

HONG KONG / JUDGMENT

HKSAR v. NG PO ON AND ANOTHER

COURT

Court of First Instance

DECIDED

4 April 2007

CASE / FILE NUMBER

HCMA198/2006

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bjbj HCMA198/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 198 OF 2006 (ON APPEAL FROM ESCC 1026 OF 2003)

BETWEEN HKSAR Respondent and (D2) NG PO ON (O7_)

AUTONUMOUT The two appellants were each convicted after trial before a magistrate at Kowloon City Magistracy of offences of failing to comply with a notice issued under section 14(1) of the Prevention of Bribery Ordinance, Cap. 201 (the Ordinance), contrary to section 14(4) of the Ordinance. Both were fined \$10,000, each now appeals his conviction. AUTONUMOUT The prosecution case was that the appellants (who were the 2nd and 3rd defendants of five defendants at trial) were police officers who were served with notices pursuant to section 14(1) of the Ordinance on 16 September 2002. The notices set out detailed requirements for the provision of information concerning the appellants assets, income, liabilities and expenditure going back for a period of three years as authorised by the provisions of section 14(1) which is in these terms

- (1) Where on an application under subsection (1A) the Court of First Instance is satisfied that there are reasonable grounds for suspecting that an offence under this Ordinance has been committed it may make an order authorizing the Commissioner by a notice in writing to require
 - (a) such person to furnish to the investigating officer specified in such notice a statutory declaration or, as the Commissioner sees fit, a statement in writing, enumerating
 - (i) the property, being property in such categories or classes of property, movable or immovable, as may be specified in such notice, belonging to or possessed by, or which at any time during the 3 years immediately preceding the date of such notice or during such shorter period as may be specified in such notice belonged to or was possessed by, such person, his agents or trustees, specifying in respect of each property enumerated whether it

is or was possessed jointly (and, if so, with whom) or severally; and specifying the date upon which, and the person from whom, each such property was acquired and whether by purchase, gift, bequest, inheritance or otherwise, and, where it was acquired by purchase, specifying the consideration paid therefor; and in respect of any property enumerated which has been disposed of, whether by sale, gift or otherwise, at any time during the 3 years immediately preceding the date of the notice or such shorter period as aforesaid, specifying how and to whom the same was disposed of and, where it was disposed of by sale, specifying the consideration given therefor; (ii) all expenditure incurred by such person in respect of himself, his spouse, parents or children with regard to living expenses and other private expenditure during any period specified in such notice (not, however, being a period commencing earlier than 3 years from the date of the notice); (iii) all liabilities incurred by such person, his agents or trustees, at such time or during such period as may be specified in such notice (not, however, being a time or a period commencing earlier than 3 years from the date of the notice), and specifying in respect of each such liability whether it was incurred jointly (and, if so, with whom) or severally;

- (b) such person to furnish to the investigating officer specified in such notice a statutory declaration or, as the Commissioner sees fit, a statement in writing of any money or other property sent out of Hong Kong by him or on his behalf during such period as may be specified in the notice; AUTONUMOUT The appellants purported to provide the information within the time limited by the notices and, in doing so, were advised by their counsel (who became DW6 at trial). The prosecution case was that many of the responses of the appellants to the items of information demanded by the notices were incomplete and insufficient and thereby offended the provisions of section 14(4) of the Ordinance which is in these terms
- (4) Every person on whom a notice under subsection (1) is served shall, notwithstanding the provisions of any other Ordinance or rule of law to the contrary save only the provisions of section 4 of the Inland Revenue Ordinance (Cap 112), comply with the terms of that notice within such time as may be specified therein or within such further time as the Commissioner may, in his discretion, authorize, and any person on whom such a notice has been served, who, without reasonable excuse, neglects or fails so to comply shall be guilty of an offence and shall be liable on conviction to a fine of \$20000 and to imprisonment for 1 year. AUTONUMOUT The appellants case at trial was that they had made substantial compliance with the terms of the notices served upon them and that they had been advised by counsel that their compliance was sufficient to satisfy the terms of section 14(1). More particularly, the appellants argued that section 14(4) only requires the recipient of a section 14(1) notice to act honestly and diligently and that, given the three years time span of the notices, there were enormous difficulties in providing details of every item of expenditure over that period as had been requested, so that by providing all their bank and credit card details the appellants had substantially complied with the notices. As there was no evidence either appellant had deliberately omitted any information, there had been no breach of the terms of section 14(4). AUTONUMOUT On the first trial of the prosecution case, the magistrate ruled that there was no case for the appellants to answer. Her reasons for that

