

The Attorney General of Hong Kong

Appellant

v.

Tse Hung-Lit and Chan Yat-Sing

Respondents

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 22ND MAY 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD BRIGHTMAN
LORD MACKAY OF CLASHFERN
LORD ACKNER
LORD GOFF OF CHIEVELEY

[Delivered by Lord Bridge of Harwich]

This is an appeal from the majority decision of the Court of Appeal of Hong Kong (Sir Alan Huggins V-P. and Cons JA., Fuad JA. dissenting) allowing appeals by the respondents against their convictions by the Magistrate's Court at Tsuen Wan of attempting to export unmanifested cargo and attempting to export articles without the required export licence.

The facts may be inferred from the respondents' statements and from the findings of the magistrate. The respondents agreed for reward with a man named Ah Fai to load 34 video cassette recorders on board a speedboat, carry them to an agreed meeting place within Hong Kong waters and there transfer them to a fishing boat. As the respondents knew, it was intended that the crew of the fishing boat would then take the video cassette recorders to China. The export of video cassette recorders from Hong Kong to any country without a licence is prohibited. No licence for the export of these video cassette recorders had been issued. Needless to say, there was no cargo manifest. In the event the respondents took the video cassette recorders to the agreed meeting place where they waited for some hours, but the fishing boat never arrived. On the return

journey the respondents' speedboat was intercepted by a police launch.

The respondents were convicted by the magistrate of the offences of attempt already mentioned. On appeal a new point was taken, which had not been taken before the magistrate. The respondents, it was submitted, could not be convicted of any attempt to export the goods because, if the fishing boat had arrived and taken the goods to China, the respondents would not have been guilty as principals of the relevant offences. This was the argument which the majority of the Court of Appeal accepted. It is common ground that the respondents could properly have been convicted of conspiracy to commit the relevant offences. On the other hand, the prosecution do not seek to support the convictions on the ground that, if the goods had been exported by the crew of the fishing boat, the respondents could have been convicted of aiding and abetting or of counselling and procuring the offences. For the purpose of both the offences which the respondents were accused of attempting to commit the prohibited activity was to "export" and this is defined in section 2 of the Import and Export Ordinance (Cap. 60) as meaning "to take, or cause to be taken, out of Hong Kong any article other than an article in transit". Nothing turns on the degree of proximity of what the respondents did to the completion of the offences. If the video cassette recorders had been transferred to the fishing boat within Hong Kong waters and taken out of Hong Kong aboard that boat, it was only faintly suggested for the appellant that the respondents could have been convicted on the basis that they themselves had taken the goods out of Hong Kong. Their Lordships are satisfied they could not. The real issue in the appeal is whether, in those circumstances, the respondents, on the true construction of the definition of "export" as applied to the two offences, could properly be said to have "caused to be taken out of Hong Kong" the unlicensed and unmanifested cargo.

Questions of causation arise in many different legal contexts and no single theory of causation will provide a ready made answer to the question whether A's action is to be treated as the cause or a cause of some ensuing event. The approach must necessarily be pragmatic, as is well illustrated by the many more or less imprecise distinctions which the common law draws between what is and what is not to be treated as an effective cause in different legal situations. When, as here, the word "cause" is used in a statutory definition which falls to be applied in ascertaining the ingredients of criminal offences, care must be taken to give it no wider meaning than necessary to give effect to the evident legislative purpose of the enactment.

The argument for the appellant, briefly summarised, is that the taking of goods out of Hong Kong is an event and that any action in a chain of circumstances which foreseeably leads to and facilitates the occurrence of that event may be said to be a cause of that event, so as to bring the action within the relevant definition of "export". It is immaterial, according to this submission, whether or not the independent action of a third party may intervene between the action of the person alleged to have exported goods by causing them to be taken out of Hong Kong and the event of the goods crossing the Hong Kong border. So here, it is said, the respondents, if the fishing boat had kept the appointment and taken the video cassette recorders out of Hong Kong, would have been a necessary link in the chain of causation between Ah Fai, who planned and initiated the operation, and the crew of the fishing boat, who brought it to fruition. The respondents knew that the goods were to be taken out of Hong Kong, they played their allotted part in attempting to effect that result and, if the plan had not miscarried, they could properly be said to have caused the goods to be taken out of Hong Kong.

