

HONG KONG / JUDGMENT

HKSAR v. HUI RUSSEL AND ANOTHER

COURT

Court of Appeal

DECIDED

18 September 2009

CASE / FILE NUMBER

CACC64/2009

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bjbj

icant

Before: Hon Cheung

JA, Hartmann

JA and Wright

J in Court

Date of Hearing: 19

June 2009

Date of Judgment: 19

June 2009

Date of Handing Down Reasons for Judgment: 18

September 2009

REASONS FOR JUDGMENT

Hon Hartmann

JA (giving the reasons for judgment of the Court):

Introduction

On 15 January 2009, following a trial in the District Court before Deputy Judge Dufton, the two applicants were convicted of a charge of conspiracy to defraud. The first applicant was sentenced to 10 months imprisonment, the second to serve a term of 12 months.

In addition, the first applicant was convicted of one count of offering an advantage to a public servant, contrary to s.

4(1)(2) of the Prevention of Bribery Ordinance, Cap.

201. In respect of the bribery offence, the first applicant was sentenced to a further term of 10 months imprisonment. The judge, however, ordered that five months of the one sentence imposed on him was to run concurrently with the other, making an overall sentence of 15 months.

The first applicant sought leave to appeal his conviction for offering an advantage to a public servant and further sought leave to appeal the sentence imposed upon him for the offence of conspiracy to defraud. The second applicant sought leave to appeal both his conviction and sentence for conspiracy to defraud.

When the matter came before us, it was possible only to hear the applications of the first applicant. Having heard submissions from his counsel, Mr

Gerard McCoy SC, we dismissed both applications, saying that we would give our reasons later. We do so now.

To avoid any possible ambiguity, it is emphasised that this judgment relates only to the applications of the first applicant. The applications of the second applicant have been adjourned to a future date.

The conspiracy to defraud

The Stamp Duty Ordinance, Cap.

117, directs that an agreement for the sale of immovable property is chargeable with stamp duty, the duty being calculated according to the sale price. The Ordinance further directs that in certain specified circumstances, even if an agreement for the sale of immovable property is cancelled or otherwise not performed, it will still attract stamp duty. One such circumstance occurs when the purchaser of an immovable property agrees to sell the property to a third party but, instead of entering into an independent agreement with that third party, cancels the original agreement and arranges for the vendor to sell directly to the third party.

The prosecution of the two applicants for conspiracy to defraud was based on the assertion that, having purchased certain properties and then, almost immediately, having sold them on to third parties, they entered into such an arrangement: they failed to declare that there had been two independent agreements, each attracting a revenue payment.

In January 2005, a residential development known as The Merton was placed on the market for sale. The development had been built by way of a joint venture between a private property developer, New World, and a statutory body, the Urban Renewal Authority.

In terms of the Prevention of Bribery Ordinance, the Authority is classified as a public body. Its officers are therefore public servants who are subject to the restraints of the Ordinance.

The sales campaign orchestrated by New World and the Authority commenced with the offer of apartments to persons deemed to have a close association with the developers. The applicants were able to take advantage of this opening offer and purchased 24

apartments on the 19th, 37th and 50th floors of Block One. They did so through two companies: Lucky Wise Holdings and Fat Tak Development.

It was a finding of fact by the judge that, in respect of each apartment, a written provisional agreement of sale and purchase was concluded between New World, as agent for the Authority, and whichever of the two companies the applicants had designated to be purchaser. In terms of each agreement, a deposit was paid to New World. Each agreement attracted stamp duty.

The purchase of the apartments by the applicants was a commercial decision. It was the intention to sell the apartments on the open market at an enhanced price. Indeed, on the same day that they had purchased certain of the apartments through their company, Lucky Wise Holdings, the applicants were able to re-sell four of them, three at a profit.

However, instead of a second agreement of sale and purchase being entered into in respect of the four apartments with Lucky Wise Holdings being the vendor and the third party being the purchaser, the applicants entered into an arrangement of substitution with New World of the kind we have spoken of earlier. In terms of this arrangement, the original provisional agreement of sale and purchase between New World and Lucky Wise Holdings was discarded and a new agreement of sale and purchase

at the original purchase price

was entered into with New World being the vendor and the third party being the purchaser. The original agreement between New World and Lucky Wise was not tendered to the Inland Revenue Department for stamping; only the substitute agreement was.

As to the passing of money, the third-party purchasers dealt directly with the applicants, reimbursing the deposit paid by the applicants to New World and paying whatever premium was due to the applicants by way of their profit factor.

As the judge found, the mischief of the scheme was, first, that only one set of stamp duty fell due for payment when, in accordance with law, two sets of stamp duty fell due and, second, that, in respect of the single agreements put before the Collector of Stamp Revenue for assessment, that is, the agreements between the vendors and the third-party purchasers, the true purchase price had been understated by not reflecting, in three instances, the profit earned on the resale by Lucky Wise Holdings.

