committing an act

of gross indecency “with or towards” a child under 16 offended the rule against duplicity. Here, however, the indictment in the present case charged the respondent with the offence of committing an act of gross indecency only “towards” (and not additionally “with”) X (the child) and of inciting the commission of an act of gross indecency only “towards” (and not additionally “with”) him (the respondent). So there is no question of any of the charges being duplicitous whichever view is taken on this issue.

However, as the point has been fully argued in this appeal it is appropriate to express a view on it.

In my view, although the words “with” and “towards” are different, they are both, in the context of s.146, merely prepositions describing different ways in which a child might be exposed to, and thereby harmed, by an act of gross indecency. The two different words merely indicate that a degree of connection must exist between the child and the defendant or another person in respect of an act of gross indecency. It follows that the two words do not create different offences and that there remain only two forms of offending in s.146, namely the commission limb and the incitement limb. The commission limb may be done by a defendant with or towards a child and the incitement limb may be done by incitement of a child to do an act with or towards the defendant or another person.

This conclusion is unaffected, in my judgment, by the fact that in Hong Kong the incitement limb of s.146 was enacted with the words “with or towards” included, so that the additional reason given by Lord Parker CJ in *DPP v Burgess* (supra) is not applicable. I do not think that the difference in the structure of s.146 compared to s.1(1) of the Indecency with Children Act 1960 is a sufficient reason to reject Lord Parker CJ’s principal conclusion that there is only one offence of committing an act of gross indecency involving a child (and, by extension, only one offence of inciting a child to commit an act of gross indecency involving the defendant or another).

That there is no material difference, in this context, between the two concepts of indecency “with” and indecency “towards” another is illustrated by the situation encountered in *Fairclough v Whipp*. In circumstances in which a defendant did not commit an assault upon a child because he did not touch the child but instead incited the child to touch him, the child’s touching of the defendant could, as a matter of ordinary language, constitute the defendant’s commission of an act of gross indecency both “with” and “towards” the child. Whilst it may be more natural to describe a particular activity as being done with another person rather than towards, or vice versa, it does not follow that they are entirely distinct acts for the purposes of s.146.

There is, in my view, force in the view expressed in *Hulme J*’s dissenting opinion in *R v Orsos* (supra), where he said:

“The introduction of s 76A [a precursor of s.61N] in terms so similar to those in the English Indecency with Children Act after the operation of those terms had been defined in Burgess provides a strong argument for adopting the same interpretation. Furthermore, it is to my mind clear that the mischief against which the provision is directed is indecency involving children. On the question of the mischief it seems to me utterly irrelevant whether the indecency is with them in the sense that there is some active participation by them or towards them in that their presence gives the offender some added

stimulation. The statutory provision is directed to protecting children from acts of indecency.

This was the first point made by Lord Parker in Burgess. But I also agree with his Lordship that in many cases involving young children it will be impossible to know whether the child involved was participating or not. In circumstances where this does not seem to me to matter, there is advantage in regarding the section as creating but one offence. To do so will further the policy I see behind the provision.”

In my judgment, therefore, and with respect, I would decline to follow the Australian cases referred to above on this point. I consider that the distinction drawn by those courts that committing an act of indecency with another involves two participants, whereas one person may commit such an act towards another, is somewhat artificial since there is no compelling reason why, as a matter of ordinary language, one person on his own cannot commit an act of gross indecency together with another.

The only practical consequence of a contrary conclusion would be a risk that a prosecution might offend the rule against duplicity. That is a rule which “originated in a time of high technicality” and should be applied having regard to its purpose of serving the needs of fairness to the community and to the accused. It certainly does not provide any reason for construing the words “with” or “towards” as creating separate offences.