ruling were, so far as they were relevant, as follows My Ruling on the No Case Submission

38. Upon hearing submissions from the Appellant and the Respondents I ruled that each Respondent had no case to answer on the charge for the reason that there was no evidence of non compliance by the Respondents in that insufficient materials for me to draw any adverse inference against them. In making this ruling I took the following matters into account : (i) . there was no guideline or direction anywhere in the Notice or in the Ordinance in relation to the manner in which the information should be enumerated. There was nothing in the Ordinance that prevented the Respondents from relying on their memories in enumerating the information as required. If a recipient of the Notice relied solely on his or her memory in replying, then he or she would run the risk of being prosecuted under section 14(5) for making false statements in answer to a Notice. (ii) There were no guidelines or directions in the Ordinance or the notice as to what type of information was required to be listed and there was nothing in the Ordinance or the Notices to prevent the Respondents from enumerating the expenses by reference to other documents. (iii) In providing some of their answers to certain of the questions the Respondents stated that the information sought could be obtained from certain documents such as bank statements, credit card statements, stock accounts, demands for rates, company search and mortgage documents, but did not produce those documents as part of their statutory declarations.
- (v) As regards the Third Respondent s failure to enumerate the purchase price of 3 watches, it did not amount to non compliance because the Third Respondent had already explained that the relevant receipts had been seized by the ICAC. AUTONUMOUT The prosecution was aggrieved by that result and applied by way of case stated pursuant to section 105 of the Magistrates Ordinance, Cap. 227 to this court. What was contended by the prosecution was that the compliance required by section 14(4) was strict compliance and not substantial or reasonable compliance. AUTONUMOUT The matter came before Tong J on 16 September 2004 as Secretary for Justice v. Sin Kam Wah and Others, HCMA 443/2004. There were six questions of law before him, they were
- (i) Does a recipient of a notice (Notice) issued by the Commissioner of the ICAC pursuant to section 14(1)(a) of the Ordinance have to comply with the Notice strictly or is it sufficient if there is substantial compliance thereof? (ii) If strict compliance is required by the Ordinance can any non compliance by a recipient of a Notice be reasonably excused only if that recipient has taken all steps that he/she can reasonably be expected to take in the circumstances in order to comply with the Notice; (iii) Whether I erred in law in holding that a recipient of a Notice complies with the obligation to enumerate the information required by each paragraph of the Notice by disclosing in his/her statutory declaration where the information that he/she is required to enumerate can be obtained and need not enumerate the information itself? (iv) Whether I erred in law in holding that where a recipient of a Notice wishes to enumerate the information required by the Notice by referring to specific documents, it is unnecessary for him/her to exhibit those documents to his/her statutory declaration?