This is a formidable argument which perhaps gains in attraction from the consideration that its application to the circumstances of the instant case would cause no injustice whatever. The respondents have no merit and were fully alive to the criminality of the enterprise in which they were prepared to participate. But it is important to bear in mind that, if the enterprise had succeeded, the question whether the respondents caused the video cassette recorders to be taken out of Hong Kong would have fallen to be answered independently of their guilty knowledge of the illegality of the exportation.

The respondents rely on a line of English and Scottish authority in which a variety of expressions have been used to limit and define the nature of the relationship which is required to be established before one person can be convicted under a criminal statute of "causing" another person to act in a way which the statute prohibits. The principal cases are *Watkins v. O'Shaughnessy* [1939] 1 All E.R. 385; *McLeod v. Buchanan* [1940] 2 All E.R. 179; *Shave v. Rosner* [1954] 2 Q.B. 113. Their Lordships are relieved of the duty of undertaking an independent review of these authorities since this task has, in their Lordships' respectful opinion, been so thoroughly and admirably performed by the High Court of Australia in *O'Sullivan v. Truth and Sportsman Limited* [1957] 96 C.L.R. 220. The question at issue in that case was whether the respondent newspaper publishers could properly be convicted of "causing to be offered for sale" by a newsagent a newspaper containing certain prohibited matter, in

circumstances where the publishers distributed the paper to the newsagent for the very purpose of making it available for sale to the public. The High Court of Australia answered the question in the negative. After a review of the relevant English authorities, the judgment of Sir Owen Dixon C.J., Williams, Webb and Fullagar JJ. contains the following statement of the principle to be derived from them, at p. 228:-

"This appears to mean that when it is made an offence by or under statute for one man to 'cause' the doing of a prohibited act by another the provision is not to be understood as referring to any description of antecedent event or condition produced by the first man which contributed to the determination of the will of the second man to do the prohibited act. Nor is it enough that in producing the antecedent event or condition the first man was actuated by the desire that the second should be led to do the prohibited act. The provision should be understood as opening up a less indefinite inquiry into the sequence of anterior events to which the forbidden result may be ascribed. It should be interpreted as confined to cases where the prohibited act is done on the actual authority, express or implied, of the party said to have caused it or in consequence of his exerting some capacity which he possesses in fact or law to control or influence the acts of the other. He must moreover contemplate or desire that the prohibited act will ensue."

Later, in considering whether the English principle should be followed, the judgment adds, at p. 229:-

"It tends to greater certainty in interpretation. It provides a sensible and workable test, which, at the same time, is hardly open to objection as inelastic. Without some such interpretation the words might be used to impose criminal sanctions in a manner that could not be foreseen on conduct vaguely and indefinitely described. But being a question of the meaning of terms the definition can provide only a primary meaning which context or any other sufficient indication of a different intention would displace. In the present case no contrary intention appears and the words 'cause to be offered for sale or sold' in s. 35 (1) should accordingly be understood as bearing the meaning stated."

Their Lordships gratefully adopt both these passages, the first as an accurate and succinct statement of the general principle *prima facie* to be applied, the second as a salutary reminder that the principle may be displaced by the context in which it is made an offence for one person to cause another to act in a particular way.

If the general principle is here applicable, it appears to their Lordships to afford to the respondents a complete defence. Had the fishing boat kept the appointment with the respondents and taken the video cassette recorders out of Hong Kong, there would have been a plain inference that the crew of that boat were acting on the authority of Ah Fai, the organiser of the forbidden exportation, and expecting no doubt, like the respondents, to be rewarded by Ah Fai. But there was nothing in the evidence led by the prosecution which could have justified the inference that the respondents were in any position, in fact or in law, to control or influence the crew of the fishing boat, or that, if the plan had been carried through, the crew of the fishing boat would have been acting on the express or implied authority of the respondents.

The question then is whether the context of the relevant Hong Kong legislation requires a different approach to the interpretation of the expression "cause to be taken out of Hong Kong". In his dissenting judgment Fuad J.A. answered that question affirmatively. After a review of the authorities and reference to *O'Sullivan's* case, he said:-

"In my respectful judgment, different considerations apply in the case before us. Here, we are not concerned with an offence of the kind discussed in the cases to which I have referred. Although it would be a rare case that an intervening human agency is not involved, the offence here essentially is not causing someone else to do a prohibited act, but the very act of 'exporting', which can be done by the person charged either by taking the controlled goods out of Hong Kong himself, or by causing them to be taken out of Hong Kong. Put another way, there is a conceptual difference, it seems to me, between causing another to do an illegal act to which one is not a party in the usual sense, on the one hand, and being the actual perpetrator of an act which is the cause of an event taking place, on the other. It is only in the former case that considerations of 'control, dominance or compulsion' (*Watkins v. O'Shaughnessy*) are relevant.

