**FACC No. 19 of 2018**

**[2019] HKCFA 2**

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

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 19 OF 2018 (CRIMINAL)**

(ON APPEAL FROM HCMA NO. 113 OF 2016)

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BETWEEN

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|  | **HKSAR** | **Respondent** |
|  | **and** |  |
|  | **SHUM WAI KEE (岑偉基)** | **Appellant** |

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| Before: | Chief Justice Ma, Mr Justice Ribeiro PJ,  Mr Justice Fok PJ, Mr Justice Cheung PJ and  Lord Hoffmann NPJ |
| Date of Hearing and Judgment: | 10 January 2019 |
| Date of Reasons for Judgment: | 31 January 2019 |

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|  | **REASONS FOR JUDGMENT** |  |

Mr Justice Fok PJ:

***A. Introduction***

1. This appeal concerns the mental element of the offence under section 37(a) of the Crimes Ordinance[[1]](#footnote-1) (set out below), which makes it an offence to make a false declaration to obtain registration for carrying on a vocation. The section requires that the defendant “knows” the declaration “to be false or fraudulent” and the appeal raises the questions: (a) what, as a matter of law, must a defendant know in order to be guilty of the offence; and (b) did the appellant in this case have the necessary guilty mind? As will be seen, the appeal arises in the context of an application for enrolment as a nurse and the false declaration concerns the existence of previous criminal convictions.
2. At the conclusion of the hearing of the appeal, the Court made the orders set out in Section G below and indicated that its reasons for doing so would be handed down in due course. These are the reasons of the Court.

***B. The background facts***

1. The salient background facts taken from the admitted facts and the exhibits below are as follows:
   1. On 10 January 2007, the appellant was convicted of two charges of obtaining property by deception, for which he was sentenced to seven weeks’ imprisonment on each (to be served concurrently).
   2. Between September 2011 and August 2013, the appellant took a course for pupil enrolled nurses at the Open University of Hong Kong. After completing the course, the appellant filled out an application form[[2]](#footnote-2) addressed to the Nursing Council of Hong Kong (“the Nursing Council”) seeking enrolment as an enrolled general nurse.
   3. The application form was Exhibit P1 at trial and was accompanied by a Declaration Form addressed to the Secretary of the Nursing Council and signed by the appellant (“the Declaration Form”).[[3]](#footnote-3) The Declaration Form included a number of declarations, including one stating “I declare that … (a) I have/have not been convicted of any offence punishable with imprisonment in Hong Kong or elsewhere.” An asterisk after the words “have/have not” invited the appellant to delete whichever was inappropriate and, on his form, the word “have” was crossed out.
   4. On 11 November 2013, the Open University of Hong Kong submitted Exhibit P1, together with the Declaration Form, and other required documents to the Nursing Council for his application to be processed.
   5. The Nursing Council duly processed the appellant’s application and, based on his application form and accompanying declarations, issued him with the enrolment certificate (Exhibit P8) and practising certificate (Exhibit P9) of an enrolled nurse which the appellant collected from the Open University of Hong Kong.
   6. Thereafter, from 6 February 2014 to 1 December 2014, the appellant worked as an enrolled nurse at Chung Shak Hei (Cheung Chau) Home for the Aged. In applying for that employment, the appellant had submitted to the Home a copy of his practising certificate.
2. The appellant was charged with the offence of making a false declaration to obtain registration for the carrying on of a vocation, contrary to section 37(a) of the Crimes Ordinance (set out below). The particulars of the offence alleged that, on or about 16 October 2013, the appellant attempted to procure himself to be registered on the roll of enrolled nurses kept under the Nurses Registration Ordinance of persons qualified by law to practise nursing by wilfully making in writing a declaration which he knew to be false or fraudulent, namely a declaration that he had not been convicted of any offence punishable with imprisonment in Hong Kong or elsewhere.

