Privy Council Appeal No. 13 of 1986

The Attorney General of Hong Kong *Appellant*

v.

Sham Chuen *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE 1986

Present at the Hearing:

LORD KEITH OF KINKEL
LORD BRIGHTMAN
LORD GRIFFITHS
LORD MACKAY OF CLASHFERN
LORD OLIVER OF AYLMERTON

*[Delivered by **Lord Keith of Kinkel**]*

The respondent was tried in the Magistrates Court at South Kowloon on 8th July 1985 upon a complaint preferred by the appellant, which charged him with an offence in these terms:-

"Loitering, contrary to section 160(1) of the Crimes Ordinance, Cap. 200, Laws of Hong Kong.

Particulars of offence

SHAM Chuen, you are charged that at 0520 hours on the 27th day of May 1985, you did loiter in a public place, to wit the staircase near the ground floor of Nos. 151-153 Temple Street, Kowloon, in Hong Kong, and did not give a satisfactory account yourself and a satisfactory explanation of your presence there."

At the conclusion of the case for the prosecution the learned magistrate ruled that there was no case for the respondent to answer and he was accordingly discharged. At the request of the appellant the magistrate, on 7th August 1985, stated a case for the opinion of the High Court of Hong Kong containing the following findings of fact:

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"(a) Two police officers, one of whom was PC 19181, were on patrol in Temple Street at 5.00 a.m. on the 27th May 1985 when the respondent came under their observation.

(b) The respondent was seen by PC 19181 to be walking along Temple St. towards Jordan Road paying attention to the entrances to buildings.

(c) PC 19181 saw him stop outside the entrance to No. 149 of Temple Street which had an iron grille across it. He saw him look around and then pushed and pulled at the grille in an attempt to open it. If it had opened, it would have given access to flats on the upper floors.

(d) PC 19181 saw the respondent move on from that spot to the staircase entrance to a residential building at No. 151-153 Temple Street. He looked around again and went inside up a flight of stairs and was followed by PC 19181 and the other officer and he was seen to be pushing at the iron grille on the stairs which separated the ground and mezzanine floors.

(e) PC 19181 questioned the respondent and asked him where he lived and why he had gone into the building at such an early hour.

(f) The respondent replied that he had lived formerly at the Lok Fu Estate but now had nowhere to live.

(g) PC 19181 asked him why he had gone into the building and the respondent made no reply.

(h) PC 19181 then asked him to explain his pushing and pulling at the grille of No. 149 of Temple Street to which he replied 'Sir, you have seen it, it is no use to explain'.

(i) PC 19181 then asked him to explain (again) why he had gone inside No. 151-153 Temple Street and he replied by saying 'What shall I say?'.

(j) PC 19181 then told the respondent that he had to explain why he pushed at the grille at No. 149 of Temple Street and why he had gone into No. 151-153 or else he would be arrested for loitering.

(k) The respondent made no reply to the question put to him by PC 19181 and the police

officer therefore arrested him for loitering and cautioned him to which the respondent replied 'I understand'."

The magistrate expressed the opinion that it had been proved that the respondent had been loitering in a public place or in public parts of a building at all material times. He considered, however, that upon the authority of *The Queen v. Ma Kui* [1985] H.K.L.R. 414 it was incumbent upon him to hold that the respondent was not given an opportunity to give an account of himself and an explanation for his presence.

The questions of law stated for the opinion of the court were:-

"(i) Was I correct in law in holding that PC 19181 in questioning the respondent about his observed conduct did not thereby give him an opportunity to give an account of himself and an explanation of his presence, within the meaning of section 160(1) of the Crimes Ordinance, Chapter 200.

(ii) Was I correct in law in holding that PC 19181 must, in any event, when seeking to comply with section 160(1) of the Crimes Ordinance in order to make a requirement thereunder, have said to the respondent, 'I require you to give a satisfactory explanation of yourself and a satisfactory explanation of your presence here'."