- (v) Whether I erred in law in holding that there is nothing in the Ordinance or in the Notices to prevent the Respondents from relying on their memory when enumerating the information.
- (vi) Whether I erred in law in finding no case to answer in the light of the prosecution's concession that there is no non disclosure or misrepresentation by the Respondents.
- AUTONUMOUT Tong J was concerned that at least some of the questions stated did not arise out of the magistrate's ruling on the no case submission but proceeded to answer them. On the way to doing so, he said
22. Whether the need to combat corruption justifies this very harsh law is not for this Court to comment. But how can this section be draconian if the recipient could simply say I can't recall or go see the documents yourselves? And then if the prosecution could not prove that the recipient has deliberately failed to remember, then the ICAC could not bring a charge under this section. If that could be the case, I wonder how many people would choose to disclose the information even if they can remember the details.
23. One must not ignore that the section has some built in safeguards : a recipient is only required to provide the information within three years immediately preceding the date of the Notice; the time required to comply may be extended by the ICAC Commissioner; and if the recipient could not comply because of excuses that are reasonable, then he would have a defence.
24. There was much argument regarding the nature of the offence, whether it was a strict liability or not. If it has to be answered in order to dispose of this case, then the conclusion must be the one proposed by the appellant, that it is a strict liability offence. Apart from the points made by Mr McWalters in this regard, one may consider this section together with the other section, i.e. 14(5). The scenario would be that the recipient must strictly comply with the terms of the Notice issued under section 14(1), and if he fails or neglects to do so, and there is no reasonable excuse for the failure or neglect, then he shall be prosecuted under section 14(4); and if it is found that the recipient willfully makes a false statement in answer to a Notice, he shall be prosecuted under section 14(5). The legislature has provided a defence of reasonable excuse for section 14(4) but not in section 14(5); but then for section 14(5), the prosecution have to prove the element of willfulness. From the scheme of things, it is clear that the legislature had intended section 14(4) to be a strict liability offence and no mens rea is required. AUTONUMOUT Subsequently, he provided the following answers to the questions asked
- (i) Recipients of a Notice under section 14(1)(a) of POBO have to comply with the Notice strictly in the sense that there must be full compliance. If substantial compliance means less than full compliance then it is not sufficient. (ii) Yes. But what is reasonable and whether the steps taken amount to reasonable excuse would be a matter for the magistrate to decide based on the evidence of the case. (iii) Yes. But whether there is reasonable excuse for the recipient not to do so in the particular circumstances is a matter for the magistrate to decide based on the evidence of the case. (iv) Yes. But whether there is reasonable excuse to do so in the particular circumstances is a matter for the magistrate to decide based on the

evidence of the case. It should be noted here that the appellant accepts that enumeration by reference to documents is acceptable but the specific entries to be adopted by the recipient should be clearly identified in order to satisfy the requirement to enumerate.

- (v) The answer is if the ruling means that the recipient need not do anything further if his or her memory is deficient. I would approve the proposed answer by the appellant for this question that a recipient may rely on his memory but not to its exclusion; where the recipient's memory is deficient, he shall take such further steps as may be reasonable in the circumstances in order to comply with the obligation to enumerate. And whether the steps taken are reasonable is a matter for the magistrate to decide based on the evidence of the case. Yes. The issue of misrepresentation is not relevant to the present charge and the concession of no non disclosure is neither here nor there as the obligation to enumerate has not been complied with. The matter was then remitted back to the magistrate for the continuation of the trial. AUTONUMOUT should say here, that I agree with Tong's conclusions, subject to what follows concerning the nature of the burden of proof of reasonable excuse. The provisions of section 14(4) plainly impose a strict, though not absolute liability upon the recipient of a section 14(1) notice to disclose the information which is requested. There is no absolute liability given that it is a defence to the non provision of information if a defendant has a reasonable excuse for that failure. AUTONUMOUT At the continuation of the trial of the appellants, the magistrate, on the basis of Tong's judgment, found a case to answer in respect of both appellants and they gave evidence. AUTONUMOUT Their cases, generally, were to the effect that they had done their best to comply with the notices but that they were not able to provide full answers to the section 14(1) notices as documents had gone missing and memories had faded. An important plank of both appellants' defences was that they had been advised by counsel that what information they had provided in response to the notices requirements was sufficient. AUTONUMOUT At the conclusion of the trial, the magistrate rejected the defence case and accepted the prosecution evidence. In rejecting the defence case, the magistrate said this