***C. The falsity of the declaration***

1. It is not in dispute that the relevant inquiry in the Declaration Form required him to declare whether he had any *disclosable* convictions of any offence punishable with imprisonment in Hong Kong or elsewhere. This is clearly correct as a matter of construction of the Declaration Form in the context of the laws of Hong Kong, which include the Rehabilitation of Offenders Ordinance.[[4]](#footnote-4) The purpose of that ordinance, as reflected in its Long Title is “[t]o rehabilitate offenders who have not been reconvicted for 3 years, to prevent unauthorized disclosure of their previous convictions and for connected purposes.”
2. Thus, section 2 of the ROO excuses the disclosure of certain convictions by providing:

“(1) Where –

* + 1. an individual has been convicted in Hong Kong (before or after the commencement of this Ordinance) of an offence in respect of which he was not sentenced to imprisonment exceeding 3 months or to a fine exceeding $10,000;
    2. he has not been convicted in Hong Kong on any earlier day of an offence; and

(c) a period of 3 years has elapsed without that individual being again convicted in Hong Kong of an offence,

then –

(i) subject to section 3(3) and (4), no evidence shall be admissible in any proceedings which tends to show that that individual was so convicted in Hong Kong;

(ii) any question asked of that individual or any other person relating to, or any obligation imposed on that individual or any other person to disclose, that individual’s previous convictions, offences, conduct or circumstances shall be treated as not referring to that conviction; and

(iii) that conviction, or any failure to disclose it shall not be a lawful or proper ground for dismissing or excluding that individual from any office, profession, occupation or employment or for prejudicing him in any way in that office, profession, occupation or employment.”

Relevantly to the present case, by section 2(1)(ii) of the ROO, a fiction is created in that where a person is asked about his previous convictions, a question about (and any obligation on him to disclose) any previous conviction is treated as not referring to a conviction falling within paragraphs (a), (b) and (c) of section 2(1).

1. However, there are exceptions to the confidentiality afforded by that section, which include those set out in section 4 of the ROO. For present purposes, it is sufficient to refer to section 4(1)(c), which provides:

“(1) Section 2(1) and (1A) shall not apply to –

…

(c) proceedings relating to a person’s suitability to be granted, or to continue to hold, any licence, permit or dispensation, or to be registered, or continue to be registered, under any law;

…”.

1. It is not in dispute in this appeal that section 4(1)(c) of the ROO applied in respect of the appellant’s application for enrolment as an enrolled nurse under the Nurses Registration Ordinance.[[5]](#footnote-5) As such, he could not rely on section 2 of the ROO to excuse him from disclosing, in completing the Declaration Form, that he had indeed been convicted of an offence punishable with imprisonment in Hong Kong. By signing the Declaration Form stating that he had not been convicted of an imprisonable offence, the appellant made a false declaration. Whether he did so knowing the declaration was false lies at the heart of this appeal.

***D. The procedural history***

***D.1 The magistracy trial***

1. At trial in the magistracy,[[6]](#footnote-6) the appellant pleaded not guilty and testified that:
   1. He had been told, by his lawyers at the time of his convictions in 2007 and by staff of the Correctional Services Department when he served his term of imprisonment, that the ROO might assist him.
   2. Before he filled in the Declaration Form, he read the relevant provisions of the ROO and sought the views of the Nursing Council, who suggested that he seek legal advice.
   3. In October 2010, through his ex-wife, Ms Fan Hoi Wan, he had sought legal advice from the Free Legal Advice Scheme provided by the Duty Lawyer Service. Ms Fan approached a Scheme lawyer and asked the following question (as recorded on the Free Legal Advice Scheme application form):

“I would like to enquire about the Rehabilitation of Offenders Ordinance. (That is), there is a person who had not had any previous criminal conviction, but was sentenced to imprisonment of 5 weeks (i.e. less than 3 months) at the Magistrates’ Courts for (the offence of fraud). Since then, (he) has not got involved in any (other) criminal offences.

Having studied hard for 5 years, he managed to complete the (Nursing) and (Social Work) courses soon. In that case, when filling out the application form for registration, can he apply the (Rehabilitation of Offenders Ordinance) to state on the application form for registration that ‘(he) has never been convicted of any offences punishable by imprisonment in Hong Kong’?

Assuming that he writes on the application form for registration that ‘(he) have [sic] never been convicted of any offences punishable by imprisonment in Hong Kong’, does he breach the law by doing so?”

* 1. The advice given to Ms Fan by the Scheme lawyer, as subsequently summarised in writing (adduced at trial as Exhibit D1), was that:

“Since the application form for the social worker position required Ms Fan to declare if she has been convicted previously and it required the applicant to disclose such record even though he/she is protected under the Ordinance. I advised Ms Fan to disclose her record if such form had such declaration but if other forms do not have such provision, she would declare she has no previous conviction.”

