

HONG KONG / JUDGMENT

HKSAR v. HO HUNG KWAN MICHAEL

COURT

Court of Final Appeal

DECIDED

26 September 2013

CASE / FILE NUMBER

FACC9/2012

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bjbj FACC No. 9 of 2012 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION FINAL APPEAL NO. 9 OF 2012 (CRIMINAL) (ON APPEAL FROM HCMA NO. 582 OF 2011)

BETWEEN HKSAR Respondent

- and - HO HUNG KWAN MICHAEL Appellant

Before: Mr Justice Chan Acting CJ, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Mortimer NPJ and Sir Thomas Gault NPJ Date of Hearing: 27 August 2013 Date of Judgment: 26 September 2013

J U D G M E N T

Mr Justice Chan, Acting CJ: The Since Shum Kwok Sher v HKSAR (2002) 5 HKCFAR 381 and Sin Kam Wah & another v HKSAR (2005) 8 HKCFAR 192, officers in the public service who were accused of improper or criminal activities in the discharge of their public duty or the exercise of their discretion have sometimes been charged with the offence of misconduct in public office. In some cases, this offence was charged in addition to other substantive criminal offences which the public officers face. In this appeal, the appropriateness of such a charge in the circumstances of this case is questioned by the appellant. It is contended that his conduct was not so serious as to constitute this common law offence. The appellant's conduct The appellant is a doctor employed by the Hospital Authority. At the time of the alleged offences, he was working at the out-patient clinic in the Central Kowloon Health Centre (the Clinic). The normal procedure for a patient to seek the services of the Clinic is as follows. He makes an appointment with the Clinic; he attends the Clinic personally to register his attendance; he pays \$45 (which includes consultation fee and any prescribed medicine) to get a ticket and waits for his turn; he is called to see one of the

doctors; he consults the doctor who diagnoses him and puts a consultation summary of his conditions into the computer; the doctor prescribes the medicine using the computer; the patient takes the prescription to the pharmacy; he gets a ticket and waits to take his medicine. Each doctor at the Clinic has a daily quota of 70 patients but he has the discretion whether to see any additional walk-in patient. The appellant's family members were entitled to public medical services when they were in Hong Kong and had previously made use of the services at the Clinic. Between 22 June 2007 and 28 November 2008, on 16 occasions, the appellant booked appointments in the names of his parents and 6 year old son for consultation in the Clinic. On each of these occasions, he bought tickets for consultation, wrote consultation summaries and prescribed medicines on the computer and later obtained the medicine. The total cost of all the medicines to the Government was \$247. At the time of these consultations, his parents were in Australia and his son was attending kindergarten. They did not attend the Clinic at the relevant times. There is no express rule set by the Hospital Authority which requires that a doctor must diagnose his patients inside the Clinic, although he is generally expected to do so. The doctors and staff of the Clinic said that upon seeing the relevant consultation summaries in the present case, they would assume that the consultations in question were conducted inside the Clinic. The pharmacist also said that if he had known that the diagnoses were not conducted in the Clinic, he would not dispense the prescribed medicine. The appellant explained that the diagnoses of his parents were conducted over long distance phone calls and the diagnoses of his son were done at home. He thought that in order to obtain medicines for his family members, he had to follow the procedure at the Clinic. Some of the medicines obtained were either mailed to his parents in Australia or delivered to them by his relatives. Other medicines were placed at home for future use. He conceded that he could not personally verify his parents symptoms without seeing them face to face or his son's condition without the necessary equipment. The charges The appellant was charged with two counts of misconduct in public office (charges 1 and 5), three counts of fraud, contrary to s.16A of the Theft Ordinance, Cap 210 (charges 2, 3 and 4) which were alternatives to charge 1, and 22 counts of gaining access to computers with criminal or dishonest intent, contrary to s.161(1) (b) of the Crimes Ordinance, Cap 200 (charges 6 to 27) which were alternatives to charge 5. He was convicted by the Deputy Magistrate of charge 1 and acquitted of charge 5. The other charges were left on file and no verdict was given in respect of these charges. His conviction on charge 1 was upheld on appeal by Deputy High Court Judge A Wong. With the leave of the Appeal Committee, the appellant now appeals on the substantial and grave injustice ground. Issues in this appeal The common law offence of misconduct in public office was affirmed in *Shum Kwon Sher* and the ingredients of this offence were reformulated in *Sin Kam Wah*: the offence is committed where a public officer in the course of or in relation to his public office willfully and intentionally misconducts himself by act or omission, without reasonable excuse or justification and the misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities (para. 45). The crucial question to be decided in this case was whether what he did amounted to misconduct which was so serious as to constitute the offence of misconduct in public office. The Magistrate and the Judge took the view that it was. This is challenged by Mr Peter Duncan SC, leading M

