**FACC No 1 of 2017**

**[2018] HKCFA 1**

**IN THE COURT OF FINAL APPEAL OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

**FINAL APPEAL NO 1 OF 2017 (CRIMINAL)**

(ON APPEAL FROM HCMA NO 729 OF 2015)

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BETWEEN

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| HKSAR | Respondent |
| and |  |
| LAM TAN CHING PAUL（林丹青） | Appellant |

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| Before: | Chief Justice Ma, Mr Justice Ribeiro PJ,  Mr Justice Tang PJ, Mr Justice Fok PJ and  Lord Hoffmann NPJ |
| Date of  Hearing and Judgment: | 9 January 2018 |
| Date of  Reasons for Judgment: | 25 January 2018 |

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**REASONS FOR JUDGMENT**

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Chief Justice Ma:

1. After hearing counsel, we allowed the appeal and made an order as to costs.[[1]](#footnote-1) I agree with the reasons contained in the judgement of Mr Justice   
   Tang PJ.

Mr Justice Ribeiro PJ:

1. I agree with the Reasons given by Mr Justice Tang PJ.

Mr Justice Tang PJ:

1. The Import and Export (General) (Amendment) Regulation 2013 which came into operation on 1 March 2013[[2]](#footnote-2) was enacted to combat parallel trading in powdered milk formula between Hong Kong and the Mainland. For that purpose, amendments were made to the Import and Export (General) Regulations, Cap 60A (“the Regulations”) with the result that the export of powdered formula to all places outside Hong Kong except and in accordance with an export licence issued by the Director-General of Trade and Industry became prohibited under s 6D(1) of the Import and Export Ordinance, Cap 60. But Regulation 6(1D) was added to exempt, from s 6D(1), powdered formula:

“ … that is exported in the accompanied personal baggage of a person aged 16 or above leaving Hong Kong –

* 1. if –

1. the person did not leave Hong Kong in the last 24 hours; and

(ii) the formula does not exceed 1.8 kg[[3]](#footnote-3) in total net weight;”

1. On 25 January 2015, in the departure hall of Lo Wu Control Point, the appellant was found with four cans containing a total of 3.6 kg of powdered formula. He was charged with and convicted[[4]](#footnote-4) of the attempted exportation of   
   powdered formula in excess of the permitted limit of 1.8 kg without an export licence under s 6D(1) of the Import and Export Ordinance and s 159G of the Crimes Ordinance, Cap 200 and fined $500.
2. His case as summarised by the learned magistrate was that he and his wife were travelling from Hong Kong to the Mainland via Lo Wu.[[5]](#footnote-5) He was carrying four cans of powdered formula in his backpack, two for himself and two for his wife. He was walking side by side with his wife but:

“When they reached the customs channel, as there was a large flow of people, they were no longer holding hands, and his wife was a few steps ahead of him. Suddenly, someone called him and asked to check his baggage. He slowed down. When he was called a second time, he had already lost sight of his wife. Customs officers found four cans of powdered formula in his backpack. He explained to the customs officers that he was going through clearance with his wife, but the customs officers paid no heed. As his identity card was kept by his wife, he phoned her. Later, she returned to the customs channel and passed his identity card to the customs officers.”[[6]](#footnote-6)

His wife’s evidence was to similar effect.

1. The learned magistrate said little about the prosecution case although he said:

“as to how (the appellant) was stopped, how the identity card was shown, his explanations to the customs officers etc, the evidence of the customs officers was substantially disputed by the defence.”[[7]](#footnote-7)

1. The learned magistrate did not think it necessary to resolve any difference between the prosecution and the defence case. He took the view that under Regulation 6(1D):

“Each person leaving Hong Kong is only allowed to export no more than   
1.8 kg of powdered formula. It is not specified [in the regulation] that a person can carry powdered formula for others travelling with him. I think it is obvious that the restriction on powdered formula only allows each person to carry 1.8 kg of powder formula with him. This also enables the customs officers to enforce the relevant law in a precise manner.” (Emphasis in original)[[8]](#footnote-8)

1. The learned magistrate went on to say there was no defence to the charge because:

“14. …. when the [appellant] was stopped, he was separated from his wife. His wife was walking ahead. He was alone when he was stopped by the customs officers.”

1. On appeal, his decision was affirmed by Fung J. His Lordship said “accompanied baggage” meant “the baggage accompanied by that person instead of the baggage entrusted to another person” and added, “In any case, the Appellant did not dispute that he was not with his wife when going through clearance.”[[9]](#footnote-9)
2. On 9 February 2017, the Appeal Committee gave leave to the appellant to appeal on the following question of law, namely:

“Whether, on the true and proper construction of the phrase ‘the accompanied personal baggage of a person’ in Regulation 6(1D) of Import and Export (General) Regulations, Cap.60A, such baggage is limited to personal baggage physically carried by, or immediately with, the person himself or extends also to baggage carried by, or immediately with, another who is accompanying the person to leave Hong Kong?”