* 1. He genuinely believed that, by reason of the provisions of the ROO, as confirmed by the legal advice given to Ms Fan, he was not required to disclose his previous convictions in the Declaration Form.

1. It will be necessary to address below some of the provisions of the Social Workers Registration Ordinance[[7]](#footnote-7) (together with the application form to which the Scheme lawyer referred in his advice to Ms Fan) to put the legal advice provided to Ms Fan into context. It is not in dispute that the advice was incorrect as a matter of law.
2. The Deputy Magistrate held that section 4(1)(c) of the ROO was applicable in the present case so that the appellant was unable to rely on section 2 of the ROO. He also concluded that the legal advice given to Ms Fan contained in Exhibit D1 did not convey what the appellant said was the advice given to her and did not support the appellant’s explanation as to why he did not disclose his previous convictions. As will be seen, there is an issue between the parties as to whether the Deputy Magistrate (and also the Deputy Judge on appeal) fundamentally misconstrued the evidence as to what advice was given to Ms Fan. Be that as it may, as the Deputy Magistrate understood the advice, the appellant was told he had to disclose his previous convictions.
3. For this reason, the Deputy Magistrate disbelieved the appellant’s evidence that he had not disclosed those convictions because he believed the legal advice he had sought. Instead, he found that the appellant wilfully made a false declaration, knowing that he had previous convictions but wilfully indicating that he had never been convicted of any offences punishable with imprisonment in Hong Kong. Accordingly, he convicted the appellant of the offence charged and sentenced him to a fine of HK$3,000 and ordered him to perform 160 hours of community service.

***D.2 The intermediate appeal to the Court of First Instance***

1. The appellant appealed against his conviction to the Court of First Instance.[[8]](#footnote-8) The sole ground of appeal advanced was that the Deputy Magistrate was wrong to hold that section 4(1)(c) of the ROO (set out above) applied, so that the conviction was unsafe and unsatisfactory. The Deputy Judge concluded that section 4(1)(c) of the ROO was applicable in the present case, but for different reasons to those given by the Deputy Magistrate, so that the appellant was unable to rely on section 2 of the ROO to avoid disclosure of his previous convictions.
2. Having disposed of that only ground of appeal, the Deputy Judge dealt very briefly with the evidence at trial concerning the legal advice obtained by the appellant. In his judgment dismissing the appeal,[[9]](#footnote-9) he concluded:

“I considered the evidence in the present case by way of rehearing. I find that the prosecution by the evidence adduced in the trial has successfully proved beyond all reasonable doubts all the constituent elements of the offence. The magistrate is right in finding that the appellant shall not rely on the legal advice he obtained to believe that he is not required to disclose his past conviction record.”[[10]](#footnote-10)

***D.3 Leave to appeal to the Court of Final Appeal***

1. The Deputy Judge dismissed the appellant’s application to certify points of law for appeal to the Court of Final Appeal.[[11]](#footnote-11) These related to the applicability of section 4(1)(c) of the ROO, a point which, as already noted, is no longer in dispute.
2. After the appellant filed an application to the Appeal Committee for leave to appeal, the Registrar of the Court of Final Appeal issued a summons under Rule 7(1) of the Court of Final Appeal Rules in respect of the application.[[12]](#footnote-12) Following the filing of written submissions on behalf of the appellant pursuant to Rule 7(1), the Appeal Committee listed the application for an oral hearing and granted the appellant leave to appeal in respect of the following question of law:

“In the light of the rule that ignorance of the law is generally no defence, what, on its true construction, is the mental element of the offence under section 37(a) of the Crimes Ordinance (Cap.200)?”[[13]](#footnote-13)

1. Leave to appeal was also granted on the basis that it was reasonably arguable that, by reason of the courts below having materially misapprehended the evidence, substantial and grave injustice was done to the appellant.[[14]](#footnote-14)

***E. Section 37(a) of the Crimes Ordinance***

1. Section 37 of the Crimes Ordinance provides as follows:

“**37. False declarations, etc., to obtain registration, etc., for carrying on a vocation**

Any person who –

(a) procures or attempts to procure himself to be registered on any register or roll kept under or in pursuance of any enactment for the time being in force of persons qualified by law to practise any vocation or calling; or

(b) procures or attempts to procure a certificate of the resignation of any person on any such register or roll as aforesaid,

by wilfully making or producing or causing to be made or produced either verbally or in writing any declaration, certificate or representation which he knows to be false or fraudulent, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 12 months and to a fine.”

