

26/79

No. 34 of 1978

In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

CHEUNG CHEE-KWONG *Appellant*

and

THE QUEEN *Respondent*

ATTORNEY GENERAL *Appellant*

and

CHEUNG CHEE-KWONG *Respondent*

CONSOLIDATED APPEALS

RECORD OF PROCEEDINGS

HAMPTON WINTER AND GLYNN

Solicitors for the Appellant

In the Privy Council

ON APPEAL
FROM THE COURT OF APPEAL OF HONG KONG

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 and
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CONSOLIDATED APPEALS

RECORD OF PROCEEDINGS

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In the District Court of Hong Kong

V.D.C. Case No. 269 of 1976

In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

CHEUNG CHEE-KWONG *Appellant*
and

THE QUEEN *Respondent*
ATTORNEY GENERAL *Appellant*

10

and
CHEUNG CHEE-KWONG *Respondent*

CONSOLIDATED APPEALS

RECORD OF PROCEEDINGS

V.D.C. Case No. 269 of 1976 *In the District Court of Hong Kong*

IN THE DISTRICT COURT OF HONG KONG

Holden at Victoria

The Queen

Against

CHEUNG Chee-kwong

No. 1
Charge Sheet
2nd November,
1976

20 The Court is informed that the following charge is preferred against CHEUNG Chee-kwong by the Attorney General:—

Statement of Offence

Being a Crown Servant was in control of pecuniary resources or property disproportionate to his then present or past official emoluments, contrary to section 10(1)(b) of the Prevention of Bribery Ordinance, Cap. 201.

Particulars of Offence

CHEUNG Chee-kwong, being a Crown Servant, namely a Building Inspector Class II of the Public Works Department of the Hong Kong

*In the District
Court of
Hong Kong*

No. 1
Charge Sheet
2nd November,
1976
(continued)

Government, was on the 29th day of November 1972 in control of pecuniary resources or property disproportionate to his then present or past official emoluments.

DATED this 2nd day of November, 1976.

(E. R. ASTIN)

Senior Crown Counsel

for and on behalf of the Attorney General

Date of Pleading:— Thursday, 11th November 1976 at 10 a.m.

The accused is on bail and his address is:— Lung Cheung Court,

No. 19 Broadcast Drive,
Flat No. 3A on 2nd Floor
of Block 8, Kowloon.

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IN THE DISTRICT COURT OF HONG KONG
HOLDEN AT VICTORIA
CRIMINAL JURISDICTION
CASE NO. 269 OF 1976

*In the District
Court of
Hong Kong*

Reasons for
Verdict of His
Honour Judge
Liu, Q.C.

The Queen

against

CHEUNG Chee-kwong

Coram: Judge Liu, Q.C. in Court

REASONS FOR VERDICT

- 10** The accused joined the Public Works Department on the 16th January 1956 as a charge-hand, and he was appointed Foreman Class III on the 7th January 1959. He was made Foreman Class II on the 1st July 1959. On the 24th October 1960, he was transferred to the Building Ordinance Office as an Assistant Building Inspector and was promoted to Building Inspector Class II on the 17th October, 1967. The accused remained in that post up to the time of his interdiction from duty on the 2nd November, 1976. By the Charge date i.e. 29th November, 1972, his total net official emoluments had reached \$211,578.56. In addition, the accused had received a sum of about \$12,000.00 in respect of overtime. There was another sum of \$44,000.00 paid to the
- 20** accused during the same period up to the 29th November 1972 by way of milage allowance. Mr. Parsons (P.W.19) explained that milage allowance is paid as reimbursement for expenses incurred in running a private car on official business proportionate to costs for petrol, oil, greasing, repairs, maintenance and tyres as well as compensation for depreciation, interests foregone, licence fee and insurance premium. This sum of \$44,000.00 has, subject to that for depreciation and interests foregone, in no way boosted the accused's resources. His official emoluments are taken intact and have not been, for the purpose of computation, diminished by the expenditure incurred for running a private car. The milage allowance, save for reimbursements for
- 30** depreciation and interests foregone, does not have the effect of inflating the accused's resources; it merely compensates part of such expenditure. With the exception of reimbursements for depreciation and interests foregone, the suggested inclusion of any part of this \$44,000. in the computation of his legitimate resources, taken intact, is a plain fallacy in pure mathematics. I will deal with the portions for depreciation and interests foregone in due course. Therefore, the total amount of official emoluments to be taken for present purpose is \$223,578.56 (\$211,578.56+\$12,000.00).

It would not be impertinent to probe into the background of the accused and his relatives. On 12th March, 1960, the accused married CHENG

40 Wai-chun. The matrimonial home was set up at 28 Pang Ching Street 4th

floor (Asset "G"). The matrimonial home was subsequently moved to the Far View Mansion, 16 Yuet Wah Street, 8th floor (Asset "K") and finally to Flat 3A, 19 Broadcast Drive, 2nd floor (Asset "A"). There are five children of the marriage. The first child was born in December, 1960, the second child in 1962, the third child in 1963, the fourth child in 1964 and the youngest child in 1969. The accused's elder sister CHEUNG Yuk-lin is married to LO Kwun-sui who worked for about twenty years with a subsidiary of the Swire Group as a Cabin Steward from 1949 to 1969. Apart from his pay, Mr. Lo would receive gratuities at about \$400.00 per trip. The boat Mr. Lo was working in made six trips in a year. Of course, the gratuities likely to be given to a Cabin Steward in earlier years were less. Even taking \$400.00 per trip and six trips at \$2,400.00 a year, Mr. Lo would probably have received under \$48,000.00 in the course of his 20 years' service. His pay for these 20 years came to \$63,238.30, and therefore his total income for the 20 years, as it transpires from the evidence in this case, was \$111,238.30 (i.e. \$63,238.30 + \$48,000.00) averaged at about \$463.00 a month. The accused's elder sister and her husband reside at a stone house erected on a permit area in Tai Po, New Territories which is small in area and modestly furnished as shown in the photographs, Documents B(1)-(14). The annual permit fee is \$31.00 on "P57" which also gives the dimensions of the permitted structures for human habitation as 560 square feet, chicken-shed 200 square feet and pigsty 200 square feet. On the visit by an I.C.A.C. officer, Mr. Siu (P.W.12), in February 1976, the stone house was found to be approximately 800 square feet. The accused's wife comes from a sizeable family of three brothers and five sisters. One of her sisters is CHENG Wai-king who resides at Apartment C, 331, Prince Edward Road, 7th floor.

The accused's control of two flats, a car and three bank accounts is not disputed and they are:

(1) Asset "A": Flat 3A, 19 Broadcast Drive, 2nd floor, Lung Cheung Court. This was acquired on the usual scheme from the Colonial Treasurer Limited by an Underlease dated 17th July 1969 "P34" for \$49,500.00. The purchase was financed by a mortgage "P35" which, together with other documents, had the effect of deducting \$326.20 per month from the accused's salary, and it is common ground that as at the Charge date, the 29th November, 1972, the accused had paid up \$20,473.00, a substantial portion of which was deducted from the accused's salary for the monthly mortgage payments. The total "net" official emoluments admitted in Document A would seem to have excluded these instalment payments which have a built-in explanation. Of this sum of \$20,473.00, there was a down-payment of \$7,425.00, and it is only this lesser sum which has to be explained. On Mr. Siu's (P.W.12) visit in February, 1976, it was found to be approximately 1,600 square feet served by three air-conditioners.

(2) Asset "B": Flat 5, 81 Argyle Street, 7th floor. This was purchased in the name of CHENG Wai-king, the accused's sister-in-law, by an Agreement for Sale and Purchase dated 7th July 1967, "P39" and under an Assignment dated 12th December 1967, "P37", for \$38,000.00 with a disbursement of

- \$512.00 as set out in "P65(3)". By a Declaration of Trust dated 12th December 1967, CHENG Wai-king declared the accused to be the beneficiary of this property. Vide "P40", the Sub-Division Register. A technical objection was raised to the admissibility of the Deed of Declaration of Trust itself "P38", and with the admitted copy Sub-Division Register, "P40", I need not dwell on the relevant provisions, if any, of the Interpretation And General Clauses Ordinance Cap.1. I pay no regard to the Deed of Declaration of Trust "P38" as if it had never been admitted. CHENG Wai-king's address was given in these purchase documents as A3, Yuet Wah Street, Yuen King
- 10 Mansion, 8th floor, Kwun Tong (Asset "K"). CHEUNG Wai-king has throughout been the registered ratepayer for this property, and for that purpose her address was given as that of Kwun Tong in Asset "K" from April 1967 to August 1969, but as from August 1969, her address was amended to the present home address of the accused's in Asset "A". CHENG Wai-king's present residence is admitted to be 331, Prince Edward Road. Rates and Property Tax were on occasions paid by the accused's cheques. by a document dated 1st May 1969, "P66", the accused's wife granted in her name a two years' tenancy to the China Products Co. Limited. Rental for this tenancy was paid to the wife of the accused. In fact, she has played a consistent
- 20 role in respect to rentals of other properties under consideration. The arguments on control of this property advanced by counsel for the defence in his submission of no case to answer are, I find, unpersuasive. In his statement, "P33", the accused denied ownership of this property. In these circumstances, I do not accept his denial. Furthermore, as the record shows, the Deed of Declaration of Trust was duly registered in the Land Office. To all intents and purposes, the accused had the right to dispose of this property at the material date. The accused has elected not to give evidence, and there is nothing to displace his beneficial interest. I find that he had control of it as at the Charge date.
- 30 (3) Asset "C": Private motor car Registration No. 3909. The accused purchased this vehicle on the 20th July 1971 for a cash payment of \$18,705.00 at a time when his salary was \$2,162.88 (i.e. \$1,836.68 + \$326.20 mortgage payment deducted). The mere size of this item of expenditure, as in the case of substantial cash deposits and payments of purchase price, cannot be taken per se as evidence of guilt. The test is: "Whether the property controlled by the defendant is such that it is questionable whether that particular defendant could have acquired it with his official emoluments", per Huggins J.A. in Sturgeon v. R.⁽¹⁾. It is admitted that as at the Charge date, 29th November 1972, the car's value was \$12,000.00. It is implicit that the agreed depreciation
- 40 for this car was \$6,705.00 part of which could have been reimbursed by the Public Works Department in the form of milage allowance. In quantifying an accused person's assets, one takes into account all his initial capital outlay, but there is no evidence as to how much, if any, of this \$6,705.00 depreciation had been absorbed in the milage allowance, and to give the accused the maximum benefit of doubt I will take the market value of \$12,000.00 for calculation purposes. After all, I have not included that part of the \$44,000.00

(1) (1975) HKLR 677 at p.686

milage allowance paid by way of contribution towards depreciation and interests foregone. There is no evidence as to precisely when or for which vehicle (if the accused had been a previous car owner) the milage allowance was paid, and I cannot speculate as to what had been paid to the accused for depreciation or interests foregone. I consider it to be more than generous in the known circumstances to have given credit to the whole of the \$6,705.00.