It was an admitted fact that, in the result, the Collector sustained a loss of \$513,883.

The bribery

The charge of offering an advantage to a public servant arose out of events which took place towards the end of 2005 when it came close to the time for completion.

The applicants had not been able to re-sell all of the apartments they had purchased. In particular, nine apartments purchased by Fat Tak Development, a company in which the first applicant

s wife was a shareholder and director, remained unsold. The balance of the purchase price for those nine apartments came to over \$33 million which would have to be paid on completion. The applicants, it seems, did not have the funds to pay that amount. They could of course simply fail to complete but, in terms of the agreements of sale and purchase, that would result, according to the calculations of the judge, in the forfeiture of a sum close to \$2 million.

The judge found that it was the first applicant

s attempt to extricate himself from this financial crisis that led to the commission of the bribery offence. Certainly, the events leading up to the commission of the offence point to a concerted effort by the first applicant to find a way to avoid having to make completion.

On 11 November 2005, the first applicant organized a lunch with two officers of the Urban Renewal Authority. One of the officers was Mr

Andrew Lam, an Executive Director who was due to retire at the end of that month. It is to be noted that the first applicant had himself once held a senior position in the Urban Renewal Authority and was therefore dining with old colleagues.

During the lunch, although he admitted to no financial difficulties himself, the first applicant said that many people who had purchased apartments in the Merton would not be able to complete and that a lot of money was at risk. He then went on to make a comment broadly to the effect that, if Andrew Lam could fix matters by allowing for the agreements to be rescinded, then he (i.e. Andrew Lam) and the first applicant could share the moneys saved. This comment was taken to be a joke by the two officers of the Authority: Andrew Lam said that the first applicant should not joke about such matters.

Some four days later, the first applicant telephoned another senior officer in the Authority, Mr

Butt. The purpose of the call was to enquire about certain legal advice that the Authority had obtained when the first applicant had himself been employed at the Authority. One aspect of the advice that had been sought at that time had seemingly concerned the internal power to sign documents such as agreements of sale and purchase. When Mr

Butt asked why the first applicant wished to see the advice, the first applicant replied:

We are thinking of rescinding the agreements.

Mr

Butt said that the first applicant should seek his own advice.

Two days later, the first applicant sent a fax to the Authority stating that many purchasers intended to rescind the agreements of sale and purchase. On the same day, solicitors representing Fat Tak Development, effectively therefore representing the first applicant, wrote to the Authority claiming that, in respect of the sale of apartments in the Merton, the Authority had been guilty of material misrepresentation. Solicitors for the Authority later responded to deny the claim.

The next day, the first applicant had a telephone conversation with another senior officer in the Authority. Although the first applicant avoided any admission of personal involvement, he said that a number of purchasers were contemplating rescission and that the Authority would be best advised to compromise with them by granting a further period of grace or making other concessions. The first applicant was told that the Authority intended to adhere strictly to the terms of the agreements.

That same day formal notices to complete in respect of apartments on the 37th floor which included the nine apartments purchased by Fat Tak Development were issued by the Authority.

Quite clearly, on that evidence (which the judge found proved) the first applicant had been persistently lobbying for the Authority to adopt a course that would save Fat Tak Development substantial losses. His endeavours had been in vain.

That was not an end to the matter. Some ten days later the first applicant made two telephone calls to his old colleague in the Authority, Andrew Lam. It was the finding of the judge that, during those calls, more particularly in the first call, the first applicant offered Andrew Lam an advantage, namely, employment as a

consultant

, if he would assist in finding some way around the problem of completion.

Why would the first applicant offer an advantage to Andrew Lam? In this regard, as the judge noted, Andrew Lam not only held the position of Executive Director but had also been the one who had signed the agreements of sale and purchase on behalf of the Authority. As the judge put it:

It is no coincidence therefore that the [first applicant] approached Andrew Lam to see if he could help in rescinding the agreements. Clearly the [first applicant] thought Andrew Lam could help him otherwise he would not have asked for his help in the first place.

Before considering what was said during the two conversations, it is to be observed that both were recorded, allowing for verbatim transcripts.

As to the first telephone conversation, it was the first applicant who raised the issue of the impending requirement for completion in respect of the Merton apartments, stressing that the matter was

serious

. When Andrew Lam asked what he was supposed to do about the issue as it was not his area of responsibility, the first applicant suggested that after retirement Andrew Lam could work for him as a

consultant

. Andrew Lam said that he could not do so as it was a matter of professional integrity. There was then a brief exchange during which the integrity or lack of it in their profession was discussed. Then came the following exchange:

Applicant: Hey, just work as a consultant, there should be no problem.

Lam: What consultant? You

re silly. If I work as a consultant, I

ll work as a landscape consultant. Well, what the hell do I know about the cancellation of contracts?