In my view, these authorities do not require us to give a restricted meaning to the words 'cause to be taken out' in the context of the Import and Export Ordinance."

It is appropriate to test this approach by reference to the statutory language creating the two offences which the respondents were accused of attempting to commit. The offence of exporting unmanifested cargo is created by section 18 of the

Import and Export Ordinance. Read with the substitution for the word "export" of the relevant terms of the definition section 18 provides:-

"(1) Any person who -

(a) ...

(b) takes, or causes to be taken, out of Hong Kong any unmanifested cargo,

shall be guilty of an offence and shall be liable on conviction to a fine of \$50,000 and to imprisonment for 6 months.

(2) It shall be a defence to a charge under this section against the owner of a vessel, aircraft or vehicle, if the owner proves that he did not know and could not with reasonable diligence have known that the cargo was unmanifested."

The offence of exporting articles without a licence is created by Regulation 4 of the Import and Export (General) Regulations. Read with the like substitution, the Regulation provides:-

"(1) No person shall take, or cause to be taken out of Hong Kong any article specified in the second column of the Second Schedule to the country or place specified opposite thereto in the third column of that Schedule except under and in accordance with a licence.

(2) Any person who contravenes paragraph (1) shall be guilty of an offence and shall be liable on conviction to a fine of \$500,000 and to imprisonment for 2 years."

In the Second Schedule "Electrical products (powered by mains supply)" are specified in the second column and "All countries" are specified opposite thereto in the third column.

It is unnecessary for the purposes of this judgment to express any conclusion as to whether a defence of lack of knowledge would be available to a defendant who was not the "owner of a vessel, aircraft or vehicle" charged with causing unmanifested cargo to be taken out of Hong Kong. It is common ground that the offence created by Regulation 4 is one of strict liability. Their Lordships express no view as to whether an offence under Regulation 4 of causing to be taken, as opposed to taking, out of Hong Kong could theoretically be committed, as Fuad J.A. thought, without any intervening human agency. Let it be assumed that it could. Nevertheless the plain purpose of including among those absolutely liable for the export of goods without the appropriate licence persons who cause such goods to be taken out of Hong Kong as well as those who take them out is to

apply the same criminal sanction to the consignor and his forwarding agent, who arrange and organise the illicit exportation, as to the owner of the ship, aircraft or vehicle which effects the exportation by actually taking the goods out of Hong Kong. Persons in these or similar categories would properly be held, on the narrow construction of the words "cause to be taken out of Hong Kong" to be exporting. The goods are taken out of Hong Kong by others acting on their express or implied authority. It seems entirely appropriate that those responsible for arranging the exportation of goods, as well as those who directly perform the act of exportation, should be responsible for ensuring that any appropriate licence has been obtained and should be held criminally liable in the absence of such a licence. But what of others who merely play a physical part in the sequence of events which leads to exportation? The road haulage contractor who brings goods from the warehouse to the dockside and the stevedoring firm which loads the goods on board the ship know full well that the goods are to be exported, but are in no position to give and do not purport to give any authority to the shipowner to effect the exportation. Yet, if the appellant's construction of the language of the legislation is adopted, they too must be held to have caused the goods to be taken out of Hong Kong and will act at their peril unless they ensure in every case that the appropriate export licence has been obtained. Their Lordships fully appreciate the necessity in such a community as Hong Kong for the authorities to exercise strict control over imports and exports, but can discern no good reason why it should be necessary, in order to make such control effective, that the criminal net should be cast as widely as it would be if the construction urged by the appellant were accepted.

In the light of this analysis their Lordships cannot accept that there is anything to be found in the context of the relevant Hong Kong legislation creating the offences of "causing to be taken out of Hong Kong" either unmanifested cargo or articles without the required export licence which is apt to displace the principle *prima facie* applicable to statutory offences of this kind as expressed in *O'Sullivan's* case. Nor, with respect, can their Lordships accept that there is a "conceptual difference" between "causing another to do an illegal act to which one is not a party in the usual sense" and "being the actual perpetrator of an act which is the cause of an event taking place" which provides a relevant basis on which *O'Sullivan's* case and the earlier authorities there considered can properly be distinguished.

Accordingly their Lordships will humbly advise Her Majesty that the appeal should be dismissed.