(4) Asset "D": Current account No.005248-001 in the name of the accused with the Hong Kong & Shanghai Banking Corporation (Mongkok Branch). The credit balance as at the Charge date, 29th November 1972, was \$23,260.32. The Crown has established a transfer of \$10,000.00 by way of a cashier order from a savings account No.07-200-0640-6 in the name of CHEUNG Yuk-lin with the Chartered Bank (Kwun Tong Branch), Asset "M", some time in January 1972. Vide "P17" and "P2(121)". Apart from the facts that this 1972 transfer of \$10,000.00 is some sign of association and that this is a current account with cheque facilities, there is no evidence for the reason behind this movement of fund. In January 1972, the accused's pay was \$2,247.36 (\$1,921.16+326.20 mortgage payment deducted), and \$10,000.00 is not a matter of great consequence. This account was opened on the 1st October 1960 as can be seen from the Specimen Signature Card, "P1", into which the accused's salary was paid. 10

(5) Asset "E": Current account No.285-022737-001 in the name of the accused with the Hang Seng Bank Limited (Kowloon City Branch). This account was opened on the 8th March 1972 as can be seen in the Specimen Signature Card "P11". The initial deposits totalling \$20,000.00 were transferred from a savings account of the accused with the same branch (Asset "F"). The credit balance in this account as at the Charge date, 29th November 1972, was \$32,131.40. Soon after the opening of this account, there were a number of substantial cash deposits amounting to \$57,000.00 from April to October, 1972: On the 19th April, 1972 \$8,000.00 cash was deposited, 9th September 1972 \$20,000.00 cash, 22nd September 1972 \$9,000.00 cash, 9th October 1972 \$10,000.00 cash, and on 31st October 1972 \$10,000.00 cash. These are recorded in Exh. "P12", and the last cash deposit is confirmed by the credit slip "P12(7)(7)". The accused sought to explain these cash deposits in his statement that they were the results of share transactions through one CHOK Kai-wan with capital from cash inheritance and sales of family jewellery and relics. This assertion was made to explain the said \$57,000.00 cash deposits into this current account and the \$69,000.00 cash deposits into the accused's another savings account with the same branch (Asset "F"). A total of \$126,000.00 cash (\$57,000.00+\$69,000.00) found its way into these two accounts of the accused in a period of 15 months merely because, as it appears in the accused's statement "P33", "CHOK Kai-wan thought it better to transact with cash", and the accused's monthly pay was only \$2,162.88 (i.e. \$1,836.68+\$326.20 mortgage payment deducted) in August 1971 and \$2,640.00 (i.e. \$2,313.80+the like \$326.20) in October, 1972. I am not prepared to accept as true a bare written explanation of the source of these huge cash deposits totalling \$57,000.00 into this account in the course of seven months in 1972 as given in his statement to an I.C.A.C. officer, "P33", to which I will return in the course of the verdict. Obviously, the election of the accused not 30 40

to give evidence takes his assertion no further. Apart from a small savings account in the name of his wife, at the material times there was no other bank account in Kowloon City, but there is no evidence as to why these waves of deposits swarmed into the two Kowloon City accounts of the accused's. The fact that these huge cash flows were not derived from the accused's official emoluments is not, by itself, sufficient evidence that he was in control of disproportionate resources. In dealing with Asset "C", I have set out the true test suggested by Huggins J.A. These cash flows are just part of the scenario.

In the District Court of Hong Kong
 Reasons for Verdict of His Honour Judge Liu, Q.C.

10 (6) Asset "F": Savings account No.285-7-018531 in the name of the accused with the Hang Seng Bank Limited (Kowloon City Branch) with a credit balance of \$49,895.65 as at the Charge date. This account was opened on the 14th August 1971 with a cash deposit of \$9,000.00 as can be seen from its History Record, "P6". In between August 1971 to May 1972, a period of nine months, there were substantial cash deposits totalling \$69,000.00 into this savings account of the accused's: On the 14th August 1971 an initial \$9,000.00 cash; 28th August 1971 \$8,000.00 cash; 20th November 1971 \$10,000.00 cash; 12th February 1972 \$14,000.00 cash; 26th February 1972 \$10,000.00 cash; 6th May 1972 \$6,000.00 cash; 20th May 1972 \$12,000.00 cash. In May 1972, the accused's monthly pay was \$2,247.36 (i.e. \$1,921.16 + \$326.20 mortgage payment deducted). Likewise, I do not accept the explanation for these deposits given by the accused in his statement "P33". However, I do not find blatant inconsistencies in his statement, "P33", read as a whole, which was written in haste and given in discomfort.

In conclusion, there was a sum of \$163,224.37 for Assets "A" to "F" as at the Charge date.

	Asset "A"	:	\$	7,425.00	
	Asset "B"	:		38,000.00	
				512.00	(disbursements)
	Asset "C"	:		12,000.00	
	Asset "D"	:		23,260.32	
30	Asset "E"	:		32,131.40	
	Asset "F"	:		49,895.65	
				\$163,224.37	
				\$163,224.37	

I turn next to deal with the other assets which were contested.

In my ruling on no case to answer given on the 25th March, I was guided by the observation of Huggins J.A. in A.G. v. YAU Ka-ping⁽²⁾ that "It is the jury which has to be satisfied (and satisfied beyond reasonable doubt) that (1) the closeness of relationship to the Defendant of the person holding the property and (2) other circumstances TOGETHER GIVE REASON TO BELIEVE that the person is holding on behalf of the defendant", but I was 40 greatly impressed by the arguments of counsel for the Defence that in reality

(2) C.A. 984 of 1976 Mr. Justice Huggin's judgment of which was delivered on 4th January, 1977, but the emphasis in capital letters is mine.

the Court must ultimately be satisfied beyond doubt that the person is holding on behalf of the defendant in order to entertain that belief. (The phrase “on behalf of” is used comprehensively to include a trust or a gift in S.10(2).)

I have since had the advantage of reading the judgments in Lloyd v. Wallach⁽³⁾, Boucaut Co. Ltd. (In liquidation) v. The Commonwealth⁽⁴⁾, Gardiner v. Land Agents Board⁽⁵⁾, Northampton Coal, Iron, and Waggon Company v. Midland Waggon Company⁽⁶⁾, Pure Spirit Company v. Fowler⁽⁷⁾ and Liversidge v. Anderson⁽⁸⁾. I have also had the benefit of the view expressed by Mr. Downey in his article “Combating Corruption: The Hong Kong Solution”⁽⁹⁾.

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In Lloyd’s case at p.313 Higgins J. described “has reason to believe” as an awkward phrase.

In Boucaut Bay Co., a similar phrase was under consideration in respect to an agreement whereby the Minister for Home and Territories was entitled to an earlier determination if he had reason to believe that it was not being duly carried out. Starke J. summed up at p.100: “The main question in this case is, of course, the true meaning of the words in Clause 15 ‘if at any time the Minister shall have reason to believe’. The argument submitted to me was that the Minister’s power to determine the agreement was dependent upon some reason justifying a belief that the agreement was not being carried out in accordance with the terms and true intent and meaning of the agreement. It followed, according to the argument, that the Court must determine for itself whether facts exist which would reasonably lead to the belief that the agreement was not being so carried out. This view of the clause I cannot adopt. In my opinion, the belief of the Minister is ‘the sole condition of his authority’; ‘he is the sole judge of the sufficiency of the material on which he forms it’ (Lloyd v. Wallach).” On appeal, confirming the decision, at p.106 Isaacs Acting C.J. said of the phrase “have reason to believe” in the same provision: “I personally cannot assent to the implication (counsel) suggests —

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(3) (1915) 20 C.L.R. 299.

(4) (1927) 40 C.L.R. 98.

(5) (1976) 12 S.A.S.R. 458.

(6) 7 Ch. D. 500.

(7) 25 W.B.D. 235.

(8) [1941] A.C. 206.

(9) (1976) HKLJ 27 at p.54 Mr. Downey observed: “It must be remembered that the presumption set out in Section 10(2) arises if the Court is satisfied that there is reason to believe that the other person was holding the property in trust for or otherwise on behalf of or as a donee of the accused. Strict proof that this was, in fact or in law, the true position is not necessary.” See also an earlier comment of Mr. Downey in the footnote at p.51.

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an implication that the minister's function was not purely administrative but was of a quasi-judicial nature which required an inquiry."

*In the District
Court of
Hong Kong*

Lastly, in Gardiner's case, S.78a of the Land and Business Agents Act 1955-1964 provided that the Land Agents Board, whenever it had reason to believe any agent, salesman or manager had been guilty of any crime, neglect of duty towards a client etc., might of its own motion conduct an inquiry. Walters J. at p.469 observed: "As I view the expression 'has reason to believe', it must be treated as imposing a condition that there should, in fact, have existed reason known to the Board before it could validly exercise, of its own

Reasons for
Verdict of His
Honour Judge
Liu, Q.C.
(continued)

10 motion, the power of proceeding to an inquiry. The expression 'reason to believe' indicates to me a mental state, or part of the concept of mind, in the members of the Board, formed on matters of opinion or judgment, but not on matters of fact."

Under S.10(2), "reason to believe" is to be formed on facts having regard to closeness of relationship and other circumstances bearing upon the case, and not on matters of opinion or judgment. These facts must be sufficient as would reasonably lead to the belief, and they will have to be proved beyond reasonable doubt so that the Court may be satisfied (and satisfied beyond reasonable doubt) that there is reason to believe that the person is holding on

20 behalf of the defendant, but nevertheless it is only a state of mind induced by the proven facts. It is a concept of mind formed on rational grounds, and it is not in itself a finding or an inference of fact, although in reaching that state of mind the Court must be satisfied beyond reasonable doubt that there are facts to justify the belief. Naturally the Court ought not form that state of mind lightly but must be satisfied beyond reasonable doubt that the "circumstances" do give sufficient reason to induce that belief. Obviously, a stage may be reached at which a Court would feel justified in believing the existence of a fact even before that very fact ever begins to be proved, letting alone being proved beyond reasonable doubt.