287. I found absolutely no merit in the Defence submissions. I find that the Defendants have failed to prove any reasonable excuse on a balance of probabilities. Each of the charges are proved beyond all reasonable doubt. Earlier, she had said that
215. Secondly, it is a long established principle that an offence of strict liability requires strict compliance. The Defendants bear the burden of proving that they had a reasonable excuse on a balance of probabilities. AUTONUMOUT There were a number of grounds advanced on behalf of the appellants, but I need to deal with only one which is common to both appellants. That ground is to the effect that by placing a legal or persuasive burden of proof upon the appellants, the magistrate was wrong in law. AUTONUMOUT Fundamental to what follows is that the magistrate, in directing herself that the appellants had the burden of proving that they had a reasonable excuse on the balance of probabilities, had only two possible statutory basis which, on their face, justified that proposition. The first was section 94A of the Criminal Procedural Ordinance, Cap. 221 which is as follows

- (1) It shall not be necessary in an indictment, charge, complaint or information alleging an offence to negative any exception or exemption from or qualification to the operation of the law creating the offence.
- (2) For the avoidance of doubt it is hereby declared that in criminal proceedings
 - (a) it is not necessary for the prosecution to negative by evidence any matter to which this subsection applies; and
 - (b) the burden of proving the same lies on the person seeking to avail himself thereof. .
- (4) The matters to which sub
 - (2) applies are any licence, permit, certificate, authorization, permission, lawful or reasonable authority, purpose, cause or excuse, exception, exemption, qualification or other similar matter. The second basis is section 24 of the Ordinance which is in these terms 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. AUTONUMOUT will deal with each in turn. Section 94A of the Criminal Procedure Ordinance, Cap. 221 AUTONUMOUT Li, for the respondent, by his written submissions (para. 23), seemed to accept that the phrase without reasonable excuse in section 14(1) of the Ordinance forms part of the elements of the offence. In arriving at that position, he relied on the comments of Lord Woolf NPJ in HKSAR v. Lam Yuk Fai [2006] 2 HKLRD
165. In that case, the applicant had been convicted of conspiring to transfer passports without reasonable excuse, contrary, inter alia, to section 42(2)(a)(ii) of the Immigration Ordinance, Cap. 115 which is in these terms
 - (2) Any person who-
 - (a) (i) (ii) transfers to another without reasonable excuse, any travel document, certificate of entitlement, entry permit, re entry permit, certificate of identity, document of identity, APEC business travel card, travel pass or Vietnamese refugee card or any document whatsoever issued, kept or made under or for the purposes of Pt. IB, II, III or IV of this Ordinance; shall be guilty of an offence. AUTONUMOUT In the course of argument before the Court of Final Appeal, counsel for the applicant submitted that the substantive offence which was the subject of the conspiracy was not merely to transfer the passports to another, but to do so without reasonable excuse, and that the judge by directing the jury that the applicant bore the burden of proving reasonable excuse had contravened the applicant's right to the presumption of innocence contained in section 8, article 11(1) of the Hong Kong Bill of Rights Ordinance, Cap. 383 as applied by article 39 of the Basic Law. AUTONUMOUT Lord Woolf NPJ, in the course of his judgment, said
32. These are formidable submissions. In considering them it is necessary to start by going back to the two limbs of the offence and ask whether the second limb constitutes an exception or exemption from or qualification to the operation of the law creating the offence referred to