The appeal by way of case stated was heard by Barnes J. on 12th September 1985, when he reserved it for consideration of the Court of Appeal of Hong Kong, pursuant to section 118(1)(d) of the Magistrates Ordinance, Cap. 227. On 8th November 1985 the Court of Appeal by a majority (Yang and Kempster JJ.A., Hunter J. dissenting) answered the first question in the affirmative and the second in the negative and dismissed the appeal. The appellant now appeals, with special leave, to Her Majesty in Council.

Section 160 of the Crimes Ordinance (Cap. 200) provides:-

"(1) Any person who loiters in a public place or in the common parts of any building shall, unless he gives a satisfactory account of himself and a satisfactory explanation for his presence there, be guilty of an offence and shall be liable on conviction to a fine of $2,000 and to imprisonment for 6 months.

(2) Any person who loiters in a public place or in the common parts of any building and in

any way wilfully obstructs any person using that place or the common parts of that building, shall be guilty of an offence and shall be liable on conviction to imprisonment for 6 months.

(3) If any person loiters in a public place or in the common parts of any building and his presence there, either alone or with others, causes any person reasonably to be concerned for his safety or well-being, he shall be guilty of an offence and shall be liable on conviction to imprisonment for 2 years.

(4) In this section 'common parts', in relation to a building, means -

(a) any entrance hall, lobby, passageway, corridor, staircase, landing, rooftop, lift or escalator;

(b) any cellar, toilet, water closet, wash house, bath-house or kitchen which is in common use by the occupiers of the building;

(c) any compound, garage, car-park, car port or lane."

The reason why the learned magistrate and the majority of the Court of Appeal held that the respondent had no case to answer was that he was not given a proper opportunity to give an account of himself and an explanation of his presence, because certain of the questions asked of him by PC 19181 were such that the answers might incriminate him of some offence other than loitering, and therefore he was entitled to refrain from answering them. Kempster J.A. said:-

"Having regard to the thrust of the questions, put by a person in authority, particularly as related in sub-paragraphs (h), (i) and (j) and even though no caution had been given, Sham Chuen, the respondent, could not be expected or required to answer them. 'A person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence.' ... His refusal or failure to answer could not, accordingly, have been regarded by the magistrate as a failure to give either a satisfactory account of himself or a satisfactory explanation for his presence where seen within the meaning of the section. The suspect's common law privilege is removed for the purposes of section 160(1) but for those purposes only."

A considerable amount of argument before the Board was directed to the meaning of "loitering" in section 160(1). Given that the acceptable dictionary meaning of the word was simply "lingering", three possible constructions of the word in its present context were suggested. These were (i) any lingering; (ii) lingering with no apparent purpose at all; and (iii) lingering in circumstances which suggest an unlawful purpose. Counsel for the appellant favoured the third construction and counsel for the respondent the second. Reference was made at some length to the legislative history of this particular enactment and of similar enactments in other Commonwealth jurisdictions, as well as to a number of reported decisions on the interpretation of such enactments. In their Lordships' opinion no helpful guidance is to be obtained from any of them. The word is to be construed in the light of the context in which it appears in this particular enactment. Sub-sections (2) and (3) of section 160 are each concerned with loitering of a particular character, the first being loitering which causes an obstruction and the second being loitering which causes reasonable concern to a person for his safety or well-being. In their Lordships' opinion sub-section (1) is also concerned with loitering of a particular character, namely loitering which calls for a satisfactory account of the loiterer and a satisfactory explanation for his presence. Obviously a person may loiter for a great variety of reasons, some entirely innocent and others not so. It would be unreasonable to construe the sub-section to the effect that there might be subjected to questioning persons loitering for plainly inoffensive purposes, such as a tourist admiring the surrounding architecture. The sub-section impliedly authorises the putting of questions to the loiterer, whether by a police officer or by any ordinary citizen. The putting of questions is intrusive, and the legislation cannot be taken to have contemplated that this would be done in the absence of some circumstances which make it appropriate in the interests of public order. So their Lordships conclude that the loitering aimed at by the sub-section is loitering in circumstances which reasonably suggest that its purpose is other than innocent.