1. As a matter of legislative history, section 37 of the Crimes Ordinance was originally enacted as section 8 of the Perjury Ordinance.[[15]](#footnote-15) The Perjury Ordinance was based on the English Perjury Act 1911[[16]](#footnote-16) and section 8 of the Perjury Ordinance was relevantly the same as section 6 of the Perjury Act 1911.

***E.1 The elements of the offence***

1. The *actus reus* of the offence is constituted by a defendant: (1) making or producing (or causing to be made or produced) a false declaration, certificate or representation; and (2) doing so for the purposes of procuring (or attempting to procure) his registration on a register or roll, kept under or in pursuance of any enactment, of persons qualified by law to practise any vocation or calling. It is not in dispute that these elements were satisfied in this case.
2. The *mens rea* of the offence is constituted by the defendant making the declaration (etc.): (3) wilfully; and (4) knowing it to be false or fraudulent. So far as wilfulness is concerned, it is not in dispute in this appeal that this element is satisfied on proof by the prosecution that the defendant made the declaration “deliberately and not inadvertently or by mistake”: see *R v Millward (Neil)* [1985] 1 QB 519 per Lord Lane CJ at 524G-525A. It is common ground the element of wilfulness was satisfied in this case. The critical question here is whether the declaration made by the appellant was one which he knew to be false.
3. This requires a determination, as a matter of statutory construction, of what is meant by the words “which he knows to be false or fraudulent” in section 37(a). Is it sufficient, as the prosecution contends,[[17]](#footnote-17) that the appellant knew he had previous convictions but declared he had none and that his claimed mistaken belief that he was entitled not to disclose those convictions is irrelevant? Or, is it necessary, as the appellant contends, for the prosecution to prove that the appellant appreciated the false character of his declaration and, despite such appreciation and knowing its falsity, made the declaration.[[18]](#footnote-18)
4. Before addressing the construction of section 37(a), because of the form of the question of law for which leave to appeal was granted, it is relevant to mention some general principles concerning ignorance and mistake of law.

***E.2 Ignorance of the law and mistake of law***

1. There is no rule or principle that ignorance or mistake of law is not a defence to a criminal charge. Instead, there is only the self-evident truism that if, as a matter of construction, the requisite *mens rea* for a given offence does not include knowledge that it was wrongful, the prosecution does not have to prove that the accused knew it was wrongful. Whether such knowledge is required or not depends upon the construction of the language of the statute creating the offence. Many offences have no such requirement but some do. As Sir Garfield Barwick CJ put it in *Iannella v French* (1968) 119 CLR 84 at 97:

“Mens rea may in some cases, depending … on the context and the subject matter, require that the defendant should know that the act is unlawful. That element of the offence itself cannot be eliminated in such a case by saying that ignorance of the law is no excuse. The defendant who is not shown in such a case to know that the act is unlawful needs no excuse. The offence has not been proved against him.”

1. Whether this is so will depend as a matter of construction on the mental element required by the statute.
2. In their printed Cases, both parties referred to decisions on the construction of various statutory offences, some of which were construed as imposing a *mens rea* requirement that included knowledge of the quality of the particular act or circumstances constituting the offence and some of which were construed as not requiring a particular mental state but merely knowledge of the facts necessary to establish guilt.
3. Thus, *R v Smith (David)* [1974] 1 QB 354,[[19]](#footnote-19) *R v Taaffe* [1983] 1 WLR 627,[[20]](#footnote-20) and *Secretary of State for Trade and Industry v Hart* [1982] 1 WLR 481[[21]](#footnote-21) were referred to as examples of the former category of cases. *Grant v Borg* [1982] 2 All ER 257[[22]](#footnote-22) and *Attorney General’s Reference (No 1 of 1995)* [1996] 4 All ER 21[[23]](#footnote-23) were referred to as examples of the latter. It is unnecessary to discuss those cases further because each is simply a decision on the construction of the particular statutory provision in question.