There was some argument directed to whether the offence under s.146 could be committed where the child is oblivious to the act of gross indecency, for example because the child was asleep or due to some mental condition or otherwise was unaware of the adult’s presence or actions. Director of Public Prosecutions (NSW) v Presnell (supra), where the child in question was oblivious to the sexual act because he was playing on his phone and the defendant’s act was hidden from him, is an example of such a situation. Ms Human Lam SADPP (Ag.), for the prosecution, contended that it could because the statutory purpose of s.146 is to protect children from objectively grossly indecent acts. Ms Priscilia Lam SC, for the respondent, contended that it could not because, whatever the number of offences created by s.146, there would be no involvement of the child in such circumstances.

Plainly, an act done by a defendant unaware that he was being observed by a child when committing an act of gross indecency, for example when being watched without his knowledge when doing an act in the privacy of his own home, would not be committing an act either “with” or “towards” the child. That is not this case and whether an act done with or towards a sleeping child, who might wake up, or a child otherwise unaware of the act of gross indecency due to some disability is within the ambit of s.146 as involving the child is not a question before the Court and its consideration should, in my view, await an appropriate case where the issue arises on the facts.

E.3

The mental element of s.146

I now turn to the principal issue raised in this appeal, concerning the mental element of the offence under s.146.

The wording of s.146 is silent as to the mental state of the defendant that is required to be proved before guilt of the offence is established. In these circumstances, it is appropriate to apply the generally accepted starting point of construing s.146 “adopting the presumption that it is incumbent on the prosecution to prove mens rea in relation to each element of the offence”.

So approaching the construction of s.146, it is clear that the prosecution must prove that the defendant intended to commit or to incite the act of gross indecency charged. The offence is not constituted by acts of gross indecency that take place involving a child under 16 which are not intended. So, for example, a man masturbating in private but visible to a child under 16 who is, unbeknownst to the man, observing him in the act does not have the mental state necessary to establish guilt of the offence. It would need to be proved that the man intended to commit the act “with or towards” the child, which would at least require proof that the man knew the child was present and could see him masturbating.

But the question raised in this appeal is whether the prosecution need to go further and prove that a defendant intended to commit or to incite the act of gross indecency in question with the additional intention that he or she obtain sexual gratification from the act. Ms Priscilia Lam SC maintains her contention, which prevailed in the Court of Appeal, that it does.

In my view, there are cogent reasons for answering the question raised in the negative.

There is nothing in the wording of s.146 to suggest this additional mens rea requirement. Sexual gratification is not mentioned in the section and so, if it is to be found, it must be implied into the section. However, given the statutory purpose of the section to protect children under 16 from acts of gross indecency, to add a requirement of intention to derive sexual gratification from the act in question would be inconsistent with and frustrate that statutory purpose. Such protection is equally necessary whether a defendant is motivated to commit an act of gross indecency towards a child out of spite or anger, or intending to humiliate the child or, perhaps, a parent of the child.

Motive, such as an intention to derive sexual gratification, might be relevant where there is a question as to whether an assault or act is indecent. The equivocal act of spanking, in *R v Court* (supra), was the reason that evidence of the defendant’s statement that he had a buttock fetish was relevant and admissible on the charge to determine the question of whether he intended to commit an indecent assault on the victim. But an assault may be indecent, and similarly an act grossly indecent, regardless of whether a sexual motive is present. As Lord Griffiths said in his speech in *R v Court* (supra):

“There is a distinction to be drawn in criminal law between motive and intent although it will very rarely be necessary to enter upon a discussion of this distinction with a jury and any unnecessary attempt to do so is likely to cause confusion and do more harm than good. But to illustrate what I mean in the context of indecent assault, the necessary intent is to commit an assault which the jury as right-thinking people consider to be sexually indecent. The motive for such an act will usually be to obtain

sexual gratification but it need not necessarily be so. A man might strip a woman in public with the motive of obtaining sexual gratification or, alternatively, with the motive of revenge to humiliate her; but whichever his motive he would undoubtedly be guilty of indecent assault because his intentional stripping of her clothing is an indecent affront to her sexual modesty. Motive generally throws light on intention and is therefore generally admissible to prove intention."

