

Cheung Chee-Kwong - - - - - *Appellant*

v.

The Queen - - - - - *Respondent*

AND

Attorney General - - - - - *Appellant*

v.

Cheung Chee-Kwong - - - - - *Respondent*

(Consolidated Appeals)

FROM

THE COURT OF APPEAL OF HONG KONG

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 25TH JUNE 1979

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*Present at the Hearing :*

LORD EDMUND-DAVIES

LORD RUSSELL OF KILLOWEN

LORD KEITH OF KINKEL

[Delivered by LORD EDMUND-DAVIES]

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These are consolidated appeals from the judgment of the Court of Appeal of Hong Kong dismissing an application by the appellant Cheung Chee-Kwong for leave to appeal against conviction, but allowing his application for leave to appeal against sentence, and in part allowing that appeal by varying the trial judge's order in respect of a payment to be made to the Crown by the appellant Cheung Chee-Kwong pursuant to section 12(3) of the Prevention of Bribery Ordinance, Cap. 201, Laws of Hong Kong.

The appellant Cheung Chee-Kwong (hereinafter called "the accused") had since 1956 been employed in the Hong Kong Public Works Department, and from 1967 he had been a Building Inspector Class II. By November 29, 1972, his total net emoluments had reached \$211,578, and, in addition, he had received \$12,000 for overtime work, making total official emoluments of \$223,578 received over the whole period. On the terminal date he was charged in the following terms:

*" 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 Chce-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 material parts of section 10(1) provide that:—

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

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

The material parts of section 12 of the same Ordinance are as follows:—

"(1) Any person guilty of an offence under this Part . . . shall be liable—

(a) on conviction on indictment—

(i) for an offence under section . . . 10, to a fine of \$100,000 and to imprisonment for 10 years . . .

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

(3) 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,

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

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

The foregoing provisions were added to the Prevention of Bribery Ordinance in 1971 and were manifestly designed to meet cases where, while it might be difficult or even impossible for the prosecution to establish that a particular Crown servant had received any bribe or bribes, nevertheless his material possessions were of an amount or value so disproportionate to his official emoluments as to create a *prima facie* case that he had been corrupted. On such circumstances being established by the Crown, the Ordinance imposed upon the accused the burden of satisfying the Court that his seemingly disproportionate resources had in fact been innocently acquired.

The trial judge, Judge Liu, Q.C., found that the accused (who elected not to give or call evidence) had been proved to be, at the date of being charged, in possession of unexplained assets totalling \$1,039,812.58 which were "obviously disproportionate", and that he was guilty as charged. Although the formal order of conviction and sentence was not included in the Record of Proceedings furnished to this Board, it seems that, in addition to imposing a term of *three years'* imprisonment, the learned judge made an order under section 12(3) for payment by the accused to the Crown of the full sum of \$1,039,812.58.

The accused appealed in respect of both conviction and sentence. As to the former, apart from challenging the trial judge's finding regarding the "unexplained" possession, the point was taken for the first time that

the charge was bad for duplicity; while as to the latter the term of imprisonment was said to be excessive. It was further asserted that no order should have been made under section 12(3), or, alternatively, that it should have been for a different sum. The Court of Appeal dismissed the appeal against conviction. But, while leaving untouched the term of imprisonment imposed, they varied the judge's order under section 12(3) to one of payment of the sum of \$692,638.58 in respect of unexplained pecuniary resources alone.

By special leave of Her Majesty in Council, the accused now appealed to this Board against the dismissal of the appeal against conviction, while the Attorney General of Hong Kong appealed against the decision of the Court of Appeal, varying the trial judge's order under section 12(3). To a substantial extent the appeal and cross-appeal are interlocked, and turn largely on the issue of duplicity, to which their Lordships now turn.