Applicant: No, it doesn

t matter what consultant you would like to be. But the point is, you, I

can make arrangements for you to work as a landscape consultant and you

It is clear that Andrew Lam did not regard this last remark as any kind of attempted joke or light-hearted verbal sparring between old colleagues. He responded:

Nothing of that sort should be said, man. Fuck, how can we talk about that, man? Your phone call is being recorded and you talk in that way.

The first applicant, however, did not back away. To the contrary, instead of passing off the remark as misplaced humour, he attempted to explain himself by saying:

Hey, I

know this consultant. You will work only after finishing your contract.

Andrew Lam then asked the first applicant if he had purchased a lot of apartments (clearly meaning at the Merton) and whether they had all been sold. The first applicant admitted that the purchases had been

very big

and that they had not all been sold. He then indicated that Andrew Lam should help him, saying:

Fuck, well, I

m very miserable, man.

Before the conversation concluded, the first applicant urged Andrew Lam to

think it over seriously

, reminding him that he would no longer be an officer with the Authority in three days time. He then suggested that after Andrew Lam had retired they should have a meal together as there was something he wished to discuss with him.

Almost immediately thereafter the first applicant made his second telephone call. This time the conversation was more equivocal although the first applicant commenced it by saying:

Hey, it

s serious, no kidding.

Andrew Lam responded:

I won

t kid.

What the first applicant said next is difficult to understand, in the English translation at least:

No, I

m not going to talk about that thing with you. I

tell you. Man, it

s kidding.

It was submitted by defence counsel that these words indicated that the first applicant had been joking with Andrew Lam all along. This was not accepted by the judge.

Of significance is the fact that immediately following this statement, the applicant went on to talk about a major contract that he had secured:

We have a job in which we are representing a Chinese

a Chinese-funded company listed in Hong Kong, well, to work on the, er,

[indistinct] change. Well, we

re talking about a floor area of approximately 600,000 square feet.

Andrew Lam then suggested that he introduce the first applicant to some people, the suggested introductions clearly being in respect of the Merton matter. However, the first applicant wanted Andrew Lam himself to deal with the matter, saying:

After you lobby, it will be fixed.

This was a clear statement of trust in Andrew Lam to bring about an agreement by the Authority for the rescission of the sale and purchase agreements or some other satisfactory compromise.

Andrew Lam, however, expressed the view that the problem would take a long time to fix

.

The conversation then tailed off into a request by the first applicant that Andrew Lam should contact him when he returned from his impending holiday so that they could have a meal and so that the first applicant could show him his

brief

; implicitly, the details of his contract with the Mainland company.

The first ground of appeal: what was said by the first applicant was too vague to constitute the offer of an advantage

The Prevention of Bribery Ordinance provides that any offer, conditional or otherwise, of any employment or contract is capable of constituting an advantage. The language of the Ordinance is broad, necessarily so in order to bring within its parameters the almost limitless circumstances in which bribes may be offered to public servants. But that being said, it being a criminal statute, the language must be read so as to avoid absurdity and the consequential risk of gross injustice. By way of illustration, an offer of a job made entirely in jest may offend good taste but does not offend the Ordinance. Equally, to amount to the offer of a bribe, the offer of a job, considered in context, must have sufficient form to be recognisable for what it is and sufficient substance to be capable of constituting an advantage under the Ordinance.

In the present case, it was submitted by Mr

McCoy that the judge fell into error by failing to consider whether in all the circumstances, especially bearing in mind that the two old friends were talking, any alleged offer was simply too vague and insubstantial to constitute the offer of an advantage under the Ordinance. Mr

McCoy emphasized that the conversation concerning a consultancy lacked any meaningful terms. As he put it, it is doubtful that a civil court, employing the lower standard of a balance of probabilities, would find that there had been a legal

offer of employment

.

In our view, however, whether there had been an offer of employment as a consultant which would amount to an offer in terms of the law of contract is immaterial. Equally immaterial is the fact that the first applicant did not set out specific terms of the proposed consultancy: the amount of remuneration and the like. What mattered in this case, as was implicit in the findings of the judge, was that, on a reading of the transcript of the two telephone conversations, there was no room for ambiguity that an inducement of some substance was being made.

What emerges from the findings of the judge is the following. The first applicant made an offer in direct terms, not as a joke but one which he asked Andrew Lam to think over seriously. It was the offer of employment as a consultant, indeed

in order to meet Andrew Lam

s preference

the offer of employment as a landscape consultant, employment that was only to commence after Andrew Lam

s retirement. To demonstrate that he had the means to make good on his offer, it was to be inferred that the first applicant gave a form of assurance by informing Andrew Lam that he (or his company) had secured a contract with a company listed on the Hong Kong Stock Exchange relating to a building (or buildings) with a floor area of approximately 600,000 square feet.