30 In Northampton Coal Co. and Pure Spirit Co., the mere fact that a plaintiff limited company is in liquidation was held under S.69 of the Companies Act, 1862 to furnish "reason to believe" that if unsuccessful it will be unable to pay the defendant's costs. That was a plain belief which had yet to be proved to be true.

In Liversidge's case, the majority of the House of Lords declined to order particulars of the grounds on which the Secretary of State for Home Affairs had "reasonable cause to believe" a detainee as having hostile associations. At p.248, Lord Macmillan explained the standard of reasonableness in a reasonable cause to believe: "Before he exercises the power confided to him

40 of making a detention order against any individual, the Secretary of State must have reasonable cause to believe certain things about that individual. Does this mean that the Secretary of State must have such cause of belief regarding the relevant facts as a court of law would hold sufficient to induce belief in the mind of any ordinary reasonable man? Or does it mean that he

must have such cause of belief as he himself deems to be reasonable?”. This and the Australian cases deal with belief reached on an administrative level in the exercise of an executive discretion as dictated by public interest and national security, but they reflect some of the pre-requisites of a judicial belief.

In my view, a belief is a concept of mind formed on matters of fact — a concept of mind induced by sufficient circumstances which may not necessarily prove the mental conclusion held by it. When a conclusion is proved, one would accept it not merely believing it. Awkward a phrase as the expression “reason to believe” may be, S.10(2) is not to be taken as redundant. In conclusion, I share the view of Mr. Downey in his article “Combating **10**
Corruption: The Hong Kong Solution”. Whilst in the final analysis under S.10(2) the Court will take into account whether or not it is satisfied beyond reasonable doubt that a person is in fact holding on behalf of an accused, it would be wrong to suggest, as I did obiter, that in reality it must be so satisfied for a belief of that fact to be entertained.

Except for Madam Lo (P.W.4), Mr. Ng (P.W.8) and Miss So (P.W.9), the evidence of the prosecution witnesses is not seriously disputed and which I accept. Certain aspects of Madam Lo’s evidence were in a muddle, but I accept that she did see and had cause to remember the accused himself depositing into and occasionally withdrawing money from an account in the **20**
name of CHEUNG Yuk-lin with the Kwun Tong Branch of the Chartered Bank. I am not unmindful that Madam Lo moved to Broadcast Drive near the accused’s present residence in 1969 and that the identification of the accused as one of the many customers was no more than a dock identification. However, I do not find it safe to act on her statement that she never saw CHEUNG Yuk-lin in the Kwun Tong Branch banking hall, but I accept that she never met her personally in the Kwun Tong Branch. I have not overlooked the inconsistencies in her evidence and her complete disregard of the Court’s warning not to embark on any discussion of the matters in this case after she had commenced her evidence, but I accept that the wife of the accused **30**
alone approached her in the Kowloon City Branch with a pass book in the name of CHEUNG Yuk-lin as she related in her testimony. Again, from her evidence I am unable to say whether or not CHEUNG Yuk-lin was present in the banking hall of the Kowloon City Branch on that occasion. In her own, sometimes misguided, way, she seemed to make every effort to assist the Court, and I find her too naive to lie. The evidence of SO Bing-ying (P.W.9) is straightforward, and I accept her evidence entirely save for the alleged absence of CHEUNG Yuk-lin in the banking hall of the Kowloon City Branch on the day of enquiry and of the opening of the savings account in **40**
Asset “O”; as for that she relied primarily on hearsay evidence, evidence of the accused’s wife who has not given evidence. I accept her evidence that the wife of the accused alone opened that account in Asset “O” with the Kowloon City Branch of the Chartered Bank and that she was the bank officer attending to her. I also accept her evidence that throughout the whole procedure of the opening of that account on that day Madam CHEUNG Yuk-lin was not presented to her nor was she seen to be in the immediate proximity. I also accept the evidence of Mr. Ng (P.W.8), and it was he who renewed for the accused a Fixed Deposit in the name of CHEUNG Yuk-lin

in the Kwun Tong Branch of the Chartered Bank before 1974. He was unable to specify on how many occasions he attended to the accused nor which particular Fixed Deposit receipt he renewed for him. The accused was also seen by Mr. Ng going to the safe deposit box section in the Kwun Tong Branch of the Chartered Bank.

*In the District
Court of
Hong Kong*

Reasons for
Verdict of His
Honour Judge
Liu, Q.C.

(continued)

- (7) Asset "G": 28, Pang Ching Street, 4th floor, registered in the name of CHENG Wai-chun, wife of the accused. The accused and his wife married on 12th March 1960 when the wife was 20 years of age. Her occupation was described in the marriage certificate "P54" as "nil", and the rank or occupation of her father was described as "Messenger". Although the assignment for this property "P41" was executed on the 29th May 1961 for \$20,660.00 with solicitors' costs at \$894.00 as can be seen from "D4(16)", the purchase price was paid by way of an initial deposit of \$10,340.00 on or about the 22nd January 1960 with almost half of the remaining purchase price left to be paid by equal monthly instalments of \$860.00 each commencing as from the 25th February 1960 and thereafter on or about 24th, 25th, 26th or 27th day of each month. In another word, the huge initial deposit was paid a little over a month and a half before the marriage, the first instalment was paid just over a fortnight before the marriage and the remaining 11 monthly instalments were paid after the marriage. Save for \$500.00, the whole of the purchase price was paid in cash. In addition to the closeness of relationship, these premises could not have been more closely linked to the accused as his first matrimonial home. In February 1962 the accused was earning about \$426.32 a month, and naturally his earning must have been somewhat less in 1960. In his statement "P33", the accused alleged that before the marriage his wife had worked as a cashier and kindergarten or primary school teacher and that the wife purchased the flat with her own savings before marriage. It is suggested by defence counsel that the word "savings" could not have had a more extensive meaning. One would have expected the accused to make some reference to his wife's other sources of income than her salaries allegedly earned as a cashier or kindergarten teacher, if indeed those had been meant to be included. "Savings" in the context of the accused's statement can only refer to his wife's alleged earnings before marriage. It is inconceivable, if there were any truth in the accused's explanation of the source of the purchase price for this property, why the whole of it was not paid at once. There is no evidence that any of the wife's alleged savings was banked to gain interest in the interim. It is not without significance to note that each monthly instalment was at least twice as much as the accused's then meagre official income. As a wife, Madam Cheng has had no gainful employment. If the accused's wife had managed to earn substantially enough to acquire this property by a large initial deposit and the monthly instalments of \$860.00 each when the accused's own pay was less than \$426.30 a month, it would have been unrealistic for her not to continue taking full advantage of such earning capacity so as to alleviate the considerable burden of home purchasing undertaken by the newly-weds. In his statement, "P33", the accused further claimed that from time to time he had occasions to use the rental collected from this property for subsidizing his family expenses. The wife collected rent from Mr. Lam (P.W.27) for about ten years, but there is no evidence that such rental was paid into the wife's or any account. Rates and

property tax of this property were at times met by the accused's cheques. There is every indication from these circumstances that the purchase price did not come from the wife but was provided from sources unexplained for the benefit of the accused, yet these circumstances do not compel me to reasonably infer that this property was indeed held in trust for the accused and was therefore in his control. Bearing this in mind, on further consideration of the same facts I am satisfied beyond reasonable doubt that there is reason to believe that the wife of the accused was holding this property in trust for him, and this property is thus presumed under section 10(2) to be in the control of the accused as at the Charge date. 10

(8) Asset "H": Savings account No. 285-4-017882 in the name of CHENG Wai-chun with the Hang Seng Bank Limited (Kowloon City Branch). This savings account was opened on the 5th June 1971 with an initial deposit of \$5,000.00 operated by a signature. Vide the Specimen Signature Card "P13" and the History Record "P14". The credit balance as at the Charge date stood at \$5,189.10. In "P33", the accused disclosed that his wife had never worked since her marriage; yet she opened this savings account after a lapse of some 11 years. An initial deposit of this comparatively sizeable sum in round figure is not indicative of the gradual savings of a sensibly thrifty housewife. \$5,000.00 is too substantial for a present from a husband with five growing children on a net pay of merely \$1,836.68 (i.e. \$2,162.88—\$326.20 deducted mortgage payment for the accused's flat in Asset "A") in June 1971 and too generous a gift from any relative for the wife of a civil servant of the accused's social standing. Of course, I have not lost sight of the huge cash deposits into the accused's savings account in Asset "F" starting from August 1971, and with cash flow of that magnitude, I cannot completely rule out the possibility that the accused did allow his wife to keep this \$5,000.00 for her own. From these and Madam Cheng's involvements with the property in Asset "G" and others which have yet to be considered, a fair, though by no means irresistible, inference is that this sum of \$5,000.00 came from a source unexplained either for the benefit of the accused or for the benefit of the accused's wife with his blessing and that the wife was either holding this \$5,000.00 and accruing interests in trust for the accused or as a gift from the accused, but the prosecution's evidence has not satisfied me beyond reasonable doubt that that is the case. There is also no evidence to show which was more probable. Furthermore, the possibility of a perfected gift excludes any reasonable inference of control. However, by reason of closeness of relationship and the known circumstances in this case, I am satisfied beyond reasonable doubt that there is reason to believe that this credit balance was either held in trust for the accused or acquired as a gift from him. On the same facts, a presumption of control therefore arises in respect to this account. 20 30 40

(9) Asset "I": Flat 10 Kin On Mansion 5th floor, Tam Kung Road registered in the name of CHENG HA Fung-ching, mother-in-law of the accused. For this property, the Agreement for Sale and Purchase dated the 21st December, 1972 is "P44" and "P43" is the Assignment dated the 2nd May 1974, but it was acquired as early as the 17th March 1972 by an Instructions for Sale of even date, "P68". The Investigating Officer of

