

HONG KONG / JUDGMENT

HKSAR v. HO KING LU

COURT

Court of Final Appeal

DECIDED

1 March 2007

CASE / FILE NUMBER

FAMC62/2006

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bjbj FAMC No. 62 of 2006 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MISCELLANEOUS PROCEEDINGS NO. 62 OF 2006 (Criminal) (ON APPLICATION FOR LEAVE TO APPEAL FROM HCMA No. 234 of 2006)

Between: HKSAR Respondent

- and - HO KING LU Applicant

Appeal Committee: Mr Justice Bokhary, Mr Justice Chan PJ and Mr Justice Ribeiro PJ Date of Hearing: 1 March 2007 Date of Determination: 1 March 2007

DETERMINATION

Mr Justice Ribeiro PJ: The applicant was the licensee of a massage establishment. On 8 March 2006, he was convicted of contravening a licence condition which prohibited vice or immoral activities on the establishment. The charge was stated as one involving s. 13(1) of the Massage Establishments Ordinance, Cap

266. The magistrate, Mr Peter Law Tak-chuen, rejected the applicant's evidence and found the offence proved beyond reasonable doubt. He also considered s. 13(2) of the Ordinance and found that that defence had not been established. On appeal, the applicant complained about the magistrate's treatment and evaluation of the evidence. Deputy High Court Judge Pang held that the magistrate's conclusions had properly been reached and dismissed the appeal. There is now an application for leave to appeal on the substantial and grave injustice ground raising a point which has not been mentioned below, concerning deficiencies in the framing of the charge. As Mr Eric Kwok SC, appearing with Ms Cancy SS Liu for the applicant, correctly points out, the statement of offence refers to s. 13(1) whereas the

particulars relate to an offence under s. 13(2). Mr Kwok also correctly points out that the Chinese version of the charge was garbled, leaving out some words. However, it was obviously intended to charge the applicant as a licensee under s. 13(2). The applicant has been represented throughout by solicitors and counsel who did not object to the charge as framed. Despite the valiant efforts of Mr Kwok to argue the contrary, it is clear that everyone proceeded on the basis that the applicant was being prosecuted as a licensee for contravention of a licence condition prohibiting immoral activities in the establishment. His counsel tested the prosecution's evidence and the applicant gave evidence on his own behalf on that basis. It is also the basis upon which the magistrate proceeded. The key findings are at paras 20 and 21 of the Statement of Findings and they were that the applicant was the licensee, that the licence was subject to the relevant condition, that such condition had been breached and that the statutory defence provided for by s. 13(2) had not been made good. Mr Kwok submitted that we should read the finding in para 20(vi), namely the licensee has contravened the relevant conditions, as indicating that the magistrate had concluded that there was knowledge on the part of the licensee of the immoral activities concerned. For my part, I think that is to read too much into those words, especially in the light of the discussion of the statutory defence in para 21 of the Statement of Findings. We are satisfied that the proceedings would have followed the same course even if the charge had been properly amended at the start of the trial. If the new point had been raised before the Judge at first instance, he would have been fully entitled, applying *Ching Kwok Yin v HKSAR* (2000) 3 HKCFAR 387 at 390, to hold that the errors were not such as to make it just that the appeal should be allowed and the conviction set aside. This is not an appropriate case for leave and the application is accordingly dismissed. (Kemal Bokhary) Permanent Judge (Patrick Chan) Permanent Judge (R A V Ribeiro) Permanent Judge Mr Eric TM Kwok SC and Ms Cancy SS Liu (instructed by Messrs Andrew Lam & Co) for the applicant Mr Cheung Wai-sun and Ms Agnes Chan (of the Department of Justice) for the respondent

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