The basic submission for the accused is that section 10(1)(b) of the Ordinance creates two offences. It makes it one offence to be in control of "disproportionate" pecuniary resources, and another and different offence to be in control of "disproportionate" property. Yet the accused was charged in the one and only count with being "in control of pecuniary resources or property disproportionate to his then present or past official emoluments". The particulars being framed in the alternative, he was thereby accused in the one count with two distinct offences, and (so it was submitted) the charge was "therefore bad for duplicity and the conviction must be quashed". Apart from the clear wording of the charge itself, additional reliance was placed on the provision in section 3 of the Interpretation and General Clauses Ordinance, Cap. 1, that—

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

That duplicity will usually exist where two separate offences are alleged in one charge is well-established law and common ground in this appeal. Why this should result in the quashing of any conviction based on such a defective charge was sought to be explained in *Rex v. Wells and another* (1904) 91 L.T.98, where a conviction for driving a motor-car in a public highway "at a speed or in a manner" dangerous to the public was quashed, Wills J. saying (at p.99):

" . . . a conviction ought to specify the particular offence of which the man was convicted, otherwise . . . if a man were charged again with one of the two alternative offences mentioned in his conviction it would be impossible to say that the plea of *autre fois convict* would be satisfied by producing the document which contained the offence of which he had been previously convicted ".

But whether such an explanation is wholly satisfactory is open to doubt if, as this Board will later consider, there can be circumstances when two offences may be included in the one charge and yet be held free from duplicity. Nevertheless, the actual decision in *Wells* has long been followed, as in *Wilmot* (1933) 24 Cr. App. R.63, where the defective count was framed in virtually identical words.

Little would be gained by analysing in the course of this judgment the many reported cases on the topic of duplicity, although several of them were cited to this Board. But what does emerge from even a superficial study is that it is misleading to assert that two different offences may never be included in the same count. Thus, in *R. v. Jones (Ex parte Thomas)* [1921] 1 K.B.632 a charge of driving on a highway "recklessly and at a speed which was dangerous to the public" was held valid. Lord Coleridge J. referred to *Wells* and said of it (at p.634/5):

"It is obvious that the defendant in that case could not know of which offence he had been convicted. A person may drive at a speed dangerous to the public and not in a manner dangerous to the public, or he may drive in a manner dangerous to the public but not at a speed dangerous to the public. In those circumstances the Court said the conviction by reason of its uncertainty could not stand . . . Where the offences charged consist of one single act they may be made the subject of a single count. Here the defendant's act was one and indivisible—the act of driving which might be both reckless and at a speed dangerous to the public".

Similarly, where a defendant was charged with causing death by driving at a speed *and* in a manner dangerous to the public, the Court of Criminal Appeal upheld in *Reg. v. Clow* [1965] 1 Q.B. 598 the trial judge's overruling of a submission that the count wrongly embraced two different offences, Lord Parker C.J. saying (at p.602)—

" . . . however illogical it may seem, the line of authority is clear and supported by Lord Coleridge J., Avory J., Humphreys J., and others to the effect that, even if these are separate offences, it is permissible to charge them conjunctively as in the present case if the matter relates to one single incident, as of course it does in the present case, the death of the unfortunate lady concerned".  
(Underlining added.)

But, as Mr. Peter Fallon has pointed out ("*Crown Court Practice : Trial*," at p.49)—

" It is only where two different offences arising from the same section relate to precisely the same piece of conduct that they may be joined in the same count".

Accordingly, in *Mallon v. Allon* [1964] 1 Q.B. 385 an information against the manager of a betting office that he had unlawfully admitted *and* allowed to remain therein a person apparently under the age of 18 was held bad for duplicity, Lord Parker C.J. saying (at p.392)—

" These are two separate acts, first of all admitting a person, and secondly allowing him to remain after he has got onto the premises, and in those circumstances it seems to me perfectly clear that these are two separate offences".

Similarly, in *Ware v. Fox and Fox v. Dingley* [1967] 1 W.L.R. 379 the Court held bad for duplicity informations of being concerned in the management of premises which in the first case were used for the purpose of smoking cannabis or cannabis resin "or" for the purpose of dealing in cannabis or cannabis resin, and in the other case for the purpose of smoking cannabis or cannabis resin "and" for the purpose of dealing in cannabis or cannabis resin. Holding that in the circumstances the use of the disjunctive in the first case and the conjunctive in the second made no difference, Lord Parker C.J. said (at p. 381) that the allegation was of—

" . . . a user for two completely different activities, one for the purpose of smoking and the other for the purpose of dealing. Prima facie, therefore, this information is alleging two separate offences. It is quite different from the sort of case which alleges one activity achieved in one of two different aspects . . ."