I.C.A.C., Mr. Siu (P.W.12), told the Court that on his visit to the home of the accused, his mother-in-law was present. There is no evidence, of course, whether the mother-in-law of the accused lived with him at the material date, but in the Instructions for Sale "P68", the Agreement for Sale and Purchase "P44" as well as the Deed of Assignment "P43", the address of the accused's flat in Asset "A" was invariably given for that of the purchaser's. Madam H is the registered ratepayer with the accused's present residence as her given address since the assignment in 1974. Vide "P60". The \$25,000.00 deposit paid in March 1972 at the time of the said Instructions for Sale for the purchase of this property came from a cashier order "P18" issued from a savings account in Asset "M" in the name of the accused's elder sister which I will come to in due course. This was certainly not the first time when fund from this savings account in Asset "M" was applied for the benefit of a person other than its account-holder. As early as January 1971, a sum of \$10,000.00 was also transferred from it to the accused's current account in Asset "D". Vide "P17". The other half of this cashier order "P18" was paying for the \$25,000.00 deposit of another flat in the same building taken in the name of the accused's elder sister (Asset "L"). The balance of the purchase price was satisfied by another cashier order which also paid for that of the other flat in Asset "L". See "P70" and "P71". Rent has since 1974 been tendered and paid to the accused's wife by Mr. Wong (P.W.16). The wife was certainly not detached from property management. She started collecting rent from the property in Asset "G" about 10 years ago in 1967 and from the Argyle Street flat in Asset "B" held for the accused in 1969. It is quite unnecessary for me to repeat the circumstances relating to the accused's wife's own financial capability or the lack of it. There is no evidence of the mother-in-law paying any of the purchase price or enjoying any of the rental so collected by the wife of the accused. The combined effect of payment of the deposit by this cashier order and the other circumstances, I have enumerated, is inconsistent with any other rational conclusion than that there is every reason for believing the acquisition of this property as being for the benefit of the accused. In effect, the prosecution's evidence has not established beyond reasonable doubt that this property was held in trust for the accused, but on the same facts, the Crown has satisfied me beyond reasonable doubt that there is reason to believe that it was so held. Thus, a presumption arises under Section 10(2) that this property was at the material time in the control of the accused. As at the Charge date, 29th November, 1972, only \$25,000.00 deposit had been paid.

(10) Asset "J": 131 Fa Yuen Street, 4th floor registered in the name of CHEUNG Yuk-lin, elder sister of the accused. This property was purchased by an Assignment dated the 11th June 1966 "P46" for \$42,000.00. Except for a payment of \$13,000.00 by cheque, the whole of the purchase price was paid in cash. There was a payment of solicitors' costs and expenses on the 24th April 1965 in the sum of \$1,563.00 which was also paid in cash. I do not propose to repeat the station of life and other personal circumstances of the elder sister of the accused and her husband. The assignment of this property was taken in the name of CHEUNG Yuk-lin of an address at Flat A3 Far View Mansion, 8th floor at 16 Yuet Wah Street, Kwun Tong in Asset "K". It is formally admitted in Document "A" that she lives in a stone house on a

permit area in the New Territories. There is no evidence where she in fact lived at the time of this purchase, but her Crown Land Permit "P57" commenced in January 1962 with permitted structures for human accommodation, chicken-shed and pigsty. I need simply to quote verbatim the accused's statement in "P33" to show its absurdity: "Far View Mansion, Kwun Tong is the property of my elder sister CHEUNG Yuk-lin. As the living environment(s) in Pang Ching Street was then no good, so I moved to live with her in Kwun Tong. I had also paid rents to her, but (the amount) was very small. Theoretically, only she lived with me then, as her husband had gone to sea and seldom returned home, and her children were living in Tai Hang Village, New Territories, and only visited her once in a while. Later I moved to Lung Cheung Court and did not live with her any longer. She just came to visit me occasionally and would stay a day or two." But from "P60", CHEUNG Yuk-lin's address as registered ratepayer was given as that of the accused's first matrimonial home at Pang Ching Street in Asset "G" from 1966 to 1967, 16 Yuet Wah Street, Kwun Tong in Asset "K" from 1967 to August 1969, and the accused's present residence in Lung Cheung Court in Asset "A" as from August 1969. There is no evidence that CHEUNG Yuk-lin ever lived in Pang Ching Street ("Asset "G"), and according to the accused's statement she has never been an occupier of his Government flat at Lung Cheung Court (Asset "A"). Rates and property tax for this property have at times been paid by personal cheques of the accused. Rental was paid to the wife of the accused by WONG Shuet-ying (P.W.33) and Mr. Lau (P.W.17) over the past 11 years. I do not accept the bald assertion by the accused in his statement "P33" that rent was collected for the benefit of CHEUNG Yuk-lin from this and other properties. Madam CHENG Wai-chun's position requires no further emphasis, and her participation in this and the other cases can but reflect her husband's interest. I have also taken into consideration the involvements of this woman in the affairs of the accused in respect to the other assets yet to be considered. In the end, I have arrived at the only conclusion that all these could not have been sheer coincidences, and in the light of her close relationship to the accused and the circumstances including that surrounding the acquisition and management of this property, I am completely satisfied that there is reason to believe that CHEUNG Yuk-lin was a mere nominee and that this property was held in trust for the accused, although I cannot say that the prosecution has discharged its heavy burden of proof that the accused was indeed in control of these premises on the 29th November 1972. This property is thus also presumed to be in the accused's control as at the Charge date.

(11) Asset "K": Flats A3 and A5 Far View Mansion, 8th floor, 16 Yuet Wah Street, Kwun Tong registered in the name of CHEUNG Yuk-lin of the same address. Closeness of relationship is obvious as in the other cases, and the station of life and personal circumstances of CHEUNG Yuk-lin are also telling. It is quite unnecessary to make any further observations on Madam Cheung's address in the Assignment. Although the assignment was signed by way of execution on the 2nd December 1967 "P48" for \$60,120.00, two separate Instructions for Sale, "P77" and "P78", were each entered into earlier by the purchaser with a chop impression. The chop itself is admitted by the defence to be that used in the case of three other bank accounts in the name

of CHEUNG Yuk-lin in subsequent assets under consideration, Asset "M", Asset "N" and Asset "O". Although the accused claimed in "P33" that CHEUNG Yuk-lin did not live with him in Lung Cheung Court, his present residence in Asset "A", she used the accused's residential address as hers for rates purposes as from August 1969. Vide "P60". Rents for these premises were for three to four years last past paid to the wife of the accused by Mr. Lam (P.W.13). I have also borne in mind the wife's involvements and her own position. Rates and property tax were on occasions paid by the accused's cheques. I have likewise taken into consideration the connection of the name

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(continued)

10 of CHEUNG Yuk-lin with the other assets in these proceedings. Again, these matters could not have been sheer coincidences. They point strongly to the conclusion that this property was held in trust for the accused, although the Crown has not managed to establish beyond reasonable doubt that the accused was indeed in control of it. However, on the same facts I am wholly satisfied that there is reason to believe that the property was so held. Therefore, a similar presumption arises that he was in control thereof as at the Charge date.

(12) Asset "L": Flat 9 Kin On Mansion, 5th floor, Tam Kung Road registered in the name of CHEUNG Yuk-lin. I need not repeat ad nauseum

20 the closeness of relationship between CHEUNG Yuk-lin and the accused and the use of her name in other transactions in these proceedings. In the Assignment dated the 2nd May 1974, "P50", the purchaser used the present address of the accused, and for payment of rates, she used the same address as from January 1974. Vide "P60". In the light of the accused's statement in "P33": "Later I moved to Lung Cheung Court and did not live with her (CHEUNG Yuk-lin) any longer. She just came to visit me occasionally and would stay a day or two", use of the accused's present address is indeed baffling. The property was purchased for \$52,700.00. The Agreement for Sale and Purchase is dated the 6th December 1972 "P51" whereby an earlier

30 payment of a \$25,000.00 deposit was acknowledged. In fact, the deposit was paid at the time of the Instructions for Sale dated the 17th March 1972 "P72". In the said Instructions for Sale "P72", someone by the name of WONG Chi-shing of the accused's present address and with the accused's present telephone number represented CHEUNG Yuk-lin, and of course the \$25,000.00 deposit came from part of the cashier order "P18" issued out of the savings account in the name of CHEUNG Yuk-lin in Asset "M" from which in January 1972 \$10,000.00 was transferred to the accused's current account in Asset "D". See "P17". The balance of the purchase price was paid from the same cashier order for that of the property in the same building in

40 Asset "I". I have also taken into consideration the station of life and personal circumstances of CHEUNG Yuk-lin and her spouse as well as her involvements in other transactions in these proceedings. For two years last past rental was paid to the accused's wife by Madam Leung (P.W.15). No more need really be said of the accused's wife. The prosecution's evidence fails to prove beyond reasonable doubt that the accused was the beneficiary. On the same facts, I am completely satisfied that the circumstances I have referred to and the closeness of relationship together give reason to believe that this property was taken in the name of CHEUNG Yuk-lin as nominee for benefit of the accused

and that the property in question was held in trust for the accused. The same presumption of control under S.10(2) arises.

(13) Asset "M": Savings account No. 07-200-0640-6 in the name of CHEUNG Yuk-lin with the Chartered Bank (Kwun Tong Branch). This savings account was opened on the 9th April 1963 and closed on the 4th December 1974. Vide "P15", the Specimen Signature Card. There were quite a number of cash withdrawals as can be seen in "P16". The cashier order "P18" was issued from this savings account for the payment of the deposit for the purchase of the two Tam Kung Road properties in Assets "I" and "L". The chop used for the operation of this savings account is the same as that used for the Instructions for Sale for the property in Asset "K" and the two other bank accounts to come. CHEUNG Yuk-lin's station of life and personal circumstances have also not been overlooked in my consideration of this savings account. The current address of the accused in Assets "G", "K" and "A" respectively was used and followed in succession for this savings account. There is no allegation that CHEUNG Yuk-lin shared accommodation in Pang Ching Street, Asset "G", or in the Government flat, Asset "A". In fact, in his statement "P33" the accused claimed that CHEUNG Yuk-lin has never become a resident of his present address in Asset "A". There were two accounts operated by CHEUNG Yuk-lin in the New Territories which the Crown does not allege to be in the control of the accused as at the Charge date. Those were savings accounts opened with the respective branches of the Hong Kong & Shanghai Banking Corporation and the Kwangtung Provincial Bank in the New Territories for which CHEUNG Yuk-lin gave her own New Territories address and, in the latter case, even for a correspondence address, and she operated those two New Territories accounts by her own signature. See Specimen Signature Cards "P29" and "P31". It is unusual that CHEUNG Yuk-lin had not approached a branch of the same banks for opening a city account such as that here. There is a marked contrast in the movements and size of funds as well as the credit balances in this and the two New Territories accounts of CHEUNG Yuk-lin. Before 1974, the accused was served by Mr. Ng (P.W.8) in renewing some Fixed Deposit account in the name of CHEUNG Yuk-lin in the Kwun Tong Branch of the Chartered Bank. Madam Lo (P.W.4) also, on occasions saw the accused depositing into and occasionally withdrawing monies from "CHEUNG Yuk-lin's" account with the Chartered Bank (Kwun Tong Branch), and it is almost common ground that the accused had no accounts in his own name with this branch. There is no evidence why the Kowloon City savings account in Asset "F" was opened in 1971 whilst this Kwun Tong savings account No. 07-200-0640-6 had been in operation since 1963, and I must not speculate. The credit balance of this account as at the Charge date was \$63,604.27. There can be no other rational premise than that CHEUNG Yuk-lin was a mere nominee, but the evidence has not proved beyond reasonable doubt that this was indeed held in trust for the accused. However, on the same known circumstances I am satisfied beyond reasonable doubt that there is reason to believe that this savings account was held in trust for the accused, and the statutory presumption likewise arises.