1. Before us, Ms Vinci Lam on behalf of the respondent submitted that accompanied personal baggage is not limited to baggage physically carried by, or immediately with, a person and can extend to baggage carried by, or immediately with, another person “so long as the baggage is physically proximate to the person as to be staying with or going along with [the relevant person]”.[[10]](#footnote-10)
2. Ms Lam submitted that in the present case, it was not in dispute even on the appellant’s version of events that he was not with his wife when going through clearance. Accordingly, even if the appellant was carrying the personal property of his and his wife, the two additional cans of powdered formula was not physically proximate to the wife.
3. I disagree with the respondent’s submissions. We are concerned with the proper construction of the expression “accompanied personal baggage”. This is an everyday expression. It is a question of fact in every case and should be approached with common sense. Suppose the wife was asked by mainland customs officer at the other side of the border, whether she had any accompanied baggage and said, “Yes, they are with my husband”. I do not believe the man in the street would say she was untruthful. Without attempting an exhaustive definition, I am of the view that on the basis of the defence case, two of the four cans of powdered formula should be regarded as part of the wife’s accompanied personal baggage, just as if she shared a suitcase with her husband and her clothes were in his suitcase. They were travelling on the same journey with her and belonged to her and should be regarded as her accompanying personal baggage. Nothing in the context of these words nor with regard to their purpose[[11]](#footnote-11) compels the construction advanced by the respondent.
4. Ms Lam submitted that this construction is liable to be exploited by parallel traders. She gave the example of a group of ten parallel traders each carrying ten cans of powdered formula. She said if nine of them got through customs undetected but one was stopped, that person could call for the return of four of his confederates each of whom would then claim that he was carrying two cans for him. This is a fanciful example. Anyway, it would not justify giving the expression “accompanied personal baggage” a construction which would ensnare innocent travellers. Families travelling together often carry stuff for one another. The crossing between Hong Kong and the Mainland is very busy. Travellers are often hurried along and told not to linger. Just as in the present case, it is easy for persons travelling together to be separated for whatever reason, particularly in a busy immigration or customs hall. In any event administrative convenience or operational concerns ought to be addressed administratively or through other measures rather than by a strained legal construction. Furthermore, persons claiming to be travelling together or to be carrying powdered formula for one another, have in truth to be doing so, not merely because they have said this to be the case.
5. Finally, in allowing the appeal, it of course follows that the conviction of the appellant must be quashed. In this respect, it should be noted that the respondent did not suggest otherwise. Moreover, although it was unclear in the SOF as to whether the magistrate accepted the appellant’s version of events, the transcript of the proceedings when he was being sentenced reveals that the magistrate did accept his version.[[12]](#footnote-12)
6. For the above reasons, I allowed the appeal.

Mr Justice Fok PJ:

1. I agree with the Reasons given by Mr Justice Tang PJ.

Lord Hoffmann NPJ:

1. I agree with the Reasons given by Mr Justice Tang PJ.

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| (Geoffrey Ma)  Chief Justice |  | (R A V Ribeiro)  Permanent Judge |  | (Robert Tang)  Permanent Judge |

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| (Joseph Fok)  Permanent Judge |  | (Lord Hoffmann)  Non-Permanent Judge |

Mr Andy Hung, instructed by Ho & Ip, assigned by the Director of Legal Aid, for the appellant

Ms Vinci Lam, SADPP and Ms Florrie Chan, SPP of the Department of Justice, for the respondent

1. The appellant was legally aided. It was ordered that the respondent pay the costs of the appellant limited to any contribution that was payable by the appellant to the Director of Legal Aid. Other than that, the appellant’s costs are to be taxed in accordance with the Legal Aid Regulations, Cap 91. [↑](#footnote-ref-1)
2. L.N. 25 of 2013. [↑](#footnote-ref-2)
3. Powdered formula usually come in cans of 0.9 kg each, so effectively, the limit is two cans of powdered formula. [↑](#footnote-ref-3)
4. By Mr Raymond Wong, a magistrate. The statement of findings of the magistrate (“the SOF”) was dated   
   5 December 2015. [↑](#footnote-ref-4)
5. The evidence is not entirely clear but it appears that they went through Immigration 9 seconds apart. See judgment of Fung J, who dismissed the appellant's appeal, dated 10 March 2016 (“the judgement”) at para 4. [↑](#footnote-ref-5)
6. Para 7 of the SOF (as translated). [↑](#footnote-ref-6)
7. Para 10 of the SOF. [↑](#footnote-ref-7)
8. Para 12 of the SOF. [↑](#footnote-ref-8)
9. Paras 16 & 17 of the judgment. [↑](#footnote-ref-9)
10. Para 18 of the respondent’s case. [↑](#footnote-ref-10)
11. See para 3 above. [↑](#footnote-ref-11)
12. “But still, I accept what you have put forward, as from beginning to end, I never queried about what you have put forward. That is, when your wife and you were walking through the immigration together, just because of the large flow the people there, then you separated from each other, a few steps ahead. But the court finds that it was not in compliance with the restriction on powdered formula which states that each person can carry one can -- each person can carry two cans.” Page 11 of the translated transcript of the closing submission of the hearing on 24 November 2015. [↑](#footnote-ref-12)