It is true that a number of matters were left unsaid. In the uncertain criminal endeavour of first offering a bribe, that is not surprising. Nor is the fact that inducements may be more enticing by reason of the fact that initially not everything is spelt out. That the reward for Andrew Lam

s assistance would be substantial was implicit in the overtures of the first applicant. Considered in context, Andrew Lam could have been under no misapprehension that, if he accepted the offer, the exact terms of his

consultancy

would be open to negotiation and those terms would no doubt be favourable. That being the case, the offer of employment had sufficient form to be recognised for what it was, namely, the offer of an advantage and concerning the nature of the employment itself, what was held out was an advantage of substance.

The second ground of appeal: the failure to consider whether the first applicant was joking

The judge was well aware of the first applicant

s defence that the purported offer of employment made to Andrew Lam had never been intended to be taken seriously, that the first applicant had merely been engaging in the sort of light-hearted banter to be expected between two old colleagues and that accordingly there could be no offer as any suggestion of an offer was merely a joke. The judge, however, as a finding of fact, rejected that defence. As he said (para

201):

Notwithstanding that Andrew Lam and Stephen Lam thought [the first applicant] was joking at the lunch meeting on 11

November when saying that, if Andrew Lam could help, the money could be shared, I

have no hesitation in rejecting the [first applicant

s] explanations in his various records of interview that the offer of employment as a consultant in the telephone calls on 28

November 2005 was also a joke.

In what appears to have been his third cautioned interview, the first applicant said that he hated Andrew Lam and never had any intention of employing him. He had therefore offered him employment by way of some sort of sardonic joke and that, as to discussing matters with Andrew Lam, that concerned a different matter. This explanation was rejected by the judge who set out his reasons as follows (paras

205-208):

It is clear, looking at the telephone conversations, in particular the first conversation, that [the first applicant] was trying his best to persuade Andrew Lam to help in rescinding the agreements. This was not the playing of a joke on someone who he hated and wished to humiliate. Each time Andrew Lam declined the offer [the first applicant] tried different ways to persuade Andrew Lam to help him. Further, if [the first applicant] merely wanted his help on a separate issue then there was no need to mention the agreements at all.

Mr. Kwok [defence counsel] submits that [the evidence that] the offer was a joke is made clear at the beginning of the second call when [the first applicant] says:

s kidding

. I do not agree with this interpretation put on the call by Mr. Kwok. [The first applicant] starts the conversation by saying:

Hey, it

s serious, no kidding.

In my view, by saying it is serious, [the first applicant] is referring to the cancellations of the agreements. [The first applicant] similarly, at the beginning of the first call, reminded Andrew Lam that it was serious.

I

am satisfied so I

am sure on all the evidence that the only inference to draw is that [the first applicant], in offering employment as a landscape consultant, did so intending this as an inducement or reward for or otherwise on account of Andrew Lam assisting or favouring him in the transaction of business with the Urban Renewal Authority.

Even if it can be said that [the first applicant] was in the second call saying the offer of employment was a joke, this does not cause me to doubt that when [the first applicant] made the offer of employment as a landscape consultant in the first call he did so intending this as an inducement.

These findings were criticized by Mr

McCoy on the basis that the judge had not only failed to take into account what he described as the

general tone of the conversations

between the first applicant and Andrew Lam but had also failed to give due weight to the prior relationship of friendship between the two men. There is no substance in either criticism.

In determining whether the first applicant may have been joking, the judge took into account not only what was actually said but, in respect of the first telephone conversation, what he described as

the whole tenor

of the call (para

197):

The first telephone call, made shortly after the solicitors for the Urban Renewal Authority had rejected the claims sent on behalf of Fat Tak, makes clear how important these agreements were to [the first applicant] when he stresses that this was a serious matter. The whole tenor of that call is trying to get Andrew Lam to help in rescinding the agreements and, in order to persuade Andrew Lam to help, [he] offered employment to Andrew Lam as an inducement or reward for his help.

In addition, the judge, as he was entitled, took into account the fact that Andrew Lam had reported the occurrence of the two telephone conversations to the management of the Authority, because he did not regard the two telephone conversations as being simply an attempt at humour: para

183.

As to the asserted failure of the judge to take into account the friendly relationship between the first applicant and Andrew Lam, while the judge may not have spoken of the matter in explicit terms, it is plain that he was all times aware of the fact that there had been, and continued to be, a friendly relationship between the two men. If there had not been such a relationship the defence that the first applicant was only joking would have had no basis.

Mr

McCoy further criticised what he described as an inconsistency in the logic of the judge in that he apparently considered, or accepted, that the second telephone conversation may have been purely jocular but failed to take into account that, on the basis of that finding, the first conversation may also have been purely jocular.

On our reading of the judge

s Reasons for Verdict, he did not accept that the second conversation may have been jocular. From paras

205-208 (cited above) it is evident that he specifically rejected that contention. He continued by conceding only that:

Even if it can be said that [the first applicant] was in the second call saying the offer of employment was a joke, this does not cause me to doubt that, when [the first applicant] made the offer of employment as a landscape consultant in the first call, he did so intending this as an inducement or reward.

