Privy Council Appeal No. 36 of 1978

Kwan Ping Bong and Kong Ching - - - - - *Appellants*

v.

The Queen - - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 16th NOVEMBER 1978

Present at the Hearing:

LORD DIPLOCK

LORD EDMUND-DAVIES

LORD KEITH OF KINKEL

[*Delivered by* LORD DIPLOCK]

At the conclusion of the hearing of this appeal on 16 November 1978, their Lordships announced that they would humbly advise Her Majesty that the appeal should be allowed, the convictions of the appellants of 22 July 1976 quashed and the case remitted to the Court of Appeal of Hong Kong to consider whether or not a new trial should be ordered. Their Lordships now give their reasons for that advice.

The appellants who carried on business in partnership as jade merchants were indicted jointly on one count of trafficking in a dangerous drug contrary to s.4 of the Dangerous Drugs Ordinance. The drug concerned was about 6 kilograms of morphine which was discovered at Kai Tak airport in a consignment of six parcels of jadestones consigned to the appellants and carried by Singapore Airlines from Bangkok.

Those facts as to which there is no dispute can be stated briefly. On arrival at Kai Tak airport the six parcels of jadestones were accompanied by two copies of an air waybill in which Kwan Ping Bong, the first appellant, was named as consignee. The copies were collected by a clerk employed by Jardine Airways who act as agents for Singapore Airlines in Hong Kong. On being off-loaded the six parcels of jadestones were detained by the Preventive Service of the Department of Commerce and Industry for examination. The Preventive Officer issued the clerk a receipt for the goods detained (" the D.C. & I. Receipt ").

Kwan Ping Bong as consignee named in the air waybill was notified by Jardine Airways of the arrival of the goods. Accompanied by Kong Ching, the second appellant, he went on the following day to Jardine Airways' office at the airport to collect the goods. On identifying himself to the clerk, he was handed a copy of the air waybill described as "Original 2 (for Consignee)" and the D.C. & I. Receipt that had been given to the Jardine Airways' clerk by the Preventive Officer. In return, Kwan Ping Bong was required to sign another copy of the waybill described as "Copy 4 (Delivery Receipt)". This he left with the clerk.

The two appellants then went to the shed at the airport where the goods were being detained by the Department of Commerce and Industry. Kwan Ping Bong produced to the officer in charge the D.C. & I. Receipt for the six parcels of jadestones and the consignee's copy of the air waybill. The parcels were then opened; their contents were inspected. Among the genuine jadestones there were found two that had been hollowed out to form receptacles which contained packets of morphine. When confronted by this discovery the appellants denied all prior knowledge of the presence of the fake jadestones containing the hidden drugs. They gave an explanation of how the fake jadestones might have been included in the consignment without the appellants' suspecting that anything was wrong.

At the trial of the appellants for trafficking in the morphine found in the parcels of jadestones that they had imported the real issue was whether the appellants knew of the presence of morphine in the consignment. Apart from statute, the onus of proving the appellants' knowledge beyond reasonable doubt would lie upon the prosecution. The Crown, however, chose to rely upon the fact that Kwan Ping Bong had been given by Jardine Airways the consignee's copy of the air waybill and the D.C. & I. Receipt, as giving rise to the presumptions for which s.47(3) and (4) of the Dangerous Drugs Ordinance provide. The relevant provisions of the section are:—

> "(1) Any person who is proved to have had in his possession or custody or under his control—
>
> (*a*) anything whatsoever containing a dangerous drug;
>
> (*b*) the keys of anything whatsoever containing a dangerous drug;
>
> (*c*) any place or premises or the part of any place or premises in which a dangerous drug is found;
>
> (*d*) the keys of any place or premises or part of any place or premises in which a dangerous drug is found,
>
> shall, until the contrary is proved, be presumed to have had such drug in his possession.
>
> "(2) Any person who is proved to have had in his possession or under his control or subject to his order—
>
> (*a*) a document of title to goods as defined in section 2 of the Sale of Goods Ordinance; or
>
> (*b*) any of the following documents, whether or not they are documents of title to goods as defined in section 2 of the Sale of Goods Ordinance, namely, a dock warrant, a godown warrant or receipt, a warehouse keeper's certificate, warrant or order for the delivery of goods or a baggage receipt or a document or thing intended to serve the purpose of a baggage receipt,
>
> relating to any thing containing a dangerous drug shall, until the contrary is proved, be presumed to have had such drug in his possession.