in s.94A(1)? The answer to this question is no. It is both limbs that are the law creating the offence. Although reasonable excuse is referred to in s.94A(4), that subsection is only relevant if the offence is one to which s.94A(1) applies. Many, if not most offences, that create an offence and then provide that there will be no offence if the defendant has a reasonable excuse for his offending conduct no doubt place at least an evidential burden on the defendant to raise the defence if not a persuasive or legal burden (see for example *Tse Chun v. HKSAR* (2003) 6 HKCFAR 601). AUTONUMOUT The approach taken by Lord Woolf NPJ is applicable to the present case as one of the legislative basis for the magistrate placing the burden of proving reasonable excuse upon the applicant is section 94A. In my judgment, the offence creating provision in section 14(4) of the Ordinance has two limbs, that is, firstly, the failure to comply with the section 14(1) notice; and secondly, an absence of reasonable excuse for that failure. AUTONUMOUT base that view not on the structure of the legislation but on its substance. I do not think that which, at the end of the day, may be an arbitrary structuring of an offence creating provision based on drafting style should carry much weight in determining the substance of an offence, that is, in determining what the elements of that offence are. The incorporation of the phrase without reasonable excuse into the offence creating provisions suggests, in my view, that the legislature was concerned that only blameworthy conduct should be punished. Mere failure to comply was not to be sufficient. That failure had to occur in the context of their being no good reason for the failure. The legislature was obviously concerned to allow for circumstances where particulars of information which were required by the section 14(1) notice, which could conceivably require considerable and quite detailed information, could not for good reason be provided. AUTONUMOUT The loss or unavailability of documents would perhaps be the most obvious example of a good reason for non compliance with a section 14(1) notice. But other reasons may well exist. The volume of transactions and the particulars requested may mean that the time period limited by the notice was insufficient to allow compliance. Illness of the recipient of the notice may prevent compliance. AUTONUMOUT Innocent non compliance is not difficult to imagine and the legislature no doubt wished the offence contained in section 14(4) to apply only to culpable non compliance. AUTONUMOUT That being so, it seems to me that the requirement that a failure to comply be without reasonable excuse is a separate element of the offence. That is a conclusion which is, as a matter of practicality, on all fours with *Lam Yuk Fai*. AUTONUMOUT It follows then that section 94A does not apply so as to legitimise the reversal of the onus of proof. That is because, again for the reasons expressed in *Lam Yuk Fai*, the section only applies to an exception or exemption from or qualification to the operation of the law creating the offence (emphasis added). If the phrase without reasonable excuse in section 14(4) itself is part of the law creating the offence, then it is not an exception or exemption from or qualification to that provision. That is the reasoning in *Lam Yuk Fai* and the reasoning I must adopt in the present case. AUTONUMOUT Accordingly, section 94A of the Criminal Procedure Ordinance does not provide a basis for the magistrate's reversal of the onus of proof. Section 24 of the Prevention of Bribery Ordinance, Cap. 201 AUTONUMOUT Section 24 is in more general terms than section 94A. It simply states that the burden of proving a defence of lawful

authority or reasonable excuse shall lie upon the accused AUTONUMOUT A narrow view of the reference to a defence would bring into play the same considerations and analysis applied by Lord Woolf NPJ in *Lam Yuk Fai*, as where the absence of a reasonable excuse forms part of the elements of an offence, its disproof cannot, strictly speaking, be a defence. AUTONUMOUT But approaching section 24 from a less semantic and broader perspective, one which I am satisfied the legislature intended, the reference to defence I take to mean no more than proof that the defendant had a reasonable excuse (or lawful authority) for what he did regardless of whether it is specifically a defence or the negating of an element of the offence. AUTONUMOUT If this broader understanding of the intended application of section 24 is correct, then it purports to apply to any provision whereby the defendant could rely upon a reasonable excuse (or lawful authority) to escape conviction. It would in its terms apply to section 14(1) so as to cast the burden of proving the present appellants had a reasonable excuse for non compliance upon them. AUTONUMOUT For the reasons stated above, I have found that the absence of a reasonable excuse for non compliance is an element of the offence created by section 14(4). If that is a correct characterisation of the offence it means section 24 would operate so as to encroach upon the presumption of innocence. AUTONUMOUT In Hong Kong, section 8, article 11(1) of the Hong Kong Bill of Rights (and article 39 of the Basic Law which incorporates article 14.2 of the International Convention for Civil and Political Rights into our law) operates to protect a defendant against having to disprove an element of the offence with which he is charged. Proof of the elements of an offence must remain the burden of the prosecution. The position was summarised thus by the Court of Appeal in *HKSAR v. Hung Chan Wa* [2005] 3 HKLRD