We find nothing inconsistent in such a finding. On a reading of the transcript of the two conversations, it appears to be both logical and rational.

The third ground of appeal: the seeking of Andrew Lam

s assistance only after his retirement

It was submitted that the judge erred in coming to a finding of fact that in the course of the two telephone conversations the first applicant had sought Andrew Lam

s assistance in his capacity as a public servant as opposed to after he had retired.

The telephone conversations between the first applicant and Andrew Lam took place on 28

November 2005. Andrew Lam was due to retire from the Authority at the end of that month and accordingly had only two full days left in office. At trial, that raised the issue of whether, if the first applicant was seeking to secure Andrew Lam

s assistance by way of the offer of a bribe, he was seeking to have that assistance rendered, in part at least, while Andrew Lam remained in office or he was seeking to have it rendered only after Andrew Lam had retired and was no longer a public servant?

As to the history which gave rise to the two telephone calls, the judge made the following findings of fact. First, the first applicant stood to lose a substantial amount of money unless the agreements to purchase apartments in the Merton were rescinded or some other suitable compromise reached. Second, by the day on which the calls were made the first applicant had been

trying whatever means he could

to find some way out of his predicament with a singular lack of success. Third, that some three or four days before the telephone calls took place, the solicitors representing the Authority had written to the first applicant

s legal representatives to refute any suggestion of misrepresentation in the sale of the Merton apartments. In summary, it would be fair to say, based on the judge

s findings, that, by 28

November 2005, the first applicant was facing a crisis. A workable solution was therefore required without delay.

Against this background, the judge rejected the submission made at trial that there was evidence to show that the first applicant had not asked Andrew Lam for his assistance in his capacity as a senior officer of the Authority but only as a retired person. In this regard, he said (paras

197 and 199):

the fact that Andrew Lam was about to leave the Urban Renewal Authority was, I

am satisfied, purely coincidental and an excuse used by [the first applicant] to purportedly take Andrew Lam out for lunch on 11

November and later to call him on 28

November 2005. The first telephone call, made shortly after the solicitors for the Authority had rejected the claims sent on behalf of Fat Tack, makes clear how important these agreements were to [the first applicant] when he stresses this was a serious matter

.

Having regard to the fact that, at the time [the first applicant] was seeking the help of Andrew Lam, Andrew Lam was still working for the Authority, there can be no other reason why [the first applicant] asked for Andrew Lam

s help in rescinding the agreements other than that [the first applicant] thought Andrew Lam might be able to help. The answer to the question ... would the advantage have been offered, or could it have been offered, it

s Andrew Lam was not the public servant he was, is

certainly not

. I

am satisfied that, had Andrew Lam no longer been working for the Urban Renewal Authority, [the first applicant] would not have approached him and asked for his help in rescinding the contracts.

As the judge noted, on 28

November 2005 Andrew Lam was still a serving public officer. It follows that there was still time enough

two full days

for an officer of his seniority in the Authority to arrange a solution.

Nothing is said by the first applicant in either telephone conversation to suggest that he is only seeking Andrew Lam

s help by the exercise of his influence after he has retired which would mean, for all practical purposes, only after Andrew Lam has returned from his post-retirement holiday and certainly nothing to suggest that, if Andrew Lam had said that he would see what he could do immediately, the first applicant would have attempted to dissuade him from doing so.

It is correct that the judge did not specifically consider the suggestions made by the first applicant at the end of each telephone conversation to the effect that he and Andrew Lam must get together to discuss matters after Andrew Lam had retired. But those suggestions were equivocal in the sense that they were open to several interpretations. They could equally, in part or whole, suggest a fallback position, one in which

if it was necessary

the two men could meet up at a future date to discuss strategy or, if Andrew Lam had already started the ball rolling, to discuss progress. The suggestion of a future meeting at the end of the second conversation was made by the first applicant so that he could show Andrew Lam the

brief

that he had received, this clearly being a reference to the new contract that had been secured, evidence of the first applicant

s substance as a businessman, that substance, it may be inferred, being an indicator that he was capable of making good on his offer of employment.

In summary, we are satisfied that the judge had good grounds for coming to the finding of fact that the first applicant approached Andrew Lam when he was still a serving public officer in order to secure his assistance while he still held that post.

The fourth ground of appeal: an incorrect interpretation of the statutory provision under which the first applicant was charged

The first applicant was charged with offering an advantage, contrary to s.4(1)(c) of the Prevention of Bribery Ordinance. S.4(1) provides that:

Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant

- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
- (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant

s capacity as a public servant; or

- (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,

shall be guilty of an offence.

In order to prove an offence under s.4(1)(a) or (b), the prosecution must show that the advantage was offered as an inducement or reward for a public servant performing an act in his

capacity as a public servant

. S.4(1)(c), however, does not employ that phrase and speaks only of an offer being made to a public servant as an inducement or reward for some form of assistance in the transaction of any business with a public body.