Derek Chan and Ms Fiona Nam for the appellant. He relies on two grounds in submitting that the conviction should be quashed: the appellant was not guilty of the misconduct as alleged in that it was wrong to find as the Magistrate did that the appellant had falsified the records of the Hospital Authority in order to show that his parents and son had attended the Clinic when in fact they had not; and the appellant's conduct when considered in the proper context was not sufficiently serious as to amount to the offence of misconduct in public office. Was there any falsification? In relation to the first ground, it is argued that the prosecution had failed to prove that the appellant had falsified any record and that the Magistrate was wrong to focus on certain records or acts and interpret them out of context when in fact none of the records said there was physical attendance by the appellant's parents or his son; in short, the appellant did not make any false statement in the consultation summaries or any of the records. The particulars in charge 1 stated relevantly that the appellant had wilfully and intentionally misconducted himself by: (a) falsifying records including consultation summaries and out-patient prescriptions in the computer system purporting to show that his family members had respectively on various occasions attended the [Clinic] when his family members had in fact not attended; and (b) causing or intending to cause the Hospital Authority to issue prescribed medicines to his family members. The charge does not however specify how he had falsified the records. It is not disputed that the appellant had followed the normal procedure on the occasions in question, except that his family members did not personally attend the Clinic at the relevant times. There is no evidence to suggest that the diagnoses of his family members as described by the appellant did not happen, that is, he had not diagnosed them on those occasions either over the phone or at home. There is also no evidence to show that he had made up the entries in the consultation summaries or made any false entry in any of the records. The Magistrate certainly made no finding to this effect. She only found that the appellant's diagnoses as stated in the consultation summaries might not be accurate since he could not verify them face to face in relation to his parents' conditions and did not have the necessary equipment at home to do so in relation to his son's condition. The Magistrate considered (and the Judge agreed) that the appellant had falsified the consultation summaries and computer records as a whole in that he had omitted to state in the records that his family members were not at the Clinic, knowing that such records represented to others that his family members had attended the Clinic. Thus the real complaint against the appellant was that he had failed to make it clear in the consultation summaries and prescription forms that his family members did not personally attend the Clinic on those occasions, hence giving rise to the impression that they had. With respect, I find it difficult to accept the Magistrate's conclusion. First, it must be noted that this offence is not a statutory offence and there is no definition of what amounts to falsification. This word should not be construed as if it bears any statutory meaning. The common understanding of this word (as the two Chinese characters adopted by the Magistrate also suggest) is that it involves creating a false document or record, or changing any entry or adding any false entry in a document or record. I cannot see how the appellant can be said to have done any of these in the present case. Nor was he alleged to have done so. Secondly, there is no evidence of any requirement or obligation on the part of a doctor or staff member to state in the consultation summary or any part of the computer record whether a patient is present in the Clinic or not. This seems to be consistent with the absence of any rule requiring