(14) Asset "N": A Fixed Deposit evidenced by a receipt No. 31251385 "P21" in the name of CHEUNG Yuk-lin with the Chartered Bank (Kwun

Tong Branch) in the sum of \$313,090.87 which was not withdrawn as at the Charge date. OIn “P22”, the ledger card of the bank for this Fixed Deposit, the address of account-holder was given as the accused’s present address. CHEUNG Yuk-lin is admittedly never an occupant of the accused’s Government flat. The same chop was used. In every respect, this is noticeably different from the two New Territories accounts of CHEUNG Yuk-lin herself. The accused was assisted by Mr. Ng (P.W.8) in renewing a Fixed Deposit account in the name of CHEUNG Yuk-lin in the Kwun Tong Branch, and he was also seen there depositing into and occasionally withdrawing monies from the account in the name of CHEUNG Yuk-lin by Madam Lo (P.W.4). Generally the circumstances for this fixed deposit account are very similar to those I have enumerated for the savings account in Asset “M”, and I have arrived at the same findings and conclusions.

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Reasons for Verdict of His Honour Judge Liu, Q.C.
(continued)

(15) Asset “O”: Savings account No. 20-201-0689-7 in the name of CHEUNG Yuk-lin with the Chartered Bank (Kowloon City Branch). Madam Lo (P.W.4) testified that the accused’s wife alone approached her with a pass book in the name of CHEUNG Yuk-lin. Miss So (P.W.9) told the Court that this account was opened by the wife of the accused in the absence of CHEUNG Yuk-lin. This savings account shares, in many respects, similarities with the savings account in Asset “M” and the Fixed Deposit in Asset “N”. The Specimen Signature Card “P24” authorized the use of the same chop and was opened on the 29th November 1972, the Charge date, with a sum of \$393,985.70. The accused’s present address was also used. An added feature for this savings account is that a mammoth sum of \$393,785.70 was thrown into this savings account after the initial deposit of \$200.00. The circumstances relating to the financial capability of the accused’s wife and his elder sister require no repetition. Circumstances are such that they produce little doubt in my mind as to what the object of the exercise was. It is obvious that CHEUNG Yuk-lin was, as in the other cases, used as a nominee, although the evidence fails to establish beyond reasonable doubt that this savings account was held in trust for the accused as at the Charge date. However, I am satisfied beyond reasonable doubt that there is reason to believe that this savings account was so held.

When each of these Assets is looked at particularly against the background information based on the others of them, and not in isolation, there is no room for doubting the belief giving rise to the presumption in each case.

	Therefore, Asset “G”	:	\$ 20,660.00
	Solicitors’ costs & disbursement “D4(16)”	:	894.00
40	Asset “H”	:	5,189.10
	Asset “I”	:	25,000.00
	Asset “J”	:	42,000.00
	Solicitors’ costs & disbursements	:	1,563.00
	Asset “K”	:	60,120.00
	Asset “L”	:	25,000.00
	Asset “M”	:	63,604.27

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Court of
Hong Kong

Reasons for
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Honour Judge
Liu, Q.C.
(continued)

Asset "N"	:	313,090.87
Asset "O"	:	393,985.70
		<hr/>
Total	:	\$951,106.94
		<hr/>

The accused was married in 1960, and by September 1969 he had had five daughters with a non-working wife. In November 1972 the accused's monthly pay was \$2,797.00 (i.e. \$2,470.80 + \$326.20 being mortgage payment deducted), and he was given from time to time some overtime pay which for all his years of service came to about \$12,000.00, but of course his earlier pay was more insignificant. When he married in 1960, he was earning less than \$426.32 a month. Having regard to all I know about the accused and his station of life from the evidence, it is impossible that he could have saved or acquired \$1,114,331.31 (i.e. \$163,224.37 + \$951,106.94) in the same period without any other sources than his official emoluments of \$223,578.56. **10**

There is no real dispute as to Assets "A" to "F" which I have found to be in the accused's control. The accused has elected not to give or call evidence, and in my view none of the presumptions against him under section 10(2) in respect to Assets "G" to "O" has been rebutted. I place no reliance on what he disclosed in his statement which are or may be taken as satisfactory explanations. Apart from such assertions being monumentally self-serving, they are plagued by alleged cash transactions of all forms. The accused has also not seen fit to attempt to substantiate these allegations by his viva voce evidence. I do not accept his allegations of savings, inheritance and the sales thereof, share transactions, and winnings made in "P33". I also do not accept the alleged rent collection on behalf of his elder sister or the alleged illicit activities said to have been pursued by the husband of CHEUNG Yuk-lin whose way of life has not been shown to be accompanied by any generosity befitting the wife of a successful smuggler. In the end, I am satisfied beyond reasonable doubt, on the whole of the evidence I accept including the presumptions, that the accused was in control of Assets "G" to "O". **20**

The total value of the assets in the accused's control on the 29th November 1972 stood at \$1,114,331.31. Taking the accused's total official emoluments up to the Charge date at \$223,578.56, the unexplained balance is \$890,752.75 (\$1,114,331.31 - \$223,578.56), but, in my view, that is not the proper computation. Family expenses, taxation and the other recurrent expenditure of a working man with five children should not be ignored. The accused was known to have purchased a car in July 1971 and to own three air-conditioners in February 1976. I am entitled to take judicial notice of the reality that savings of one-fifth or 20% of a working man's total income represents a commendable effort. When the accused's income was meagre, there was naturally little or no savings at all. Of course, the possibility of having some bank interests accrued must not be entirely overlooked. With all these in mind, in the circumstances I would and do put the net savings of the accused from his total official emoluments at a third or 33.33% thereof. One-third of \$223,578.56 is \$74,518.73. In my view, it is only this \$74,518.73 which should be deducted from the pecuniary resources and properties found **40**

to be in the control of the accused as at the Charge date. My calculations are therefore:

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\$1,114,331.31 – \$74,518.73 = \$1,039,812.58 being the balance unexplained.

Reasons for
Verdict of His
Honour Judge
Liu, Q.C.
(continued)

10 Substantial arguments on the value of the landed properties have been advanced as to whether the purchase price or the market price at the Charge date should be adopted. For reasons I have given in Kan Ping's case, the purchase price would seem to offer precision and fair play. I do not propose to repeat what I said in the case of Kan Ping. Whatever yardstick one adopts, it would make no real difference in the end result. The object of the exercise in a case under section 10(1)(b) is to quantify precisely what resources there were from which an accused person could draw in making his initial capital investment. The purchase price itself is a fair and workable criterion, and even if one were to adopt the market price at a particular Charge date arbitrarily selected by the prosecution in each case, there would invariably be a built-in explanation for the difference between the market value and the purchase price either by way of appreciation or depreciation which must be accounted for.

20 With the accused's then salary in November 1972 at \$2,797.00 (\$2,457.80 + \$326.20 mortgage payment deducted), assets amassed by the accused even to the extent of \$163,224.37 being the value of pecuniary resources and properties in Assets "A" to "F" as at the Charge date are, in my view, disproportionate to his then present and past official emoluments. With his actual net savings therefrom at \$74,518.73 (i.e. at 33.33% of the accused's official emoluments), the point is well illustrated with the accused in control of an unexplained excess of \$88,705.64 (\$163,224.37 – \$74,518.73). We are not dealing with any numerical discrepancy. Control of even the lesser sum of \$163,224.37 by a man whose earnings ranged from less than \$426.32 to \$2,797.00 over some 16½ years in the circumstances of the accused is, I find, disproportionate to his then past and present official emoluments. Including Assets "G" to "O", the 30 unexplained balance of \$1,039,812.58 is obviously disproportionate. Needless to say the onus of establishing guilt in this trial remains throughout with the prosecution. I am satisfied beyond reasonable doubt on the whole of the evidence inclusive of the presumptions that the accused was in control of Assets "A" to "N" as at the Charge date and is guilty as charged.

(B. LIU)

Judge of the District Court

In the Supreme Court of Hong Kong
Appellate Jurisdiction
Criminal Appeal No. 492 of 1977

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 492 of 1977

*In the Supreme
Court of
Hong Kong
Appellate
Jurisdiction*

BETWEEN

CHEUNG CHEE KONG

Appellant

and

THE QUEEN

Respondent

Amended
Grounds of
Appeal
29th December,
1977

AMENDED GROUNDS OF APPEAL

APPEAL AGAINST CONVICTION

- 10 1. That with respect to assets 'G' to 'O' the learned Judge misdirected himself as to the application of the presumption provided for by Section 10(2) of the Prevention of Bribery Ordinance, Cap. 201, Laws of Hong Kong.
2. That if the appellant is correct in law in ground 1 above then the learned Judge misdirected himself as to the appellants explanation with regard to asset 'D'. Further and in any event the learned Judge on the evidence should have accepted the explanation as to Hong Kong dollars \$13,260.32 with respect to this asset.
3. That the learned Judge should have assessed asset 'B' at Hong Kong dollars \$38,000.00 and not included HK\$512.00 disbursements.
- 20 4. That in the premises and in all the circumstances the learned Judge should not have found the case proven.