In his Reasons for Verdict, when considering the elements of an offence under s.4(1)(c), the judge concluded that it was not necessary therefore to prove that, in rendering some form of assistance in the transaction of business with a public body, the public servant was doing so in his capacity as a public servant:

In my view, on a charge brought under s.4(1)(c), the prosecution need only prove that the advantage was offered to a public servant as an inducement or reward for or otherwise on account of the public servant, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body. While in

practice this will inevitably be done in the capacity as a public servant the prosecution do not need to prove this fact, only that the advantage was offered in connection with the transaction of any business with a public body.

Before us, it was submitted that this was an incorrect interpretation of the essential elements of an offence under s.4(1)(c), the result being that the judge had failed to satisfy himself that the offer made to Andrew Lam constituted an inducement in terms of which Andrew Lam would act in his capacity as a public servant, and not merely as a retired person, in his dealings with the Authority.

As it was, later in his Reasons for Verdict, the judge came to the conclusion that, even if he was wrong in his interpretation of s.4(1)(c) and it had to be proved that the offer made to Andrew Lam was for his assistance in his

capacity as a public servant

, that fact had been proved:

even if I

am wrong and the

Leonard test

applies to an offence brought under s.4(1)(c), for the reasons already given, that test is satisfied. Having regard to the fact that at the time [the first applicant] was seeking the help of Andrew Lam, Andrew Lam was still working for the Urban Renewal Authority, there can be no other reason why [the first applicant] asked [for] Andrew Lam

s help in rescinding the agreements other than that [the first applicant] thought Andrew Lam might be able to help. The answer to the question posed in the

Leonard test

would the advantage have been offered or could it have been offered if Andrew Lam was not the public servant he was, is:

certainly not

. I

am satisfied that, had Andrew Lam no longer been working for the Urban Renewal Authority, [the first applicant] would not have approached him and asked for his help in rescinding the contracts.

In the result, nothing turned on the interpretation of s.4(1)(c) and accordingly there was no need for us to determine the correct interpretation of the section, not in light of the clear findings of fact made by the judge.

The fifth ground of appeal: a failure to prove how Andrew Lam was required to assist

or

favour

the first applicant

In his Reasons for Verdict, the judge held that

specifically how Andrew Lam could help; whether or not Andrew Lam could help or intended to help

was

irrelevant to the proof of the charge

. He concluded that the prosecution did not have to specify how exactly the assistance or favouring was to be given so long as the assistance or favouring was discernible as being in the transaction of business with the Authority.

That conclusion, submitted Mr

McCoy, was wrong in law. We did not agree. While, in terms of s.4(1)(c), some definition of the purpose of a bribe will be required so that the nature of the assistance or favouring that is sought can be proved, the section does not impose any obligation on the prosecution to prove how exactly that assistance or favouring is to be carried out.

This was not a case prosecuted on the basis that Andrew Lam had been offered

tea money

or some form of

sweetener

for generally favouring the first applicant in the day-to-day discharge of his duties without reference to any particular act that he was expected to perform within the scope of those duties. Just the opposite was the case. The evidence accepted by the judge made it manifest that the first applicant had sought a very particular act by Andrew Lam. As the judge said (para

192):

The business of the Urban Renewal Authority was the sale of properties in the Merton. By asking Andrew Lam to help in rescinding the agreements relating to the Merton, [the first applicant] was asking Andrew Lam to assist or favour him in transactions of that business. Mr

Kwok submits that at no time have the prosecution said how Andrew Lam was to specifically render assistance. Clearly, the first applicant thought Andrew Lam could help otherwise

he would not have asked Andrew Lam to help in rescinding the agreements. The asking of help in the rescinding of agreements is, in my view, sufficient to amount to assisting or favouring in the transaction of business with the Urban Renewal Authority

.

To that extent, the judge had identified the nature of the assistance or favouring that was sought. That, in our view, in the circumstances of this case, was sufficient. There was no requirement placed on the prosecution to satisfy the judge as to how exactly the first applicant intended Andrew Lam to act. Indeed, the first applicant may not have turned his mind to the issue of how exactly he wished Andrew Lam to act, leaving the methodology of how best to achieve the corrupt purpose to Andrew Lam himself.

The sixth ground of appeal: a constitutional issue arising out of the defence of lawful authority or reasonable excuse

S.4(1) of the Prevention of Bribery Ordinance, which we have earlier cited in full, commences in the following terms:

Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant

[our emphasis]

S.24 of the Ordinance directs that the provision of without lawful authority or reasonable excuse

is not to be characterised as an essential ingredient of every offence and therefore to be disproved in each instance by the prosecution. Instead -

In any proceedings against a person for an offence under this Ordinance, the burden of proving a defence of lawful authority or reasonable excuse shall lie upon the accused.