"(3) Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug.

"(4) The presumptions provided for in this section shall not be rebutted by proof that the defendant never had physical possession of the dangerous drug."

The definition of "documents of title" in s.2 of the Sale of Goods Ordinance which is incorporated in s.47(2) reads as follows:—

"'Document of title to goods' includes any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented".

The effect of these provisions is that if it is proved by the prosecution that the accused had in his possession a document falling within any of the categories described in either para. (*a*) or para. (*b*) of subsection (2), the onus shifts to the accused to prove (on the balance of probabilities) that he did not know of the presence or nature of the drug in the goods to which the document relates.

The burden lies upon the prosecution to prove that any document in the possession of the accused which it relies upon as giving rise to the presumption that reverses the ordinary onus of proof in criminal cases, does fall within the described categories. Neither the air waybill nor the D.C. & I. Receipt is a document of a kind which is mentioned by name among those referred to in s.47(2), nor was any evidence called at the trial as to the use made of either of these documents in the ordinary course of business, so as to bring them within the more general description of documents which appears at the end of the definition of "document of title" in the Sale of Goods Ordinance. In their Lordships' view the prosecution failed to prove at the trial that either of the documents handed to Kwan Ping Bong by Jardine Airways' clerk at the airport fell within s.47(2) of the Dangerous Drugs Ordinance. The onus of proof that the appellants knew of the presence of morphine in the consignment thus remained throughout upon the prosecution and the standard of proof of their knowledge remained proof beyond reasonable doubt.

Unfortunately the assertion by counsel for the prosecution, in his final speech, that the documents handed to Kwan Ping Bong at the airport were of a kind that raised the statutory presumption of knowledge on his part and on that of his partner Kong Ching on whose behalf also he had them in his possession, was not contested by counsel for the appellants. Indeed in his own final speech, he explicitly stated his agreement with it and addressed the jury on the basis that the onus lay upon his clients to satisfy the jury on the balance of probabilities that they had no knowledge that the consignment of jadestones contained any morphine.

One can therefore have great sympathy with the trial judge who was thereby led, as their Lordships hold, erroneously, to direct the jury that in consequence of the appellants' possession of the air waybill and the D.C. & I. Receipt the onus lay upon them to prove upon the balance of probabilities that they had no knowledge of the presence of morphine in the consignment. On this direction on the vital issue of knowledge, which coincided with what counsel for the prosecution and the defence in their speeches had previously told the jury was the applicable law, the jury convicted both appellants.

The appellants appealed against their convictions. By the time the appeal was heard in the Court of Appeal, their counsel had appreciated the common error of law that had been made at the trial by counsel and judge alike as to the applicability of s.47 of the Dangerous Drugs Ordinance. In the Court of Appeal the question whether the air waybill and the D.C. & I. Receipt fell within the categories of documents described in s.47(2) was argued first. That court, unlike their Lordships, did not think it necessary to reach a final decision on that question. They were of opinion that even if the judge was wrong in law in telling the jury that they should give effect to the presumption which threw the onus of proving absence of guilty knowledge upon the appellants, no miscarriage of justice had actually occurred. They accordingly applied the proviso to s.83(1) of the Criminal Procedure Ordinance and dismissed the appeals.

