26/79

IN THE PRIVY COUNCIL No. 34 of 1978

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :-

CHEUNG CHEE-KWONG	Appellant
- AND -	
THE QUEEN	Respondent
ATTORNEY GENERAL	Appellant
- AND -	
CHEUNG CHEE-KWONG	Respondent

CONSOLIDATED APPEALS

REPONDENT'S CASE (FIRST APPEAL)

APPELLANT'S CASE (SECOND APPEAL)

Record

1. These are Consolidated Appeals from the judgment of the Court of Appeal of Hong Kong whereby the Court of Appeal dismissed the application for leave to appeal against conviction made by the first Appellant (Cheung Chee-Kwong), and allowed the first Appellant's application for leave to appeal and his appeal against sentence to the extent that the Court of Appeal varied the trial Judge's order in respect of the payment to be made to the Crown by the first Appellant pursuant to Section 12(3) of the Prevention of Bribery Ordinance Cap 201, Laws of Hong Kong. pp 33-44 pp 41-42

2. The questions for decision involve the construction and application of the Prevention of Bribery Ordinance, and in particular the following provisions:-

(a) Section 10(1) which provides that:-

"10(1) Any person who, being or having been a Crown servant -

(a) maintains a standard of living above that

which is commensurate with his present or past official emoluments; or

(b) is in control of pecuniary resources or property disproportionate to his present or past official emolument, shall, unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence."

(b) Section 12 which provides that:-

"12(1) Any person guilty of an offence under this Part, other than an offence under Section 3, shall be liable -

(a) on conviction on indictment -

(i) for an offence under Section 5, 6, or 10, to a fine of $100,000 and to imprisonment for 10 years, and

(ii) for any other offence under this Part, to a fine of $100,000 and to imprisonment for 7 years; and

(b) on summary convictions, to a fine of $50,000 and to imprisonment for 3 years,

and shall be ordered to pay to such person or public body and in such manner as the Court directs, the amount or value of any advantage received by him, or such part thereof as the Court may specify.

(2) Any person guilty of an offence under Section 3 shall be liable on conviction to a fine of $20,000 and to imprisonment for 1 year, and shall be ordered to pay to the Crown in such manner as the Court directs the amount or value of the advantage received by him or such part thereof as the Court may specify.

(3) In addition to any penalty imposed under sub-section (1), the Court may order a person convicted of an offence under Section 10(1)(b) to pay to the Crown - (a) a sum not exceeding the amount of the pecuniary resources; or

(b) a sum not exceeding the value of the property, the acquisition of which by him was not explained to the satisfaction of the Court.

(4) An order under sub-section (3) may be enforced in the same manner as a judgment of the Supreme Court in its civil jurisdiction."

3. Section 3 of the Interpretation and General Clauses Ordinance provides inter alia that:-

> " "or", "other" and "otherwise" shall be construed disjunctively and not as implying similarity, unless the word "similar" or some other word of like meaning is added;".

4. Section 2(1) of the Interpretation and General Clauses Ordinance provides that:-

> "2.(1) Save where the contrary intention appears either from this Ordinance or from the context of any other Ordinance or instrument, the provisions of this Ordinance shall apply to this Ordinance and to any other Ordinance in force, whether such Ordinance came or comes into operation before or after the commencement of this Ordinance, and to any instrument made or issued under or by virtue of any such Ordinance."

5. The first Appellant in his sole ground of appeal to the Privy Council alleges that the indictment against him was bad in law in that the only count in the indictment charged more than one offence in that it alleged control by the first Appellant of "pecuniary resources or property disproportionate to his then present or past official emoluments."

6. This point was not taken in theCourt of trial. The Court of Appeal held that the charge was not bad for duplicity, and it is submitted that the Court of Appeal correctly so held.

7. It is submitted that in all the circumstances the word "or" in sub-section 10(1)(b) must be construed conjunctively. The clear meaning and intention of the sub-section is to impose a burden upon the prosecution to establish a disproportion between a Crown servant's emoluments and his total wealth, whether that wealth consists of "pecuniary resources or property."

8. The Court of Appeal found that the total of the seven items comprising "pecuniary resources" in the control of the first Appellant added up to a total of H.K.$881,157.31, and that the total value of the eight items comprising "property" in the control of the Respondent added up to a total of H.K.$469,627.00, and the first Appellant had explained wealth of H.K.$118,518.73. pp 41-42

9. In the face of these figures the Court of Appeal acceded to the first Appellant's argument that in Section 12(3) the word "or" between sub-sections 12(3)(a) and 12(3)(b) should be construed disjunctively.

10. The result of this was that the Court of Appeal allowed the first Appellant's appeal to the extent that it found that it could only order payment of the excess underone or other of the two separate sums representing "pecuniary resources" or "property".

The Court chose that sum which allowed for the larger repayment, thus leaving in the first Appellant's hands the sum of H.K.$469,627.00 which was expressly found to have been unexplained wealth represented by property to that value.

11. It is submitted that the word "or" should in this instance also be construed conjunctively. The clear meaning and intention of the sub-section is to allow the Court to order payment of all unexplained excess wealth.

12. The word "which" in the final phrase "the acquisition of which by him was not explained to the satisfaction of the Court" governs both the sums referred to in sub-sections 12(3)(a) and 12(3)(b), and both sums can be ordered to be paid back by the offender.

13. The Attorney General for Hong Kong (second Appellant) appeals against that part of the Court of Appeal's order which produced the result set out in Paragraph 10 above and submits that the trial Judge's order was in this respect correct.

14. The Second Appellant accordingly submits that this Appeal by the first Appellant should be dismissed with costs, and that his Appeal should be allowed with costs.

R E A S O N S

1. BECAUSE in both instances the word "or" in the sub-sections referred to should be construed conjunctively.

2. BECAUSE the charge made in the Indictment was not bad for duplicity.

3. BECAUSE the meaning and intention of each relevant sub-section was as set out above.

4. BECAUSE the judgment of the trial Judge was right in both respects referred to, and the Court of Appeal was right in respect of the one point raised by the first Appellant and wrong in respect of the point raised by the second Appellant.

W.A. MacPHERSON A.C.

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- AND -	
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RESPONDENT'S/APPELLANT'S CASE

CHARLES RUSSELL & CO.,
Hale Court,
Lincoln's Inn,
London WC2A 3UL.
Ref. R/JA/10225
Tel: 242 1031