- (1) It is a cardinal tenet of our criminal law that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. That principle is specifically protected by article 14.2 of the ICCPR which Covenant is applied by article 39 of the Basic Law. The provision is repeated by article 11(1) of the Hong Kong Bill of Rights Ordinance. Article 87(2) of the Basic Law reiterates the same protection. See also article 87(2) of the Basic Law; article 14.1 of the ICCPR; and article 10 of the Bill of Rights Ordinance for their protection of the right to a fair trial.
- (2) The necessary corollary of the presumption of innocence is that in a criminal trial the duty lies upon the prosecutor to prove all the elements of the offence.
- (3) What constitutes the elements of an offence is a question of substance and not of form. AUTONUMOUT might add that where a defendant is provided with a defence which requires proof of matters extrinsic to the elements of an offence, there can be less basis for any assertion that his right to a presumption of innocence has been contravened. AUTONUMOUT What is objectionable is where legislation places upon a defendant a burden of proving his innocence, so that he might be convicted of the offence with which he is charged even though there was a reasonable doubt about his having committed that offence. This is reasoning which underlies the approach of the court in *HKSAR v. Lam Kwong Wai* [2006] 3 HKLRD 808, both in the Court of Appeal and the Court of Final Appeal. In the Court

of Appeal, Stock JA in considering section 20 of the Firearm and Ammunition Ordinance, Cap. 238 and the burden of proof which section 20(3)(c) purports to place on a defendant said :

55. Concentrating on substance and not on technicalities and niceties , we are satisfied that the legislature intended to criminalize more than mere possession, namely, possession plus criminal intent and that the burden which section 20(3)(c) imposes upon defendants is a burden which goes to that which is in truth intended to be an essential element of the offence or, put otherwise, an essential ingredient of the blameworthy conduct to be penalised; and that the subsection imposes a persuasive burden and not an evidential one in respect of that element or ingredient. It follows, and one can readily conjure realistic examples, that a person faced with a charge under the section could be convicted despite the existence of a reasonable doubt. ; and per Mason NPJ in the Court of Final Appeal the substance of the offence created by s.20(1) and (3)(c) is an offence of being in possession of an imitation firearm for a purpose dangerous to the public peace or for the commission of an offence. When the offence is characterised correctly in this way, it is evident that s.20(3)(c) throws the onus of proof on to the defendant, the prosecution being required to do no more than prove bare or physical possession plus knowledge of possession. Accordingly, there exists the real risk that a defendant, in failing to satisfy the magistrate of the s.20(3)(c) defence, might nevertheless raise a doubt as to the purpose of his possession, yet be convicted the possibility identified by Lord Steyn in *Lambert* at 572D. The second point, a matter also considered to be important by Lord Steyn in *Lambert* at 571C; and by Lordingham of Cornhill in *Sheldrake* at 291H, is that the substance of the offence is the element of moral blameworthiness. In the present case that element is the unlawful purpose of the possession. This view of the offence again leads to the conclusion that the substance of the offence is being in possession of the imitation firearm for an unlawful purpose, a reverse onus being placed on the defendant in relation to the critical element of the offence. AUTONUMOUT Both judgments proceeded on the basis that if the burden of proof is purportedly cast upon a defendant to disprove an element of an offence with which he is charged, then there has been a contravention of his right to be presumed innocent. AUTONUMOUT In any event, in the present case, for the reasons I have given, I am satisfied there has been an interference with the appellants right to be presumed innocent and the question which remains is whether that interference can be justified. If it is a justified encroachment on the appellants right to a presumption of innocence, then the magistrate was correct in directing herself that the burden of proving a reasonable excuse for non compliance with the section 14(1) notice was on the appellants. If it is not a justified encroachment, then there was no proper basis for the magistrate to direct herself in those terms. AUTONUMOUT The efficient investigation of suspected corruption offences in Hong Kong is vital to the continued efficient functioning of the government and the well being of the community. There is very little need to demonstrate the importance of the societal objective to Hong Kong of combating corruption, and of providing the investigators of that category of offence with powerful tools to do so. The placing of a burden upon a suspect in a

corruption investigation to produce requested information and to prove he had a reasonable excuse for not doing so is, in the context of this community, rational. AUTONUMOUT The real question is whether the reverse onus section 24 purports to place on a person charged with an offence pursuant to section 14(4) is proportional. That is, as said by Stock JA in Lam Kwong Wai