The Judicial Committee of the Privy Council is always reluctant to interfere with a decision of the local court of criminal appeal as to whether or not to apply a proviso in the terms of that contained in s.83(1). Their Lordships will only do so in cases where it appears that the decision was based upon an error involving some principle of general importance to the administration of criminal justice. This, in their Lordships' view, is such a case.

There is no principle in the criminal law of Hong Kong more fundamental than that the prosecution must prove the existence of all essential elements of the offence with which the accused is charged—and the proof must be " beyond all reasonable doubt ", which calls for a degree of certainty considerably higher than proof on a mere balance of probabilities. The requirement of proof beyond all reasonable doubt does not prevent a jury from inferring, from the facts that have been the subject of direct evidence before them, the existence of some further fact, such as the knowledge or intent of the accused, which constitutes an essential element of the offence; but the inference must be compelling—one (and the only one) that no reasonable man could fail to draw from the direct facts proved.

Where, as is not uncommon in modern legislation dealing with drugs and other dangerous objects or materials, there is provision that on proof by the prosecution of the existence of certain facts some other fact shall be presumed to exist unless the contrary is proved, (in the instant case guilty knowledge on the part of the accused) the effect of the provision is to convert an inference which at common law the jury would not be entitled to draw unless they were satisfied beyond all reasonable doubt that it was right, into an inference which they are bound to draw unless they are satisfied that on the balance of probabilities it is wrong. So they must draw it even though they think that it is equally likely to be right as to be wrong.

Their Lordships are driven to the conclusion that in deciding to apply the proviso in the instant case, the Court of Appeal overlooked this effect of the presumption that the jury had been wrongly directed to apply, upon the standard of proof of the guilty knowledge of the accused that was required. The only contest at the trial was as to the appellants' knowledge of the presence of the morphine in the consignment of jadestones. In order to rebut the presumption each of the appellants gave evidence. Each told a story which in effect placed the blame upon the consignor in Bangkok, a Mr. Fong, for including in the consignment to them jadestones of his own which, unknown to them, were hollowed out and used for carrying drugs. From the fact that the jury convicted the accused it is possible to infer that the jury were *not* satisfied that this explanation, which, if true, would have exonerated the appellants, was

more likely to be true than false; but it is not possible to infer anything more than that. As has been pointed out their decision to convict is consistent with their having thought the appellants' story to be equally likely to be true as to be false.

The reason why the Court of Appeal decided to apply the proviso is stated repeatedly in their judgment. It was because the jury by convicting the appellants had shown that they " disbelieved " the story by which the appellants had sought to explain the presence of the fake jadestones in the consignment without their knowing that morphine was hidden in the stones. What the Court meant by " disbelieved " is made clear by the passage in the judgment:

> " If the jury thought the Fong story was true or *possibly true* they must have acquitted ".

If the words that their Lordships have italicised were right the case might well have been an appropriate one for the application of the proviso; the appellants had tied themselves to a particular explanation of how the fake jadestones had come to be included in the consignment, and if the jury had rejected that explanation as being, beyond all reasonable doubt, a pack of lies, a positive inference of guilty knowledge on their part might well be irresistible. In the instant case, however, if the jury were acting in accordance with the directions of the judge, as one must assume they were, then even though they did think that the Fong story was *possibly true*, they were still bound to convict unless the appellants had gone further and succeeded in convincing them that, on the balance of probabilities, the Fong story was actually true.

A misdirection as to the onus of proving an essential fact in issue at the trial seldom provides an appropriate case for the application of the proviso. In the instant case the misdirection was as to the onus of proving what was, in effect, the only issue in the case that was seriously contested. The guilt or innocence of the appellants depended on it. In their Lordships' view a verdict of guilty based on this misdirection cannot be other than unsafe and unsatisfactory. The conviction must be quashed. It will be for the Court of Appeal to consider whether or not in all the circumstances a re-trial should be ordered.

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In the Privy Council

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DELIVERED BY
LORD DIPLOCK

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