that a doctor must diagnose his patient inside the Clinic. While some may consider it prudent or proper to make this clear in the records, the failure to do so cannot be regarded as an act of falsification. Thirdly, there is no evidence that the consultation summary or any other record is intended to record the personal attendance of a patient. That is not the function of a consultation summary or prescription form. None of the consultation summaries required the author to say where the diagnoses were conducted. Looking at these documents, it is also not clear how and where this information was to be put in the documents if it were so intended. Fourthly, it is argued by the prosecution (and this appears to have been accepted by the Magistrate and the Judge) that if the appellant had not intended to represent to others that his family members had attended, he would not have gone through the normal procedure. However, there is no clear evidence as to any other way in which a doctor can get medicine for his family members who are entitled to public medical services and whom he has diagnosed outside the Clinic without going through the normal procedure. In the present case, there is nothing to challenge the appellant's evidence that he went through the normal procedure with the intention of obtaining medicines for his family members whom he had diagnosed without asking them to attend the Clinic personally. Some might consider this unnecessary bearing in mind the close relationship between them. The appellant could of course have stated in the records that his family members had not attended the Clinic on the occasions in question. Admittedly, his failure to do so did have the effect of misleading the reader of the relevant records that his family members had actually attended for consultation on those occasions. But such impression was the result of his following the normal procedure and not because of anything he had done to or written on the records. In my view, it would be difficult in the circumstances of this case to say that by failing to do so, he had created any false document or had made any change to any entry or added any false entry in any of the records. I am therefore inclined to think that there was no falsification of any record by the appellant. Nor can it be said that the omission to state the absence of the patient in the consultation summary has caused the Hospital Authority to prescribe medicine to the patient. Notwithstanding what the pharmacist said, there is no evidence that the Hospital Authority would not have prescribed medicine to a patient who has not personally attended the Clinic. If there is no express requirement that an out-patient must be diagnosed inside the Clinic, I doubt if prescription could be declined. After all, the prescription was indeed given by a doctor of the Clinic and the appellant had paid the requisite fee which included any prescribed medicine. Although this is not a statutory offence in which the prosecution have to set out and prove all the ingredients of the offence as provided in the statute, nevertheless, it is important to formulate the particulars of the charge correctly so that the matters alleged against the appellant as constituting this common law offence are clearly stated. This is required to enable the accused to know the case he has to meet at the trial. For the reasons I have discussed above, I do not think the prosecution have succeeded in proving their pleaded case against the appellant. Was the appellant's conduct serious misconduct? I shall now turn to the second ground. In *Shum Kwok Sher*, when Sir Anthony Mason NPJ was considering the offence of misconduct in public office, he pointed out that the difficulty in this offence stems from the range of misconduct by officials which may fall within the reach of the offence and he remarked that what constitutes misconduct in a particular case will depend upon the nature of the relevant power or duty of the officer or of

the office which is held and the nature of the conduct said to constitute the commission of the offence. (para.69) In considering this important question, one must not lose sight of the object of this offence. It is clear from a review of the authorities that this offence is aimed at punishing an abuse by a public officer of the power and duty entrusted to him for the public benefit or of his official position: *R v Bembridge*, 3 Doug KB 327, Lord Mansfield CJ; Professor P D Finn in his article *Public Officers: Some Personal Liabilities*

(1977) 51 ALJ 313, 315 and in *Official Misconduct*

(1978) 2 Crim LJ 307 at 308; *R v Dytham* [1979] QB 722, 727G to 728A, Lord Widgery CJ; *Shum Kwok Sher*, Sir Anthony Mason NPJ in para.76; and *HKSAR v Wong Lin Kay* (2012) 15 HKCFAR 185, Ribeiro PJ in para. 17 and Lord Millett NPJ in paras. 44 and 46. In *Shum Kwok Sher*, when he was formulating the ingredients of the offence of misconduct in public office, Sir Anthony Mason NPJ considered that to constitute the offence, the conduct in question must be serious misconduct, not trivial and this is to be determined having regard to: (i) the responsibilities of the office and the office holder, (ii) the importance of the public objects which they serve, and (iii) the nature and extent of the departure from those responsibilities (para.86). He regarded that this is consistent with the concept of abuse of office. But he acknowledged that there would be borderline cases between this common law offence and disciplinary offences (para.87). These factors were adopted by the English Court of Appeal in *Attorney General s Reference (No.3 of 2003)* [2005] QB 73. However, Pill LJ added in para.46 the following remarks: Having considered the authorities, we agree that the misconduct complained of must be serious misconduct. Whether it is of a sufficiently serious nature will depend on the factors stated by Sir Anthony Mason NPJ along with the seriousness of the consequences which may follow from an act or omission. An act or omission which may have as its consequence a death, viewed in terms of the need for maintenance of public standards to be marked and the public interest to be asserted, is likely to be more serious than one which would cause a trivial injury. This factor is likely to have less significance where, as in *Shum Kwok Sher*, the allegation is of corruption where the judgment upon the conduct may not vary directly in proportion to the amount of money involved. (emphasis added) In cases where corruption, dishonesty or other illegal practices are involved, it is not necessary to specifically consider the consequences of the misconduct in deciding whether it is serious enough as to constitute the offence of misconduct in public office. The misconduct speaks for itself: the seriousness of the consequences of such corrupt, dishonest or illegal practices will be obvious. In other cases, where corruption, dishonesty or other illegal practices are not involved, the consequences of the misconduct may not be obvious. Nevertheless, this must be a factor which is also relevant when considering whether the misconduct is serious enough as to merit criminal sanction. I do not think the prosecution is disputing the relevance of this factor. Nor can this be disputed. This factor was not mentioned in the discussion of this offence in *Shum Kwok Sher*. That was a case of granting preferential treatment to a close relative in relation to some government contracts and the seriousness of such misconduct and its consequences could be readily