Lord Ackner also alluded to the irrelevance of motive where an assault was inherently indecent. He said:

"The assault which the prosecution seek to establish may be of a kind which is inherently indecent. The defendant removes against her will, a woman's clothing. Such a case, to my mind, raises no problem. Those very facts, devoid of any explanation, would give rise to the irresistible inference that the defendant intended to assault his victim in a manner which right-minded persons would clearly think was indecent. Whether he did so for his own personal sexual gratification or because, being a misogynist or for some other reason, he wished to embarrass or humiliate his victim, seems to me to be irrelevant. He has failed, ex-hypothesi, to show any lawful justification for his indecent conduct. This, of course, was not such a case."

Thus, *R v Court* (supra) establishes that, where there is available evidence of a sexual motive, this will be relevant and admissible to the question of whether an equivocal assault is indecent. But where a case involves an assault or act which is inherently indecent, the offender's purpose will be irrelevant. A non-sexual motive will not negate guilt and, although evidence of a sexual motive may be helpful to establish beyond doubt that an assault or act is indecent, such evidence is not necessary to support a conviction. It is to be noted that the Appeal Committee of this Court has previously arrived at a similar conclusion, following *R v Court* (supra).

Ms Lam SC submitted that in order for a man to involve a child under 16 in an act of gross indecency, which is required in order for the act to be done "with or towards" the child, an intention to derive sexual gratification must be proved. She referred to the fact that the offence is a sexual offence, being included in Part XII of the Crimes Ordinance, headed "Sexual and Related Offences". She also referred to the Criminal Law Revision Committee First Report (Indecency with Children) (August 1959), in which the committee said (inter alia):

"... We have not thought it right to go further and recommend what might at first sight seem the obvious solution of providing in the widest terms that any kind of indecency in relation to children should be a crime. First, not all conduct which is morally harmful or reprehensible ought necessarily to be covered by the criminal law. ...

...

... [it] would cover cases where the accused's conduct does not result in an offence by anyone under the first limb (for instance, because the incitement is unsuccessful, or because the resulting act of indecency is between two innocent children incited to do it for the gratification of the accused)."

However, insofar as the offence under s.146 is a sexual offence, the sexual content of the offence is constituted by the grossly indecent character of the act in question. As already noted above, the act charged must be grossly indecent as regarded by right-minded members of the public applying contemporary customs and moral standards. The sexual nature of the grossly indecent act does not require, additionally, proof of motivation on the part of the defendant to obtain sexual gratification in order for the act to be grossly indecent or for the statutory purpose of protecting the child to be engaged.

The views of the Criminal Law Revision Committee relied upon do not, in my view, suggest otherwise. The reference to an example of what might constitute the incitement limb of the offence (at [7] of the Committee's Report) is illustrative of only one situation that would be caught by the offence. In any event, the Committee's view is not expressed in terms of an intent to derive sexual gratification, but merely in terms of "gratification of the accused" which could also include a motive of revenge or humiliation.

Reliance was placed on the judgment of Lord Lane CJ in *R v Francis* (supra) to support the respondent's case, in particular the following passage:

"That being the case it seems to this Court that the act of a man masturbating in the presence of youngsters under the age of 14 may or may not, according to the circumstances, be an act in contravention of this subsection of the 1960 Act. If a man does masturbate in the presence of children, it may be in circumstances where he believes they are not observing what he is doing. In that case there can be, in the view of this Court, no question of his acting towards the children. He does not involve the children in his action."

On the other hand where a man masturbates in the presence of children knowing that they are watching him, whether he has deliberately attracted their attention or not, and deriving excitement from the fact that they are watching him masturbating, then, in the view of this Court, he can truly be said to be committing an act of gross indecency towards those children who are watching and whose observation is acting upon him as a stimulus or added stimulus to what he is doing. Indeed there is very little difference between the two sides, the appellant and the respondent, in the view that they took about those propositions which I have just endeavoured to describe."