APPEAL AGAINST SENTENCE

That the sentence was excessive and the order under Section 12(3) should not have been made at all or alternatively in the sum in fact ordered.

Dated the 29th day of December, 1977.

A. SCRIVENER, Q.C.

Counsel for the Appellant.

*In the Supreme
Court of
Hong Kong
Appellate
Jurisdiction*

Amended
Grounds of
Appeal
3rd January,
1978

IN THE COURT OF APPEAL
APPEAL FROM VICTORIA DISTRICT COURT
CRIMINAL CASE NO. 269 of 1977

APPEAL NO. of 1977

BETWEEN

CHEUNG CHEE KWONG

Appellant

and

THE QUEEN

Respondent

AMENDED GROUNDS OF APPEAL

1. That with refer to assets "G" to "O" the learned Judge misdirected himself **10** as to the application of the presumption provided for by Section 10(2) of the Prevention of Bribery Ordinance.
2. That if the Applicant is correct in law on ground 1 above then the learned Judge misdirected himself as to the Appellant's explanation with regard to asset "D". Further and in any event the learned Judge on the evidence should have accepted the explanation as to HK\$13,260.32 with refer to this asset.
3. That the learned Judge misdirected himself on the evidence in holding in relation to asset "B" that "To all intents and purposes, the accused had the right to dispose of this property at the material date." **20** Alternatively that the learned Judge should have assessed asset "B" at HK\$38,000.00 and not included HK\$512.00 disbursements.
4. That the charge was bad for duplicity.
5. That the learned Judge should have taken the sum of \$44,000.00 paid to the Appellant as mileage allowance as part of his emoluments.

Dated the 3rd day of January, 1978.

A. SCRIVENER, Q.C.

Counsel for the Appellant.

IN THE COURT OF APPEAL

1977 No. 492
(Criminal)

*In the Supreme
Court of
Hong Kong
Appellate
Jurisdiction*

BETWEEN

CHEUNG Chee-kwong

Appellant

and

Judgment of the
Honourable Mr.
Justice Huggins

THE QUEEN

Respondent

Coram: Huggins and Pickering, J.J.A. and McMullin, J.

JUDGMENT

10 Huggins, J.A. :

McMullin, J. has read this judgment and agrees with it.

The Appellant was convicted under s.10(1)(b) of the Prevention of Bribery Ordinance and seeks leave to appeal against that conviction. The charge against him was as follows:

“Statement of Offence

Being a Crown Servant was in control of pecuniary resources or property disproportionate to his then present or past official emoluments, contrary to section 10(1)(b) of the Prevention of Bribery Ordinance, Cap. 201.

20

Particulars of Offence

Cheung Chee-kwong, being a Crown Servant, namely a Building Inspector Class II of the Public Works Department of the Hong Kong Government, was on the 29th day of November 1972 in control of pecuniary resources or property disproportionate to his then present or past official emoluments.”

The first point taken by Mr. Scrivener on the Appellant’s behalf is that that charge was bad for duplicity in that it related in the alternative to “pecuniary resources” and “property”. He has subjected the decided cases on duplicity to an exhaustive analysis and submits that they show that duplicity
30 can arise in two different ways: (1) Where one criminal offence is charged and where that charge alleges on its face, or where the evidence shows, that there were two different and separate acts constituting more than one offence; and (2) Where two different crimes are alleged in one charge. As to (1) he submits that the test is whether the matters alleged involve “one activity”, a matter which has to be decided by looking at the charge and/or at the evidence.

Such a case is Jemmison v Priddle 1972 1 Q.B. 489, where a hunter shot two red deer in the same place and at the same time. In such a case, Mr. Scrivener concedes, it is proper for the court on an appeal to consider whether or not the appellant was prejudiced in his defence. As to (2), on the other hand, he contends that such a charge is bad in law, that its defectiveness is to be adjudged by looking at the charge alone and that on appeal the court is not concerned to ask itself whether prejudice resulted. He accepts that separate crimes may sometimes be charged conjunctively in the same charge (see Reg. v Clow 1965 1 Q.B. 598) but that that is so only where they both arise from one activity and that the present is not such a case. Mr. Scrivener 10 argues that the present is a case within "Category 2" because s.10(1)(b) creates two separate crimes, one of controlling disproportionate pecuniary resources and one of controlling disproportionate "property". That that is so appears, it is said, not only from s.10(1) itself, which could so easily have been drafted to include in para. (b) some such words as "control of wealth, whether in the form of pecuniary resources or of other property", but also from the fact that s.12(3) similarly contains the disjunctive "or" in relation to orders for payment to the Crown of

"(a) a sum not exceeding the amount of the pecuniary resources; or

(b) a sum not exceeding the value of the property, 20
the acquisition of which by [the convicted person] was not explained
to the satisfaction of the court".

This is a very forceful and, prima facie, very attractive argument. The difficulty we see in adopting it arises from the nature of the legislation. If the argument were right, it would follow that this Appellant should have been charged with two offences, one relating to the pecuniary resources and one relating to the "property". It does not follow from the argument of Mr. Scrivener, as it was suggested that it did, that upon a charge relating to the pecuniary resources evidence relating to the "property" would be irrelevant. Nevertheless the fact remains that once control of the "property" was proved 30 not only would that "property" have to be considered in relation to the disproportion of the pecuniary resources but if the defendant were convicted on the pecuniary resources charge he would necessarily be guilty on the "property" charge. This shows that despite the use in the subsection of the disjunctive "or" there is in truth created only one offence and not two. The draftsman of the charge sheet cannot be blamed for any deficiency in the language which he has taken directly from the statute. If we do not review all the cases cited to us it is not out of disrespect for the argument of counsel, whilst the contrary argument, which we think must prevail, does not admit of 40 elaboration. This statute is in a class of its own and s.10(1)(b) creates an offence which arises not directly from an act or activity of the defendant but from a situation which the defendant is unable to explain. It must be conceded that the intention that the word "or" in the subsection shall not be read disjunctively, as provided for by ss.2(1) and 3 of the Interpretation and General Clauses Ordinance, is not expressed as clearly as it might have been, but we are satisfied that such an intention sufficiently appears.

The next point alleges that the learned judge misdirected himself as to the application of the presumption provided for by s.10(2). The Crown alleged that the Appellant was in control of various flats and bank accounts standing in the name of relatives. It could not be proved directly that the Appellant was in control of these assets and the judge had to decide whether they were in the Appellant's control by virtue of the presumption. This matter appears to have given the judge some difficulty and takes up a large part of his Reasons for Verdict. Indeed, it has been pointed out to us that he changed his mind upon the matter in the course of the trial. Upon a submission of no case to
10 answer he agreed with counsel then appearing for the Appellant.

“that in the final analysis the Court will have to be satisfied beyond reasonable doubt or at least to take into account whether or not it is so satisfied beyond reasonable doubt that there was a trust, agency, bailment or gift. Circumstances to found a belief must be such as to produce no reasonable doubt. Cases in which a Court would, under s.10(2), believe the existence of a fact not proved beyond reasonable doubt must be rare. In the circumstances of this case as presently known, in effect I shall have to be ultimately satisfied beyond reasonable doubt that a trust, an agency, a bailment or a gift did exist as at the Charge date. Thus, the eventual difference, as submitted by Mr. Lee and I agree, is negligible whatever interpretation one seeks to put on this subsection and however one looks at and analyses the language of it.”
20

With respect to the learned judge this is not entirely clear, but it does appear to say that at some stage the judge would have to be satisfied beyond reasonable doubt that a trust, agency, bailment or gift had been made of the pecuniary resources and “property” alleged to be in his control on the charge date although standing in the name of a relative. In his Reasons for Verdict the learned judge explained this earlier view as being one that “in reality [the
30 court] must be [satisfied beyond reasonable doubt that a person is in fact holding on behalf of the accused] for a belief of that fact to be entertained”, which he agreed was wrong. However, in his Reasons the learned judge became somewhat metaphysical in his approach to the whole problem and we think that this led him to use language which in places is far from clear. There are, indeed, passages which are at the best obscure and at the worst questionable. Thus he said :

“Obviously, a stage may be reached at which a Court would feel justified in believing the existence of a fact even before that very fact ever begins to be proved, letting alone being proved beyond
40 reasonable doubt.”

Probably what he meant was that a stage may be reached at which a court would feel justified in finding that there was reason to believe the existence of a fact before that fact has been proved even to a standard lower than that of proof beyond reasonable doubt. The judgment must be read as a whole and when one looks at the judge's findings in respect of each separate asset we think it is apparent that he was adopting as the primary fact giving rise to the presumption — a primary fact which had to be proved beyond all

reasonable doubt — the existence of “a reason to believe”. Mr. Scrivener did argue that the primary fact giving rise to the presumption was not the reason to believe but the existence of the trust, agency, bailment or gift but that was not in truth essential to his main contention that the judge was in error in relation to the standard of proof. As to the unessential point we think the language of the statute leaves no room for doubt: the primary fact is “the reason to believe”. No one questions that the burden of proving the guilt of the Appellant and, therefore, of proving the primary facts giving rise to any presumption was on the Crown. No doubt what is “reason to believe” is largely a matter of opinion, but whether such reason to believe exists is nevertheless a matter of fact. Although in relation to the presumption it is the primary fact, by itself it may be said to be a matter of secondary fact the existence of which must be established from other “primary facts”. In the present case those other primary facts are specified by the legislation, namely “the closeness of [the person’s] relationship to the accused and . . . other circumstances”. Those other primary facts must, of course, be “proved beyond reasonable doubt”. Although there must be proof beyond reasonable doubt of the reason to believe and of the facts on which the belief is founded, and although those facts must be such as could reasonably found the belief, that is not to say that the existence of the trust, agency, bailment or gift must be proved beyond reasonable doubt. 10 20

However, the real force of Mr. Scrivener’s argument lies in the contention that belief in relation to criminal proceedings must always be belief beyond all reasonable doubt, so that when the Crown seeks to establish beyond all reasonable doubt the existence of reason to believe it must establish beyond all reasonable doubt reason to believe beyond all reasonable doubt. If that be right, the words “there is reason to believe” are surplusage in the sense that the end result is the same whether they are there or not — the Crown must prove beyond all reasonable doubt the trust, agency, bailment or gift, for where there is reason to believe, beyond all reasonable doubt, the existence of a fact it would be perverse not to believe the existence of that fact. But must belief in relation to criminal proceedings necessarily be belief beyond all reasonable doubt? As was said in Chan Siu-shing v Reg. 1974 H.K.L.R. 493, 498 what has to be proved beyond all reasonable doubt is the guilt of the defendant. If s.10(2) had said “Where the court is satisfied that there is reason to believe on a balance of probabilities”, no one could reasonably have contended that the belief which had to be proved was belief beyond all reasonable doubt and we do not think such a provision would be so outrageous that it is impossible the Legislature could ever contemplate it. We do not overlook the principle that a criminal statute should always be construed strictly and, in case of ambiguity, in favour of the subject, but we do not think the general onus of proof is relevant to the interpretation of this subsection. We have to give the statute “such fair, large, liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit”: see s.19 of the Interpretation and General Clauses Ordinance as interpreted in Mirchandani v Reg. Cr. App. 1977 No. 266. In so doing we must not treat words as otiose if they 30 40

can be given some reasonable meaning. As it seems to us the only possible purpose in inserting the words “there is reason to believe” was to indicate that the existence of the trust, agency, bailment or gift did not have to be proved beyond all reasonable doubt. If it were correct that there was a presumption in favour of requiring a higher standard of belief which could only be displaced by clear words, we would hold that such clear words have been use. It matters not that by inserting some such phrase as “on a balance of probabilities” the point could have been made so clear as to be unarguable.