In this regard, in his Reasons for Verdict, when looking in general terms only

to the elements of the offence of which the first applicant stood charged, the judge said the following in respect of s.24:

the burden of proving a defence of lawful authority or reasonable excuse shall lie upon the accused. The standard of proof is on the balance of probabilities. Consideration of whether there is lawful authority or reasonable excuse only applies where the prosecution have first proved all the elements of the offence beyond reasonable doubt.

Later in his Reasons for Verdict, the judge qualified this by making reference to the judgment of the Court of Final Appeal in HKSAR v Ng Po On [2008]

4 HKLRD

176, a judgment in which it was held that s.24, read in conjunction with another section of the Ordinance, namely, s.14(4), constituted a derogation from the constitutionally protected right of the presumption of innocence. By way of a remedial interpretation, the Court of Final Appeal read down s.24, when read with s.14(4), so that those provisions imposed on an accused person an evidential burden instead of a persuasive burden. In giving the judgment of the Court, Ribeiro

PJ said (para

77):

So read down, the accused would be required to raise the issue of reasonable excuse, supported by sufficient credible evidence to engender a reasonable doubt as to the prosecution

s case, but the prosecution would retain throughout the persuasive burden of proving non-compliance, encompassing a burden of negating any purported reasonable excuse. Read in this way, the two sections would be consistent with the presumption of innocence....

It is to be noted that s.14(4) of the Ordinance does not define a substantive offence of corruption but, as an aid to investigation of corruption, imposes criminal liability on any person who fails to comply with an investigative notice served on him pursuant to the provisions of the Ordinance.

Having considered the principles in *Ng Po On*, the judge, in his Reasons for Verdict concluded that, when s.24 was read with s.4 of the Ordinance

s.4 defining a substantive offence of corruption

there was no derogation from the presumption of innocence in that the two sections were both rational and proportional.

It was Mr

McCoy

s submission, however, that, contrary to the findings of the judge, s.4, when read with s.24, placed a burden on the first applicant to prove a matter which was integral to the determination of his guilt or innocence and, as such, unless read down, as was done by the Court of Final Appeal in respect of s.14(4) and s.24, constituted an impermissible encroachment on the presumption of innocence.

Mr

McCoy further submitted that in any event the judge had been in error in the manner in which he came to the conclusion that the test of proportionality had been met. In the result, he argued, his Reasons for Verdict had given rise to an unresolved constitutional issue, one which rendered the first applicant

s conviction unsafe.

Assuming, without finding it to be so, that the judge was wrong in law in concluding that the two sections of the Ordinance, when read together, were both rational and proportional, what must first be determined, in our view, is whether that error, if it be such, had any bearing on evidential matters which were in issue in the trial. If not, the findings of the judge, whether correct or incorrect, were academic and nothing turned on them.

We say this because, in his Reasons for Verdict (para

210), the judge recorded the fact that, with the exception of one indirect matter to which we shall refer below, no submission had been made to him by the defence to the effect that the first applicant had acted either with lawful authority or with reasonable excuse. In short, neither issue had arisen at trial.

The judge recorded that two grounds of defence had been advanced. The first gave rise to the issue of whether, during the telephone conversations, the first applicant had been doing no more than playing out a sardonic joke and accordingly

did not have a corrupt intent

: para

154.

In respect of that defence, there is nothing to suggest that the judge did not appreciate that the burden was at all times on the prosecution to prove corrupt intent. On a consideration of all the evidence, he rejected any suggestion that in the two telephone conversations the first applicant had just been joking. He was further satisfied that the

whole tenor

of the two telephone calls had been to try and get Andrew Lam to help in rescinding the agreements of sale and purchase and, to get that help, to offer him an inducement by way of an offer of employment. In summary he was satisfied that the prosecution had proved corrupt intent on the part of the first applicant.

Being satisfied that the prosecution had negated the suggestion that the first applicant may have been joking, it was not then necessary for the judge to consider the same issue in the context of whether, the first applicant having raised the issue of reasonable excuse (i.e. that he was joking), was then subject to either an evidential or persuasive burden.

At this juncture, we pause to say that, in our view, the judge was correct to hold that the issue of whether the first applicant may have been joking was one that went to the fundamental issue of mens rea and not to the statutory defence of reasonable excuse.

The second ground of defence related to when it was that the first applicant wished Andrew Lam to act on his behalf and when it was that the job offer was to come into effect.

Again, the judge determined this issue on the basis that it was an essential element of an offence under s.4 for the prosecution to prove that any offer made by the first applicant was made to Andrew Lam in the latter

s capacity as a public servant. In this regard, the judge came to specific findings of fact, holding that the prosecution had proved that the offer of employment was only made to Andrew Lam because he was at that time, and would remain so for the next two full days, a senior public servant who was in a position to render immediate help to him.

That being the case, it was not necessary for the judge to consider a defence of reasonable excuse to the effect that the first applicant had only intended his offer to take effect after Andrew Lam had retired from his job in the public service.