seen. I also do not think the list of factors mentioned in that case was intended to be exhaustive. Further, in most cases, the consequences of the misconduct will usually have been considered when one is examining the nature and extent of the departure from those responsibilities. The approach to be adopted in considering whether any misconduct was serious enough as to call for condemnation and punishment was further discussed in *Chan Tak Ming v HKSAR* (2010) 13 HKCFAR 745. Bokhary PJ said at para.27: trivial misconduct will of course not support a charge of misconduct in public office. That said, the question is whether the offence is serious having regard to as stated in that item (5th item of the reformulation) the responsibilities of the office and the office holder, the importance of the public objects which they serve and the extent of the departure from those responsibilities. It is in that way and not by saying that it must be sufficiently serious since it is not trivial that one goes about deciding whether the necessary seriousness exists. One must consider all the circumstances of the case including the factors mentioned above. It would be wrong simply to conclude that if the misconduct in question is not trivial, then it must be serious enough to merit criminal sanction. It is a high threshold for the prosecution. As Pill LJ said in *AG s Reference (No.3 of 2003)* in para.56: It supports the view expressed in the criminal cases, from *R v Borrow* 3 B & Ald 432 to *Shum Kwok Sher v HKSAR* 5 HKCFAR 381 that there must be a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. A mistake, even a serious one, will not suffice. The motive with which a public officer acts may be relevant to the decision whether the public's trust is abused by the conduct. In the present case, the Magistrate held that the appellant's conduct was serious enough as to amount to misconduct in public office. Her reasoning was as follows: Making a booking for a family member per se is not improper. If the Appellant had made a booking for his family members and they attended the clinic in the manner that is required of other members of the public, there may not be any impropriety. However, if the Appellant uses his position to make a booking for a family member who does not attend the clinic and to obtain medicine which is only for use in just in case scenarios, the Appellant has shown favouritism towards his family members as it is clear that other members of the public are not entitled to such special services from the Appellant. By making a booking for his family members and registering their attendance, the appellant has denied the right of one member of the public to use the HA services on that particular day at that particular time. For the Appellant to claim that he thought he was acting properly, in such circumstances is, unbelievable and unreasonable. (para.74) It can readily be seen from the above passage that the Magistrate did not consider the making of appointments for family members in itself was anything improper; nor was it improper if the patients turned up at the Clinic. It was, according to her, the making of a booking for someone who would not attend and the obtaining of medicine which would not be immediately needed that was improper. This, she said, was because this would be showing favouritism to that person and would deprive one member of the public of the

use of public medical services. Such reasoning ignores the fact that there is no requirement that a patient must be diagnosed inside the Clinic. There is evidence from some of the doctor witnesses that while the normal practice is to diagnose a patient face to face, there can be exceptional circumstances when this is not done and that although this is not the best or most desirable practice, it is acceptable in some cases, for example, in the updating of a consultation summary or the changing of medication over the phone. Secondly, as submitted by counsel for the appellant, it has not been proved that the public had been deprived of medical services in that the public was prevented from making a booking or that the public had been deprived of access to the medicines prescribed to the appellant's family members. The Magistrate had also overlooked the fact that the appellant's family members were entitled to public medical services. There was nothing to suggest that the diagnoses on the occasions in question were not genuine. The appellant had gone through the normal procedure and paid the requisite fee. It cannot be said that public resources had been wasted. The only favour which the appellant had shown to his family members was to dispense with their personal attendance at the Clinic. The Magistrate's conclusion that the appellant's misconduct was serious was upheld by the Judge. He was satisfied that the Magistrate had considered all the relevant factors in coming to this conclusion. However, the Judge apparently went further than the Magistrate. He said: Under normal circumstances, it may be beyond reproach that a doctor prescribes medicine for his family members after proper diagnosis even the consultation is not conducted in a clinic as judging from the present case's evidence. However, the present case cannot be judged from this angle only, because the Appellant had obviously made a series of actions that had affected other public officers' judgment, damaged the integrity of the system, wasted the public resources and shaken the confidence of the public in the system. (para. 107) It can be noted that the Judge, unlike the Magistrate, did not consider it was reproachable conduct for the appellant to prescribe medicine to his family members after proper diagnosis even though this was not done inside the Clinic. His main objection was the possible damage to the integrity of the system and the effect on public confidence in the system. The integrity of the system and the public confidence in such a system are clearly relevant matters for consideration in deciding whether the conduct of a public officer is so serious as to amount to the offence of misconduct in public office. But these matters must be considered in context and together with other relevant factors. The object of the system operated at the Clinic is to provide out-patient medical services to members of the public. The appellant was one of the doctors entrusted with the responsibility of running the Clinic fairly and efficiently. His family members were entitled to the medical services provided at the Clinic and had made use of such services and personally attended the Clinic before. On the occasions in question, he had followed the normal procedure for his family members in order to make use of the services at the Clinic. When what he did is analyzed in the proper context, the only departure from his responsibilities was that he had dispensed with the attendance of his family members at the Clinic. In this way, it can be correctly said that he has shown preferential treatment to his family members. The consequences of what he did might have the possible effect of blocking one or two patients