*In the Supreme
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(continued)

10 The conclusion we have reached as regards the presumption has the effect of limiting Ground 2 of the Amended Grounds of Appeal to the contention that, on the evidence, the learned judge should have accepted the Appellant’s explanation as to part of asset D, namely a sum of \$13,260.32. Asset D was a current account in the name of the Appellant himself which contained \$23,260.32 at the charge date. This was the account to which the Appellant’s official emoluments were credited and it is submitted on his behalf that that fact was sufficient explanation. Prima facie it is an explanation of that particular sum, but what is being sought is an explanation of how pecuniary resources and “property” disproportionate to his official emoluments came under his control. The learned judge accepted that the Appellant might have saved as much as \$74,518.73 and held that there was an explanation to that extent. The \$13,260.32 in the current account described as asset D is part of the total wealth of which \$74,518.73 has been explained. This point therefore fails.

30 Ground 3 alleges a misdirection by the learned judge when he said in respect of a flat in the name of the Appellant’s sister-in-law (asset B) that “to all intents and purposes, the accused had the right to dispose of this property at the material date”. The argument is that the judge did not here rely upon the presumption, that there was no evidence to justify the finding that the Appellant had the right to dispose of the flat, that all that was proved was that he had a beneficial interest and that the existence of a beneficial interest did not necessarily give control. The evidence relied upon by the prosecution was as follows:

- (a) On several occasions rates and property tax in respect of the flat were paid by cheques drawn by the Appellant:
- (b) the Appellant’s wife granted a tenancy of the flat in her own name:
- (c) the sister-in-law gave as her address from 1969 the same address as that of the Appellant, although that was not where she was actually residing:
- 40 (d) a copy of an entry in the Land Register which has been admitted “for all intents and purposes” and which indicates that a declaration of trust was made by the sister-in-law in favour of the Appellant.

Some difficulty arose as to the alleged declaration of trust because the deed itself was admitted in evidence but, as a result of a later submission, was

expressly disregarded by the judge in coming to his decision “as if it had never been admitted”. Mr. Scrivener sought to argue that the declaration of trust was not sufficiently proved, but felt unable to press this point to the full as Mr. Astin informed the court that he had understood the admission to include an admission of the existence and validity of the declaration of trust and not to be confined to the existence of the entry in the Register. Beyond saying that it would be strange for counsel to have argued that the deed had been wrongly admitted if he had already admitted the material facts, Mr. Scrivener was, of course, in no position to question Mr. Astin’s understanding of the situation. As to the deed itself we ruled that it would not be right for us to look at it, because of the uncertainty as to the view finally taken by the learned judge: although he said he disregarded it, his use of the phrase “as if it had never been admitted” left us in some doubt whether he had not in truth reversed his original ruling and struck the exhibit from the record. In a criminal case we thought it would be wrong for an appellate court to look at evidence which was not before the court below, even if the judge of trial had wrongly excluded it. We therefore did not decide whether the judge had been wrong to admit the deed and we declined to look at it. We think the safest course for us now to adopt is to say that the benefit of any doubt as to the extent of the admission made at the trial must be given to the Appellant. The other facts which we have set out do not, in our judgment, amount to sufficient proof of the Appellant’s control over this flat and on this part of the case the Appellant must succeed. A sum of \$38,512.00 must be deducted from the assessed wealth under the control of the Appellant.

The only other matter relating to the conviction concerns the computation of the Appellant’s “official emoluments”. The learned judge excluded from the computation a sum, agreed to be \$44,000.00, paid by the Government to the Appellant by way of “mileage allowance” in respect of the use of his own motor-car on official duties. The judge’s reasoning, based no doubt upon the ordinary meaning of the word “emoluments” as “profit or gain from station, office, or employment” (Shorter Oxford Dictionary) was that this allowance had “in no way boosted the accused’s resources” but was reimbursement for the costs of “petrol, oil, greasing, repairs, maintenance and tyres as well as compensation for depreciation, interests foregone, licence fee and insurance premium”. It was contended on the other side that “emoluments” includes everything received from the employer: all the money went into the same account and the fact that this allowance was “for a specific purpose” was irrelevant. We think that Mr. Astin is right when he submits that an allowance which is a reimbursement for an expenditure already incurred is not strictly an “emolument” in the ordinary sense. It may well be that for some purposes it would not be regarded as a “profit from his employment”. However, we have to interpret that word in the context of the Prevention of Bribery Ordinance, bearing in mind particularly that the word also appears in para. (a) of s.10(1). In Reg. v Hunt 1974 H.K.L.R. 31, 40 the Full Court accepted that in relation to that paragraph “all running costs, expense of repairs or maintenance and outgoings connected with the possession of” a motor-car must be included in the assessment of a standard of living. On that basis we think that justice requires that the court should consider on the other

side of the account any allowance which has been paid to help meet such disbursements. If a mileage allowance is part of the “official emoluments” for the purposes of para. (a), it would need a very strong argument to justify its exclusion for the purposes of para. (b). If the allowance had not been paid, the Appellant would presumably have had less wealth at the charge date and it is just that the allowance should be brought into account to balance this “additional wealth”.

*In the Supreme
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Jurisdiction*

Judgment of the
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(continued)

The result of what we have said is that the Appellant’s “official emoluments” should have been assessed as follows:

10	Basic salary	\$211,578.56
	Overtime	12,000.00
	Mileage allowance	44,000.00
		\$267,578.56
	Total:	\$267,578.56

Against this must be set wealth assessed at \$1,101,300.58, leaving a difference of \$733,722.02. On any view this wealth was disproportionate to the Appellant’s official emoluments. The learned judge found \$74,518.73 to be explicable and there is no reason to increase that figure on the basis that the Appellant might have saved some part of the mileage allowance, so that there still remains an unexplained balance of \$659,203.29 and the application for leave to appeal

20 against conviction must be dismissed.

There remains the matter of sentence. The Appellant was sentenced to imprisonment for three years and ordered to pay to the Crown a sum of \$1,414,234.58. It is to be observed that the notice of application for leave to appeal against sentence complains only of the term of imprisonment, but there is no doubt that by virtue of s.80 of the Criminal Procedure Ordinance the order for payment is part of the “sentence” and no point has been taken by the Crown as to the form of the notice. It will be convenient to deal first with the submissions affecting the order for payment. One of the arguments in favour of holding that s.10(1)(b) created two separate and distinct offences

30 was that by virtue of s.12(3) the penalty for having control of disproportionate pecuniary resources could include an order for payment which was to be assessed differently from an order for payment made as part of the penalty for having control of disproportionate “property”. Subsection (3) is in these terms:

“In addition to any penalty imposed under subsection (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,

40 the acquisition of which by him was not explained to the satisfaction of the court.”

That, says Mr. Scrivener, also contains the disjunctive “or” and clearly contemplates separate orders in respect of pecuniary resources on the one

hand and “property” on the other. As we have held that s.10(1)(b) creates only one offence, does it follow that s.12(3) may properly be interpreted as if “or” were conjunctive? One would not have been surprised if the subsection had said “an amount not exceeding the sum of the amount of the pecuniary resources and of the value of the property”. However, that is not what it says and we must interpret the words of the statute as we find them. At first sight it would appear to be inescapable that an order under s.12(3) may be made under para. (a) or para. (b) and cannot lawfully require payment of a global sum. How is one to assess separately the unexplained pecuniary resources and the unexplained “property”? Where land or goods come under the control of a defendant by way of inheritance there is no question but that the explanation relates to that land or those goods and to them alone. Where, however, the explanation of both the pecuniary resources and the “property” is the same — for example, that they both represent savings or accretions to the defendant’s wealth originally in the form of money — is one to “apportion” the explanation? Suppose a case where the defendant has pecuniary resources of \$25,000.00 and “property” valued at \$75,000.00. He explains that he has saved \$50,000.00. If an order had to be made only in respect of the “Property” the unexplained value would be \$25,000.00, whilst the whole of the pecuniary resources would have been explained. In fact, of course, the total of the unexplained wealth would be \$50,000.00, although no order could be made in that sum. The position would have been precisely the same if Mr. Scrivener had been right when he argued that the proper course was to lay separate charges in respect of each type of wealth. Nevertheless, unlikely as it is that the legislature really intended to limit the amount of the order under s.12(3) to that prescribed by para. (a) or that prescribed by para. (b) that is what they have clearly said and it is not for us to redraft the statute.