While, however, conceding (in the light of such cases as *Jones* and *Clow*, *ante*) that two separate offences may properly be included in the same count if (a) they consist of one single act, and (b) they are linked by a conjunctive, learned counsel for the accused submitted that in the present case (c) two different offences arising out of two distinct acts or sets of circumstances were wrongly contained in one charge, and (d) they

were severed by a disjunctive. But he also indicated that if, contrary to his primary submission, only one offence was here charged, he must fail even although the disjunctive was used in the particulars of the charge. This concession was in line with the decision in *Thomson v. Knights* [1947] K.B. 336, upholding a conviction for being unlawfully in charge of a motor vehicle whilst “under the influence of drink or a drug, to such an extent as to be incapable of having proper control of the vehicle”, Lord Goddard C.J. saying (at p.338)—

“ . . . the words ‘under the influence of drink or a drug’ are merely adjectival. The offence is driving, or attempting to drive, or being in charge of a vehicle, when the man is incapable of having proper control of the vehicle, and that incapacity is caused by drink or a drug. I do not think Parliament had meant to create one offence of being incapable by reason of a drug and another offence of being incapable by reason of drink. What Parliament intended to provide was that a man driving or attempting to drive, or being in charge of a motor car in a self-induced state of incapacity, whether that incapacity was due to drink or drugs, the man commits an offence in each of those cases. In my opinion the conviction is not for an alternative offence nor can it be said to be in respect of two offences. The offence was being in charge of the car when in this particular state of incapacity ”.

It is difficult to reconcile all the foregoing cases, and at times impossible, as the analysis in *Archbold*, 39th Edition, at para. 45 *et seq.* demonstrates. For the purposes of this appeal it is, however, fortunately sufficient for the Board to address itself to the question: In *this* case was one offence charged, or were there two? For the appellant Cheung Chee-Kwong it is submitted that two separate and distinct offences were charged. The first was that of being in control of “disproportionate” *pecuniary resources*, the second offence that of being in control of “disproportionate” *property*. The disjunctive in the particulars of the charge recognised that two separate offences were being alleged, and the submission was fortified by adverting to the fact that, if the court was minded to order the payment of a penalty under section 12(3), it had to proceed differently in the case where the conviction was for being in control of “disproportionate” pecuniary resources from the case where the conviction was in respect of “disproportionate” property. For in the former case, the penalty must not exceed “the *amount* of the pecuniary resources”, whereas in the latter case the penalty must not exceed “the *value* of the property”. (So far learned counsel was adhering strictly to the wording of section 12(3). But when he added that in practice the Hong Kong Courts treat the sum specified in the charge as fixing the ceiling of the penalty in respect of “disproportionate” pecuniary resources, whereas they take the value of the property *as at the date of trial* as providing the ceiling, this Board is unable to treat such practice as having any bearing upon the interpretation of the Ordinance.) The terms “pecuniary resources” and “property” were therefore mutually exclusive, as befitted two separate and distinct charges.

Such was the appellant’s argument, but it is one which this Board cannot accept. In their Lordships’ judgment, section 10(1)(b) created only one offence, although it can arise in one or other—or both—of two ways: (i) by being in control of “disproportionate” and unexplained pecuniary resources; (ii) by being in control of “disproportionate” and unexplained property. The mischief the Legislature was clearly seeking to deal with was where one who is or had been a Crown servant was in control of money’s worth of such amount or value as was, on the face of it, wholly “disproportionate” to his total lawful emoluments received during his period of service. Learned counsel for the Crown, rightly challenging the

submission that "pecuniary resources" and "property" were mutually exclusive, drew the Board's attention to the following description of "property" in section 3 of the Interpretation and General Clauses Ordinance:—

" 'property' includes—

- (a) money, goods, choses in action and land; and
- (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition".