58. . has the respondent demonstrated a compelling case that the measure adopted went no further than was necessary to secure the stated objective and, in particular, has it been demonstrated that there was a pressing necessity for the onus placed on an accused , having regard on the one hand to the nature of the threat faced by society and, on the other, the fundamental importance of the right of the individual to be protected by the presumption of innocence against the danger of wrongful conviction? AUTONUMOUT In the present case perhaps the strongest argument that can be advanced as to the proportionality of the reverse onus provision contained in section 24, so far as it may apply to section 14(4), is that a defendant charged with not complying with a section 14(1) notice is in the best position to know why he was unable to comply. But I do not think that is ultimately a convincing argument. An evidential onus would require a defendant to state, in evidence, precisely why he was unable to comply with the section 14(1) notice. That evidence could then be met by the prosecution. I appreciate that there may on occasion be logistical problems with which the prosecution would be confronted in doing so, but I do not think such problems are sufficient reason to run the risk of a person being convicted of a criminal offence which carries with it a sentence of potential imprisonment where there may exist a reasonable doubt about his guilt. AUTONUMOUT It seems to me that an evidential onus would carry with it a requirement for a defendant to specify the basis for his non compliance with the section 14(1) notice and so avoid the possibility of the prosecution being placed in a position where it had to potentially disprove a number of reasonable excuses which may or may not be advanced by a defendant. AUTONUMOUT The conviction of an individual for an offence under the Ordinance carries with it considerable social stigma in Hong Kong and may have serious consequences regarding that individual s employment. In my judgment, so far as the application of section 24 to section 14(4) is concerned, there is no justifiable necessity for the placing of anything more than an evidential burden upon a defendant to prove he had a reasonable excuse for non compliance. AUTONUMOUT am satisfied that section 24 can be treated as imposing a merely evidential burden so far as section 14(4) of the Ordinance is concerned. By doing so, the fundamental structure of the legislation is addressed and the purpose and intent of section 24 is given sufficient effect. A merely evidential onus would not breach the appellants right to be presumed innocent : see HKSAR v. Lam Kwong Wai [2006] 3 HKLRD 808, at 838. AUTONUMOUT What follows is this. If I am right for the above reasons in accepting the respondent s concession that section 14(4) of the Ordinance imposes only an evidential burden on the appellants in raising the issue of reasonable excuse , then their convictions must be set aside. That is because it is plain from the excerpts from the magistrate s Statement of Findings set out at paragraph 13 above that she approached the section as imposing a persuasive burden on the appellants. No blame can

attach to the magistrate for that. The point was not argued before her. AUTONUMOUT Nevertheless, as the appellants were convicted wrongly, on the basis that they had a persuasive burden placed upon them to disprove an element of the offence, their convictions are quashed and their sentences are set aside. AUTONUMOUT do not propose to order a retrial. The appellants now have been the subjects of the original trial, of case stated proceedings, of a further trial and of this appeal, and I do not believe, given the nature of these proceedings against them, that a further, third, trial is warranted. (M.A. McMahon) Judge of the Court of First Instance High Court Mr Marco Li, SGC of Department of Justice, for HKSAR Mr Philip Wong, instructed by Messrs Martin Law & Co., for the 1st Appellant Mr William R. Marshall, SC, leading Mr Kevin K.W. Wong, instructed by Messrs Wong & Co., for the 2nd Appellant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U 1udk 1udk F G H I J K L M N O P Q R S T U V t"(# t"(& `#\$ "@AB & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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