Before considering what orders would have been within the powers of the learned judge, we must go on to a second point which has been raised, namely whether the learned judge was right to value the “property” for the purposes of s.12(3) as at the date of the hearing. Mr. Scrivener argues that there is no warrant for taking a different value for the purpose of s.12(3) from that which was taken for the purposes of s.10(1)(b). He points to the fact that in valuing the pecuniary resources for the purposes of s.12(3)(a) no account is to be taken of interest earned between the charge date and the date of sentence and he submits that such resources do not have to be revalued. What, however, if the pecuniary resources are in the form of foreign currency? What tends to be overlooked in these days of runaway inflation is that property may depreciate as well as appreciate in value in terms of money and where depreciation has occurred it would be to the advantage of the convicted person to take the depreciated value. It is inherent in Mr. Scrivener’s argument that an order made under s.12(3) is part of the “penalty” for the offence and he submits that “penalty” is synonymous with the word “sentence” as defined in s.80 of the Criminal Procedure Ordinance. We do not accept this argument and we do not think that Attorney General v Wilkinson Application for Review 1977 No. 3 is authority which supports it. Although the order is part of the “sentence” for the purposes of appeal, in our view Mr. Astin is right when he says that it is akin to an order for restitution or compensation and that the object is to put the convicted person into the position he would have

been in if he had controlled only the wealth which he could explain: although it has not been proved that the unexplained wealth was the fruit of corruption, it is to be assumed that it was. An order can be made under s.12(3) only where the conviction was under s.10(1)(b) and where, in consequence, no mandatory order can be made under s.12(1) for payment to the Crown of “the amount or value of any advantage received”. In our judgment the purpose of both orders is the same. It is clear that where, for example, it has been proved that a person convicted under s.4 has received an advantage in the form of “property” that property will be valued at the date of trial for the purposes of s.12(1). That being so we think the same date should be taken for the purposes of s.12(3). Although such an interpretation will produce the possibility that orders could be made which amounted not merely to compensation but also to a penalty, the safeguard lies in the words “not exceeding”, which give the court a discretion, i.e. to make an order only if and in so far as it is just in order to deprive the convicted person of the fruits of his presumed corruption. As Mr. Astin pointed out, the continued retention of those fruits would result in a continuance of the offence of controlling disproportionate assets which could not be explained — unless the unexplained wealth were otherwise disposed of. The fact that interest or notional interest on pecuniary resources is not to be taken into account under para. (a) does not seem to us to outweigh the other considerations.

Our attention was drawn to Reg. 4 of the Acceptance of Advantages Regulations, but we do not think that that assists us. In the first place the terms of subsidiary legislation passed by some authority other than the Legislature itself cannot be prayed in aid of the interpretation of the principal legislation. Secondly, we are satisfied that save in so far as these “regulations” may constitute a “general or special permission of the Governor” they are ultra vires. They purport to have been made under powers conferred by s.3 of the Ordinance, but s.3 does not enable anyone to make regulations — nor, indeed, does any other section of the Ordinance.

The judge’s order was based on total unexplained assets of \$1,414,234.58. We have been unable to ascertain how that figure was arrived at, because the valuations summarized by the judge at pp.420 and 421 of the record, along with the valuations of asset C at p.496 and the seven bank account balances, make a total of \$1,485,784.31 and, after deducting the \$74,518.73 for which an explanation was found by the judge to have been given, the assets he found to be unexplained appear to have totalled only \$1,411,265.58. Our assessment of the pecuniary resources does not, as we understand it, differ from that of the learned judge, namely:

40	Asset D	23,260.32
	Asset E	32,131.40
	Asset F	49,895.65
	Asset H	5,189.10
	Asset M	63,604.27
	Asset N	313,090.87
	Asset O	393,985.70
	Total:	<u><u>\$881,157.31</u></u>

*In the Supreme
Court of
Hong Kong
Appellate
Jurisdiction*

Judgment of the
Honourable Mr.
Justice Huggins
(continued)

Although the judge took \$74,518.73 as the explained wealth, we have held that there was a sum of \$44,000.00 for mileage allowance which ought to have been credited and that would bring the explained wealth up to \$118,518.73. After deducting that sum from the total of the pecuniary assets the judge could have made an order under s.12(3)(a) in the sum of \$692,638.58.

We have assessed the "property" as follows:

Asset A	7,425.00
Asset B	Nil
Asset C	12,000.00
Asset G	75,000.00
Asset I	39,880.00
Asset J	95,000.00
Asset K	200,000.00
Asset L	40,322.00
Total:	<u>\$469,627.00</u>

10

Again after deducting the explained wealth of \$118,518.73 the judge could have made an order under s.12(3)(b) in the sum of \$351,108.27.

In the result we vary the judge's order under s.12(3) to one for payment of \$692,638.58. The sentence of three years' imprisonment appears to us appropriate and the appeal against sentence is allowed only to the extent **20** already indicated.

1st March 1978.

IN THE COURT OF APPEAL
on appeal from the District Court

1977 No. 492
(Criminal)

*In the Supreme
Court of
Hong Kong
Appellate
Jurisdiction*
—
Judgment of the
Honourable Mr.
Justice Pickering

BETWEEN

—————
CHEUNG CHEE-KWONG

Appellant

and

THE QUEEN

Respondent

Coram: Huggins & Pickering, J.J.A. & McMullin, J.

10 Date: 1st March, 1978

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JUDGMENT
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Pickering, J.A. :

I am in agreement as to the result of these applications both in regard to conviction and sentence and desire to mention only an additional reason for holding the charge to be not bad for duplicity by reason of its employment of the phrase "pecuniary resources 'or' property".

We were indebted to Mr. Scrivener, leading counsel for the appellant, for a very thorough survey of many English and Hong Kong cases undertaken against a background of the division of those cases into three categories the
20 most important two of which were (a) cases in which the evidence discloses more than one offence although there is only one count and (b) cases where two different criminal offences are charged in one count so that duplicity is demonstrable from the very form of the count. Crucial to the application of this survey to the present count was the contention that section 10(1)(b) creates two offences, one relating to unexplained pecuniary resources and one to unexplained property. This result was said to follow from the fact that section 3 of the Interpretation and General Clauses Ordinance provides that the word "or" is to be construed disjunctively unless the word "similar" or some other word of like meaning be added.

30 Mr. Astin, for the Crown, contended that having regard to the whole purpose and intent of the Prevention of Bribery Ordinance, and in particular to that of section 10(1)(b), no disjunctive interpretation of the word "or" in that sub-section was intended and for that view he called in aid section 2

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sub-section (1) of the Interpretation and General Clauses Ordinance which reads:

“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 other 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.”

I have no wish to treat in any laconic manner the weighty argument advanced and the numerous cases cited by counsel for the appellant but careful consideration persuades me that the pivotal point of his argument is based upon a wrong premise and that, in addition to the reasons advanced by my brother Huggins, section 2(1) does indeed result in a situation in which the word “or” in section 10(1)(b) of the Prevention of Bribery Ordinance is not to be construed disjunctively so that the sub-section does not create two separate offences. Whilst I am firmly of the view that section 2(1) of the Interpretation and General Clauses Ordinance is not to be used as some sort of draughtsman’s parachute or escape-hatch the present is, I am convinced, an example par excellence of its legitimate impact upon what would otherwise be an interpretation frustrating of the intention of the legislature in regard to the unique offence created by section 10(1)(b) of the Prevention of Bribery Ordinance. For this additional reason I would find that the charge was not bad for duplicity.

It is otherwise when one turns to a consideration of the word “or” as it appears between sub-sub-sections (a) and (b) of sub-section (3) of section 12 of the Prevention of Bribery Ordinance. That section is concerned with penalties which, whilst a not unimportant feature of the Ordinance do not assume the quintessential nature of those sections which create offences under the Ordinance. To construe the word “or” in section 10(1)(b) disjunctively would be to tear at the very fibre of the intention of the Ordinance. Conversely to construe that same word conjunctively where it appears in the far less vital section 12(3) would be to provide the draughtsman with a parachute at the expense of the direction as to construction of the word contained in section 3 of the Interpretation and General Clauses Ordinance. I would merely add that whatever the intention of the draughtsman may have been, the method of employment of the word “or” in section 12(3) gives the appearance of deliberation; for the word does not occur, as in section 10(1)(b) as part of a sentence but after the semi-colon found at the end of sub-sub-section (a) of sub-section (3) and in the form of a division between that sub-sub-section and sub-sub-section (b).

A. Scrivener, Q.C., P. Chan & C. Young (Hampton, Winter & Glynn)
for appellant.

E.R. Astin for Crown/respondent.

At the Court at Buckingham Palace

The 25th day of July 1978

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

*Order of the
Queens Most
Excellent
Majesty
in Council*

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 18th day of July 1978 in the words following viz:—

10 “WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Cheung Chee-Kwong in the matter of an Appeal from the Court of Appeal of Hong Kong between the Petitioner and Your Majesty Respondent setting forth that the Petitioner prays for special leave to appeal against a Judgment of the Court of Appeal of Hong Kong dated the 1st March 1978 dismissing the Appeal of the Petitioner against his conviction in the District Court on a charge under section 10(1)(b) of the Prevention of Bribery Ordinance of being a Crown Servant in control of pecuniary resources or property disproportionate to his then present or past official emoluments: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the said Judgment of the Court of Appeal of Hong Kong dated the 1st March 1978 and for further or other relief:

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30 AND WHEREAS by virtue of the aforesaid Order in Council of the 18th day of October 1909 there was also referred unto this Committee a humble Petition of The Attorney General in the matter of an Appeal from the Court of Appeal of Hong Kong between the Petitioner and Cheung Chee-Kwong Respondent setting forth that the Petitioner prays for special leave to appeal against the aforementioned Judgment of the Court of Appeal of Hong Kong dated the 1st March 1978 wherein it was held that an Order made by a Judge in the District Court under section 12(3) of the Prevention of Bribery Ordinance was invalid in law: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the said Judgment of the Court of Appeal of Hong Kong dated the 1st March 1978 and for further relief:

40 “THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petitions into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that special leave ought to be granted to both Petitioners to enter and prosecute their Appeals against the Judgment of the Court of Appeal of Hong Kong dated the 1st March 1978.

“And Their Lordships do further report to Your Majesty (1) that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeals upon payment by the Petitioners of the usual fees for the same and (2) that the two Appeals ought to be consolidated and heard on one Case on each side.”

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed **10** and carried into execution.

Whereof the Governor or Officer administering the Government of Hong Kong and its Dependencies for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

N. E. LEIGH

In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

CHEUNG CHEE-KWONG *Appellant*

and

THE QUEEN *Respondent*

ATTORNEY GENERAL *Appellant*

and

CHEUNG CHEE-KWONG *Respondent*

CONSOLIDATED APPEALS

RECORD OF PROCEEDINGS

HAMPTON WINTER AND GLYNN

Solicitors for the Appellant