Section 2(1) of the same Ordinance requires its application in all cases, "save where the contrary intention appears . . ." So far, accordingly, from there being two mutually exclusive categories, "property" includes "pecuniary resources", though the latter is only one species of the much larger genus which is "property". The Legislature was rightly concerned to deal with all cases of control by Crown servants of "disproportionate" assets of any kind, and this Board respectfully agrees with the conclusion arrived at by Huggins J.A. that—

" . . . despite the use in the subsection [10(1)(b)] 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. . . . 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 sections 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".

This Board also finds itself in respectful agreement with the view expressed by Pickering J.A., that—

" 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".

The Board has accordingly concluded that, on his findings of fact, the learned trial judge was right in convicting the accused on the offence charged and the Court of Appeal correct in affirming that conviction.

Their Lordships turn to the cross-appeal. The Court of Appeal considered that the relevant emoluments should be increased by \$44,000 expenses, increasing the trial judge's figure of "explained" wealth to \$118,518. Taking pecuniary resources as found at \$881,157 and property at \$469,627 there was a total of \$1,350,784, less \$118,518, equalling \$1,232,266 of "unexplained" disproportionate assets. The Court of Appeal by an error in law under section 12 deducted the \$118,518 from only the \$881,157 and contrived the penalty at \$692,638. (This involved also an error in mathematics, for it should have been \$762,639.) Indeed, learned counsel for the accused accepts that if (despite his submissions) the conviction was correct, the cross-appeal should succeed and an order be made under section 12(3) that the accused make a payment to the Crown not exceeding \$1,232,266.

The matter must, however, be considered independently of that concession. Out of respect for the Court of Appeal, the Board think it right to make some quotations from their judgments. Huggins J.A. said—

" 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".

Concurring with those views, Pickering J.A. added—

"... 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 subsection (3) and in the form of a division between that sub-sub-section and sub-sub-section (b)".

The Board finds itself respectfully unable to accept that, "or" having rightly been read conjunctively where found in section 10(1)(b), it is possible to read it disjunctively in section 12(3). The Court of Appeal nevertheless having found this possible, learned counsel for the accused commented that this would still enable the Crown to sue the accused in the civil court in respect of the value of the unexplained "property". But in such a suit the Crown would have to establish that the subject-matter of their claim was the proceeds of corruption, a burden which sections 10 and 12 were manifestly designed to remove from the shoulder of the Crown in circumstances of disproportionate and unexplained enrichment. The Board regards it as again inconceivable that the Legislature ever intended such a startling state of affairs. Were it nevertheless the inescapable result of the words employed in the Ordinance, it must follow. But in the opinion of the Board it is not. The proper view surely is that the draftsman of section 12(3) simply followed section 10(1)(b), enabling "or" to be used conjunctively in circumstances (as here) where the Court concludes that the accused must explain his control of both pecuniary resources and property.

The view adopted by the Court of Appeal creates practical problems of some complexity. For example, how are "explained" acquisitions to be dealt with? Are they to be deducted from "pecuniary resources"? If so, why? If from the "property" value, again why? These are not

idle questions, for the deduction, if made from only one of the two categories, may convert that category from its former "disproportionate" class to one of proportionality. The only practical and satisfactory approach throughout the case is to take the *aggregate* of the value of the two types of acquisition, make the deduction of "explained" acquisitions from that aggregate, and then decide whether the "unexplained" total is "disproportionate" to the accused's emoluments. That, indeed, was the approach approved of by the Court of Appeal in relation to section 10(1)(b), and, in the judgment of this Board, there are compelling reasons (already adverted to) why the process should be continued in relation to section 12(3). By doing so, the startling conclusion arrived at by the Appellate Court in the matter of sentence would have been avoided and the manifest underlying intention of the Legislature fulfilled.

In the result, the appeal must be dismissed and the cross-appeal allowed. The case must be remitted to the Court of Appeal so that they may consider what sum (not exceeding \$1,232,266) the accused should be ordered to pay the Crown pursuant to section 12(3). Their Lordships will humbly advise Her Majesty accordingly. The appellant Cheung Chee-Kwong must pay the costs of the appeal and the cross-appeal.





In the Privy Council

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