

HONG KONG / JUDGMENT

# TSANG WAI NAM v. HKSAR

## COURT

Court of Final Appeal

## DECIDED

17 September 2007

## CASE / FILE NUMBER

FAMC15/2007

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bjbj FAMC No. 15 of 2007 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MISCELLANEOUS PROCEEDINGS NO. 15 OF 2007 (Criminal) (ON APPLICATION FOR LEAVE TO APPEAL FROM HCMA No. 461 of 2006)

Between: TSANG WAI NAM Applicant

- and - HONG KONG SPECIAL ADMINISTRATIVE REGION Respondent

Appeal Committee: Chief Justice Li, Mr Justice Chan PJ and Mr Justice Ribeiro PJ Date of Hearing: 17 September 2007 Date of Determination: 17 September 2007

## DETERMINATION

Mr Justice Ribeiro PJ: Customs & Excise officers found that a vessel about to sail from Hong Kong had on board five containers which contained unmanifested cargo. The applicant had booked space on the vessel and made arrangements for those containers to be shipped. She was consequently convicted before the magistrate of attempting to export unmanifested cargo contrary to s 18(1)(b) of the Import and Export Ordinance (Cap 60) and sentenced to 3 months imprisonment. Her appeal to the Court of First Instance was dismissed. The vessel owners were also convicted but have not pursued any appeal. Section 18(1)(b) makes it an offence for any person to export unmanifested cargo and section 2 defines export as to take or cause to be taken out of Hong Kong any article. A single ground is put forward as the basis of this application for leave to appeal. It is argued that the applicant's conduct, even if the exportation had been brought to fruition, could not have constituted exporting in the sense of causing to be taken out of Hong Kong the goods in question. Relying on the Privy Council's decision in *AG v Tse Hung-lit* [1986] AC 876 which itself followed the decision of the Australian High Court in *O Sullivan v Truth and Sportsman Ltd* (1957) 96 CLR 220, counsel for the applicant submits that there was no

attempted exportation since it was not shown that the vessel owners were about to take the goods out of Hong Kong on the applicant's actual authority, express or implied, or in consequence of her exerting some capacity which she possessed in fact or law to control or influence the acts of the vessel owners. Barnes J lists in her judgment the acts done by the applicant in making arrangements for the containers to be delivered to and shipped by the vessel owners for carriage to the mainland. In our view, the courts below were plainly entitled to find that such acts constituted an attempt to export unmanifested cargo consistent with the test adopted by the Privy Council and the Australian High Court. No question of great and general importance arises as to the applicable test. Nor can it reasonably be argued that the conviction involves any substantial and grave injustice to the applicant. We accordingly dismiss the application for leave to appeal. (Andrew Li) (Patrick Chan) (R A V Ribeiro) Chief Justice Permanent Judge Permanent Judge Mr William Allan (instructed by Messrs Paul Kwong & Co) for the applicant Mr Cheung Wai Sun and Ms Agnes Chan (of the Department of Justice) for the respondent

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