

HONG KONG / JUDGMENT

HKSAR v. MO YUK PING

COURT

Court of Appeal

DECIDED

9 January 2007

CASE / FILE NUMBER

CACC26/2006

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bjbj /nyr%RL ?e@S) judgment allowing the appeal of two applicants against conviction on one charge of conspiracy to defraud, but dismissed the appeal of the first applicant, Mo Yuk Ping, against conviction on the second charge, also a charge of conspiracy to defraud, and refused the first applicant leave to appeal against conviction in relation to the third charge which was a charge of conspiracy to pervert the court of public justice. In relation to the appeals that were unsuccessful, there is now before us an application on behalf of Mo Yuk-ping to certify a number of points of law under section 32(2) of the Hong Kong Court of Final Appeal Ordinance. The points which are said to be of great and general importance are as follows:

1. Whether the offence of conspiracy to defraud is formulated with sufficient precision to be an offence prescribed by law in the Basic Law or according to law in the Bill of Rights Ordinance.
2. Whether it is sufficient for the admission against A of evidence of acts and declarations by B in furtherance of a conspiracy, that there is prima facie proof that A has agreed with B to be party to that conspiracy.
3. Whether it is necessary for a judge to direct himself in terms of the dangers of relying on the acts and declarations of co-conspirators where the person against whom the evidence has been admitted has no effective opportunity to cross-examine in relation to that evidence.
4. Whether on appeal from a professional judge, an appellate court is in law entitled to assume that an element of an offence as charged has been proved or an important evidential matter has or has not been relied upon in the absence of an express finding by the trial judge or alternatively notwithstanding an express finding that suggests the contrary.
5. Whether on appeal from a professional judge, an appellate court shall have regard to the findings of the trial judge and consider the merits of an appeal by reference to a proper construction of those findings. We are of the opinion that the first point, the point that relates to the width and constitutionality of the offence of conspiracy to defraud, merits certification and a certificate will be issued in the terms suggested. The argument in relation to the second point is that the trial judge s direction to himself that once there is prima facie

evidence that a particular accused was a party to conspiracy, the acts and declarations of a party to that conspiracy are admissible both against the person who made it as well as against the other members of the conspiracy if those acts and declarations are made in furtherance of that conspiracy and provided that such acts or declarations are relevant to the proceedings erred in that the threshold of prima facie evidence propounded in *R v Au Shui Yuen Alick* [1993] 2 HKC 219, and which the judge followed, is too low and that the appropriate threshold should be set at least at proof on the balance of probabilities. The argument is raised particularly in the context of this Court's judgment in relation to the third charge and in that regard, the pertinent matters on which the judge relied was a direction by the first applicant to the witness Lui, which the judge found could have but one meaning, and the acts of Lui in putting that direction into effect. Given that plain and straightforward context, this is, in our judgment, not the appropriate case for certification of the point raised. Nor do we think it appropriate to grant a certificate in the terms of the third proposed question. The question is posed on the assumption that a primary conclusion by this Court as to the evidence upon which the trial judge in fact relied in coming to his verdict on the third charge was an erroneous conclusion. In our judgment, the fourth question is in reality an attack on the Court's analysis of the Reasons for Verdict, in saying that it was clear from the Reasons themselves that the trial judge in fact made certain findings which it was said he did not make. If the Court has erred in that conclusion, then the applicant's remedy is not one under this limb of section 32. The answer to the fifth question would seem to us to be obvious and hardly the material for a certificate. What, again, in truth is the complaint is that this Court has, at paragraph 81 of its Reasons for Verdict, erred in its analysis of the trial judge's reasoning. Accordingly, a certificate is granted in terms of the first question, but declined as to the other suggested questions. (Frank Stock) Justice of Appeal (W Yeung) Justice of Appeal (Aarif Barma) Judge of the Court of First Instance Mr Kevin P Zervos, SC, DDPP (Ag) of Department of Justice for the Respondent Mr Ronny F Wong, SC and Ms Po Wing Kay instructed by Messrs W.M. Lo & Company for the Applicant PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H; < :X7Y jFen :X7Y & 6" CACC 26/2006 setup Flora-template-ABC-Final (fair)1.dot setup Microsoft Word 9.0 CACC 26/2006 Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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