We are satisfied that there was no need for the judge to determine the issue of whether s.4, when read with s.24 of the Ordinance, was inconsistent with the presumption of innocence. It appears he did so in response to a submission by the first applicant

s counsel at trial that, if he was not satisfied that an offence under s.4 had been committed, then he should consider whether an alternative offence under s.8 of the Ordinance had been committed and, if he followed that course, then the first applicant would have a defence of reasonable excuse.

As it was, being satisfied that the prosecution had proved the commission of an offence by the first applicant under s.4(1)(c), the judge did not find it necessary to look to any alternative offence and accordingly there was no need to consider any defence of lawful authority or reasonable excuse.

In his submissions before us, Mr

McCoy spoke of an unresolved constitutional issue. He may be correct in that regard. If the determination of the question was an academic exercise for the judge at first instance, it remained an academic exercise for us. In our judgment nothing was served by us considering whether the judge was correct in law in finding that s.4, read with s.24 of the Prevention of Bribery Ordinance was consistent with the constitutionally protected right of the presumption of innocence.

The application to appeal against sentence

The first applicant was sentenced to a term of 10 months imprisonment in respect of the first offence of conspiracy to defraud the Collector of Stamp Revenue. He sought leave to appeal that sentence only.

The judge adopted a starting point of 18 months after trial. He then made a number of reductions. By reason of the delay in the matter coming to trial, he reduced the sentence by two months. By reason of the payment of the outstanding stamp duty and penalties, he reduced the sentence by a further four months. He then reduced the sentence by one month to give recognition to the good character of the first applicant and by one further month to take account of the first applicant

s depressive disorder.

It was submitted that the judge had failed to give sufficient weight to the fact that the first applicant had, by the time of sentencing, fully paid his half share of both the outstanding stamp duty (an amount of some \$256,000) and the penalties that had accrued (an amount of some \$2,400,000).

The judge took both payments into account. In respect of the outstanding stamp duty, he observed that payment had been made some four years later and only after conviction. But he confirmed that some credit would be given. In respect of the penalties, it appears that one of the reasons why the judge adjourned the passing of sentence was so that the first applicant and his co-accused could decide whether or not they wished to pay the penalties. They did so.

Payment of the outstanding stamp duty and the penalties constituted significant mitigation. But the reduction given, one of four months, was itself significant and, in our view, was not open to criticism.

A further submission was to the effect that the judge erred in assessing sentence by failing to be guided by the maximum available sentence for essentially the same conduct contained in the Stamp Duty Ordinance. In this regard, s.59 of the Ordinance provides that any person who practices, or is concerned in, any fraudulent act with intent to defraud the Government of stamp duty commits an offence. As to punishment, s.60 directs that any offence under the Ordinance is punishable by imprisonment for up to one year and by a fine at level 6.

In the present case, of course, the judge considered a starting sentence of 18 months imprisonment to be appropriate, reducing that to 10

months, just two months short of the maximum that could be imposed under the Stamp Duty Ordinance.

Submissions were made to the judge that he should determine sentence in accordance with the provisions of the Stamp Duty Ordinance but this he declined to do. It was his finding that the first applicant and his co-defendant had not been guilty of a

simple non-declaration

of one or two sales but had put together a scheme to defraud the fiscus of revenue, a scheme that was reasonably complex in nature comprising several acts of deceit and, while in fact it only extended to 3

apartments, could well have been extended to more if they had been successful in selling on more of the units they had purchased.

It is right to say that, in determining a sentence of conspiracy, there may be circumstances in which it is appropriate to be guided by the sentence provided for a statutory offence which could sensibly be said to cover, or at least parallel, the same factual situation: see, for example, *R v. Bourglass* [2006] EWCA Crim 3397. But this is subject to the principle that sentencing must reflect overall criminality. In the present case, the judge determined that the criminality of the conduct of the first applicant and his co-defendant was of a nature that should be punished as a conspiracy to defraud. On the evidence before him, the judge was fully entitled to come to that determination and to sentence accordingly.

We would add that in the present case, bearing in mind that, if the first applicant had been convicted of three substantive offences under the Stamp Duty Ordinance, he would have been liable to imprisonment for one year on each of the three charges: we do not see that the starting point of 18

months adopted by the judge for the charge of conspiracy to defraud was so out of kilter with the statutory sentencing provision as to cause concern.

(Peter Cheung)

Justice of Appeal

(M.J. Hartmann)

Justice of Appeal

(A.R. Wright)

Judge of the

Court of First Instance

Mr

Gerard McCoy, SC and Ms Kirsteen Lau, instructed by Messrs Liu, Chan & Lam, for the 1st

Applicant

Ms

Charlotte Draycott, SC, instructed by Robert Lee Law Offices, for the 2nd

Applicant

Mr

Alain Sham, SADPP and Mr

Marco Li, SPP of the Department of Justice, for the Respondent

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