Care must be taken in reading the above passage. It is not expressed to be addressing the mental element of the offence. Rather it is concerned with whether the act of the defendant is sufficiently connected with the presence of the child that it can be said the defendant has done an act involving, i.e. towards, the child.

In Hong Kong, the Court of Appeal in *The Queen v Jeffrey Savage* (supra) rejected the contention that *R v Francis* (supra) requires sexual gratification as an element of gross indecency. In that case, Nazareth Ag CJ said:

“The applicant’s next point is that there was no sexual gratification either at the time of taking the video or later. The first point that has to be made is that the judge held on the applicant’s own admission in a police video interview that there was sexual gratification. The applicant was asked by the interviewing police officer what was his purpose. The applicant said ‘erotic, yes; stimulation, yes’. Upon that the judge rightly accepted, on what he himself said, ie that his purpose was erotic stimulation, which was sexual gratification. But however that may be, the authorities show that sexual gratification is not an essential element of indecency. On this point, the applicant had sought to rely on R v Francis and other authorities which he says state that sexual gratification is such an element. It is true that there are cases in which sexual gratification is mentioned but only as showing that such intention assists in determining there was indecency. It does not follow that the absence of such intention means there cannot be indecency. There is accordingly nothing in the applicant’s point that there was no sexual gratification. It is not an essential element in law; moreover upon the findings of the judge below which are entirely in accordance with the evidence, there was sexual gratification upon the applicant’s admission.”

In Attorney General’s Reference No.36 of 2013, the Court of Appeal in England and Wales regarded R v Francis (supra) as a decision on its own facts and did not treat it as holding that an intention to derive sexual gratification is a further ingredient of the offence.

Ms Lam SC cited before us, as she did in the Court of Appeal below, a more recent decision of the Court of Appeal of England and Wales, R v Holmes (Peter), in support of the contention that an intent to derive sexual gratification is an element of the offence. That case involved a school teacher who had instructed young male pupils to engage in various acts, some of which did not involve contact between him and the pupils and were not of an inherently indecent nature. It was the prosecution’s case that the defendant derived sexual satisfaction from each of the acts relied on as evidence of acts of gross indecency. In those circumstances, the Court of Appeal’s approval of the trial judge’s directions was based on the way the prosecution put its case and I do not think it is to be read as establishing that, in every case, an intention to derive sexual gratification is a necessary element of the offence under s.1(1) of the Indecency with Children Act 1960. If it were, it would be inconsistent with Attorney General’s Reference No.36 of 2013 (supra).

E.4

The Court of Appeal’s decision

In the present case, the Court of Appeal stated its conclusion on the mental element of the offence in these terms:

“After reviewing the relevant cases, this Court has the following observations regarding the requirement for obtaining sexual gratification:

1.

The requirement of obtaining sexual gratification arises from a specific scenario: the defendant and the relevant child are in the same place; they can see each other; there is no physical contact between them; the defendant masturbates while watching the child, without taking any other actions.

2.

Theoretically, the defendant's behaviour could be purely unilateral. That is, he does not care whether the child reacts or how the child reacts. Such behaviour is indistinguishable from engaging in self-gratification while looking at an inanimate object.

3.

The issue is that, regardless of whether the charge is interpreted as one or two charges (this Court needs not and will not make such a determination), the terms 'with' and 'toward' both require some form of connection between the defendant and the child; otherwise, the charge cannot be established. This is what the UK cases refer to as 'involving' a child.

4.

Within the above framework, any behaviour that can be described as 'with' a child should involve a connection, and no difficulty arises. As for the term 'toward', since it does not merely refer to facing, how can the required connection be established when there is no physical contact between the defendant and the child?

5.

The answer provided by the cases is that the child must see the defendant, and the defendant must feel 'added stimulation' because he knows the child is watching him. This satisfies the requirement of 'involving' a child. As for the nature of the stimulation, courts in UK, Australia, and New Zealand have unhesitatingly (and even without any discussion) declared it to be sexual gratification."