from making an appointment during consultation hours and this might also give rise to the perception that the system had not been operated fairly and impartially in that family members of the staff are given preferential treatment. But apart from that, the appellant had breached no rule set by the Hospital Authority: there is no express requirement that a doctor can only diagnose a patient inside the Clinic or that a doctor must state clearly in the records that the patient is or is not present at the Clinic. Another significant consideration is that non-attendance diagnosis is not against the Code of Professional Conduct. One can always say that the appellant could have made it clear in the records kept in the computer that his family members did not personally attend on the occasions in question. Alternatively, he could have made use of his discretionary power to deal with his family members cases after he had finished the usual quota for the day and that would not affect other patients interests. He may also be criticized for taking advantage of the lack of more effective control in the system. However, I do not think the appellant's conduct was, in the words of Pill LJ in *AG s Reference* (No.3 of 2003), a departure which was so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. In my view, the appellant's shortcomings cannot be regarded as an abuse of power which is the essence of the offence. In the circumstances of this case, I do not believe that the integrity of the system of out-patient service at the Clinic would be seriously tarnished by what the appellant had done. The prosecution has failed to cross the high threshold of proving that his misconduct was so serious as to call for criminal sanction.

Conclusion

For these reasons, I do not think this is a proper case to charge the appellant with the offence of misconduct in public office. I would allow the appeal and quash his conviction. Mr Justice Ribeiro PJ: I agree with the judgment of Mr Justice Chan, Acting CJ. Mr Justice Tang PJ: For the reasons given by Mr Justice Chan, Acting CJ, I would also allow this appeal and quash the appellant's conviction for misconduct in public office. Mr Justice Mortimer NPJ: For the reasons given by Mr Justice Chan, Acting CJ, I also would allow this appeal and quash the appellant's conviction for misconduct in public office. Sir Thomas Gault NPJ: I agree with the judgment of Mr Justice Chan, Acting CJ. I too would allow the appeal and quash the conviction. Mr Justice Chan, Acting CJ: The Court unanimously allows the appeal and quashes the conviction on misconduct in public office. (Patrick Chan) Acting Chief Justice (R A V Ribeiro) Permanent Judge (Robert Tang) Permanent Judge (Barry Mortimer) Non-Permanent Judge (Sir Thomas Gault) Non-Permanent Judge Mr Peter Duncan SC, Mr Derek Chan and Ms Fiona Nam, instructed by Cheung & Yip, for the Appellant Mr Gerard McCoy SC, instructed by the Department of Justice and Mr Michael Wong, SPP of that Department, for the Respondent http://lrs.jud.hksarg/doc/judg/html/vetted/other/en/2012/FACC000009_2012_files/FACC000009_2012ES.doc Press Summary (English) http://lrs.jud.hksarg/doc/judg/html/vetted/other/en/2012/FACC000009_2012_files/FACC000009_2012CS.doc Press Summary (Chinese) - PAGE - PAGE h5.N h"QG h"QG hPEh hPEh hPEh gdPEh vk`vUvJvJU h5.N h/E\ gd?x yt?x wmfafafY hPEh ytk- gdl, ytk-

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