Mere loitering in such circumstances is, however, insufficient to constitute an offence. There is the further ingredient that the loiterer, having been given an opportunity to do so, should have failed to give a satisfactory account of himself and a satisfactory explanation of his presence. The giving of such an explanation necessarily involves that questions should be put to the loiterer by the person whose suspicions have been aroused by the circumstances of the loitering, in the ordinary case no doubt a police officer. It is unnecessary for

present purposes to consider what in a particular case may amount to a satisfactory account of himself given by the loiterer. A satisfactory explanation of his presence must be an explanation which is credible and consistent with an innocent purpose. As regards the requirement of such an explanation, it seems to their Lordships that the questions put by the police officer should be directed to the circumstances which have aroused his suspicions, with a view to eliciting explanations which may have the effect of satisfying him that his suspicions are unfounded. The precise nature of these questions must depend on the circumstances of each individual case, but if there is some particular circumstance of the loitering which has given rise to suspicion it is, in their Lordships' opinion, entirely reasonable, and indeed, only fair to the loiterer to put questions designed to enable a satisfactory explanation of that circumstance to be put forward, should there be such an explanation. As the first ingredient of the offence is loitering under suspicious circumstances, the police officer at the trial of the alleged offence must necessarily give evidence as to what these suspicious circumstances were, and it would plainly be prejudicial to the accused if he had not been invited, before his apprehension, to explain satisfactorily these suspicious circumstances.

It does not appear to their Lordships that this view as to the ambit of permissible questioning makes any undesirable inroads on the privilege against self-incrimination. The sub-section itself necessarily makes some inroad on that privilege, inasmuch as, if the true explanation of the loiterer's presence is unsatisfactory, he is placed in the dilemma of either offering it or withholding it, either of which will make him guilty of an offence. That is necessary for the purpose of the enactment. But assuming that a true answer to a question directed to eliciting an explanation of a suspicious circumstance would amount to an admission of some offence other than that under section 160(1), the answer if given under a direct threat of arrest on a charge of loitering would be inadmissible upon a charge of that other offence, as not having been given voluntarily. If the answer is not given, that does no more than help to indicate that the loiterer has no satisfactory explanation of his presence.

In *The Queen v. Ma Kui (supra)* the suspicious circumstance which the police officer asked the accused to explain, namely tampering with letter boxes, was capable of constituting evidence of an attempt to steal from letter boxes, and might itself have warranted a charge of that offence. But if the question were put under threat of arrest for loitering and in answer to it the accused had admitted such an attempt, his answer would not have

been admissible in evidence upon a charge of attempted theft. If there were no such threat, there is no reason why the answer should not be admissible. It may often be a narrow question whether certain suspicious conduct is evidence of an attempt to commit an offence or merely of an act preparatory to an attempt. In their Lordships' opinion it would not be reasonable to place on police officers the burden of endeavouring to make the distinction accurately in all the variety of situations which might confront them, nor does it appear to them to be necessary in the interests of civil liberties that this should be done.

In *Ma Kui* Penlington J. took the view that the question asked of the accused was tantamount to an accusation of attempted theft, which the accused was entitled not to answer. He therefore held that the accused had not been called upon to give a satisfactory account of himself either properly or at all, and quashed the conviction. In their Lordships' opinion the decision was wrong and should be overruled.

In the present case it appears to their Lordships that there was evidence of a completed offence under section 160(1) at the stage when the question in paragraph (g) had been asked and had received no reply. The police officer had observed the respondent loitering under circumstances which called for an explanation and, having twice asked him why he had gone into the building, had received no reply. The police officer then asked the respondent to explain the circumstance which had principally aroused his suspicions, namely pushing and pulling at the grille. For the reasons which their Lordships have already set out, they are of opinion that in fairness to the respondent it was entirely proper that such an explanation should be asked for. The questions in paragraphs (h), (i) and (j) were unobjectionable.

Their Lordships are accordingly of opinion that the appeal should be allowed, to the effect of answering questions (i) and (ii) in paragraph 8 of the case stated both in the negative, and finding that the learned magistrate erred in holding that the respondent had no case to answer. The appellant does not ask that the case be remitted to the magistrate's court for a continuance of the trial. Agreement has been reached by the parties on the matter of costs, and no order upon that matter is required. Their Lordships will humbly advise Her Majesty accordingly.