The final sub-paragraph of the extract set out above is controversial. There is undoubtedly a need for some connection between the defendant and the child in order for an act of gross indecency to be committed "towards" the child. However, and with respect, the conclusion asserted that the required involvement of the child means that the defendant must intend to obtain sexual gratification from the act is not, in my view, supported either by the wording of the offence or the statutory purpose of s.146 or by the authorities referred to by the Court of Appeal in its judgment.

The absence of express wording in s.146 requiring this additional mental element and the statutory purpose of the section are addressed at [52] above.

Whilst the authorities referred to by the Court of Appeal do provide examples of cases where it was established that the defendant did the act towards the child because he did so with a motive of obtaining sexual gratification, none of them establish this intention as an additional mental element of the offence. As the Court of Appeal acknowledged, the courts did not in fact discuss the issue.

As to the cases from England and Wales cited by the Court of Appeal:

The need for caution in reading *R v Francis* (supra) is referred to above (at [60]).

R v R is a case where the issue was whether the reference to obtaining sexual gratification in *R v Francis* (supra) meant that the defendant had actually to obtain such gratification or merely intend to do so in order to commit the offence. However, in that case, it was the prosecution case that the defendant had encouraged or been content to let her child watch her and her husband having sexual relations in order to heighten her own or her husband's sexual satisfaction so the question raised in this appeal was not considered.

In *R v Holmes (Peter)* (supra), as already noted, it was the prosecution case that the defendant derived sexual satisfaction from the acts of gross indecency.

R v B is a case involving a prosecution under the Sexual Offences Act 2003 s.11(1) which criminalises engaging in sexual activity in the presence of a child and expressly requires the defendant to commit the act with the intention of obtaining sexual gratification. It does not assist in construing the elements of s.146.

The Court of Appeal cited the Australian cases of *R v Orsos* (supra), *R v Chonka* (supra) and *Director of Public Prosecutions (NSW) v Presnell* (supra). None of those cases discussed the issue raised in this appeal. *R v Orsos* (supra) and *R v Chonka* (supra) were instead dealing with the question of what acts would constitute an act of gross indecency towards a child. *Director of Public Prosecutions (NSW) v Presnell* (supra) was concerned with the different offence of committing "a sexual act" with or towards a child and so provides no assistance in this context.

The Court of Appeal's citation of the New Zealand case of *Y v R* in fact undermines the proposition for which it was cited. In that case, the Supreme Court held, in respect of statutory provisions making the doing of an indecent act "with or on" a child an offence, that it was relevant, in respect of indecencies performed by the child, to inquire whether these were instigated by the defendant "and were for his or her purposes (especially if those involved sexual gratification)". In so framing the inquiry, the Supreme Court clearly did not limit the purposes of the defendant to sexual gratification and there is nothing in that decision to suggest that an act done for some other purpose, such as punishment or humiliation, could not constitute an indecent act with or on a child.

F.

Conclusion

For the reasons set out above, I would accordingly allow the appeal and answer the certified question in the negative. Sexual gratification on the part of the offender is not an essential element of the offence of indecent conduct with or towards a child under the age of 16 under section 146 of the Crimes Ordinance (Cap.200).

Mr Justice Lam PJ:

I agree with the judgment of Mr Justice Fok PJ.

Lord Hoffmann NPJ:

I agree with the judgment of Mr Justice Fok PJ.

Chief Justice Cheung:

The Court therefore unanimously answers the certified question as set out at [71] above and allows the appeal.

(Andrew Cheung)

Chief Justice

(R A V Ribeiro)

Permanent Judge

(Joseph Fok)

Permanent Judge

(M H Lam)

Permanent Judge

(Lord Hoffmann)

Non-Permanent Judge

Ms Human Lam SADPP (Ag) and Mr Gabriel Ng PP, of the Department of Justice, for the Appellant

Ms Priscilia Lam SC and Mr Sean O'Reilly, instructed by Keith Lam Lau & Chan, assigned by the Director of Legal Aid, for the Respondent

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