***E.3 The construction of section 37(a) of the Crimes Ordinance***

1. For the following reasons, we would hold that the mental element of the offence under section 37(a) requires the prosecution to prove that the defendant has an appreciation of the falsity of the declaration (etc.) he is making or producing and that, therefore, the defendant’s state of mind as to the falsity or otherwise of the declaration is relevant. If the defendant honestly believes that the declaration is not false, the mental element of the offence will not be established.
2. What the section requires is that the defendant “knows” the declaration is “false or fraudulent”. The nature of a particular statement may require an evaluation of other circumstances in order to determine its truthfulness or falsity. Unless the maker of such a statement appreciates that it is untrue, he cannot be said to know it is false or fraudulent.[[24]](#footnote-24) Thus, in the present case, the declaration required of the appellant was whether he had any *disclosable* previous convictions (as opposed to whether he had any previous convictions at all). It is only by construing the ROO that the appellant could properly answer the inquiry as to whether he had any disclosable previous convictions. If section 2 of the ROO applied, but none of the exceptions in section 4 were relevant, his declaration would not have been untrue.
3. This construction of “declaration … which he knows to be false or fraudulent” is a natural construction of those words in the context of the section which is seeking to prohibit false statements made to procure registration on a register or roll for carrying on a vocation.
4. The above construction of section 37(a) is consistent with the English Court of Appeal’s construction of the words “knowingly and wilfully” in section 36 of the Crimes Ordinance: see *R v Rajinder Kumar Sood* [1998] 2 Cr. App. R. 355. Although *Sood* was cited by the respondent[[25]](#footnote-25) as supporting its construction of section 37(a) in this appeal, that case is authority for the proposition that the words “knowingly and wilfully” in section 36 do not import as an additional requirement a further or ulterior intention on the part of a defendant. They nevertheless do require proof of an intention to do the act proscribed “with knowledge of the material circumstances which render it an offence”.[[26]](#footnote-26)
5. Since, on a proper construction of section 37(a), an appreciation of the falsity of the declaration made is required, an honest and genuine belief by the defendant that the statement in question is in fact true, even if the result of a mistake of law, will preclude his being found to have the necessary mental element for the offence. In this way, a mistake of law may provide a defence to a charge under section 37(a). In the present case, such a mistake was relevant because of the application of the ROO. The effect of sections 2 and 4 of that ordinance (see paragraphs [6] and [7] above) was directly relevant to the fact of whether there was a disclosable conviction.

***F. Whether the courts below materially misapprehended the evidence?***

1. The basis on which the Deputy Magistrate disbelieved the appellant’s evidence that he genuinely believed that he was excused from disclosing his previous convictions by reason of the ROO is his understanding of the content of the legal advice obtained by Ms Fan from the Free Legal Advice Scheme. [[27]](#footnote-27) The Deputy Judge simply adopted the Deputy Magistrate’s reasoning in this regard. The appellant contends that substantial and grave injustice was done to him in that the Deputy Magistrate materially misapprehended the evidence below concerning that legal advice, and that the finding that his evidence was not to be believed cannot therefore be sustained.
2. The material parts of that legal advice and the Deputy Magistrate’s interpretation of it are described above. It will be recalled that Ms Fan had inquired about registration as a social worker and reference was made in the advice to the application form for registration as a social worker. A copy of the relevant registration form for social workers, with its accompanying notes, was admitted into evidence at trial as Exhibit MFI-1.
3. In this regard, it is material to note that the application for enrolment as a social worker under the Social Workers Registration Ordinance[[28]](#footnote-28) differs from that for enrolment as an enrolled nurse. Section 37(5) of that Ordinance provides that:

“(5) The Board shall exercise its power under this section in such a way as to require a person seeking to be registered as a registered social worker to make a statutory declaration as to –

(a) whether he has been convicted of any offence, whether in Hong Kong or elsewhere;

(b) if he has been so convicted, the nature of each such offence.”

1. The notes forming part of Exhibit MFI-1 provide, at paragraph 2 in respect of the statutory declaration to be completed, that:

“According to Section 37(5) of the Social Workers Registration Ordinance, a person seeking to be registered as a registered social worker is required to make a statutory declaration as to (a) whether he has been convicted of any offence, whether in Hong Kong or elsewhere; (b) if he has been so convicted, the nature of each such offence. No exemption will be granted under the Rehabilitation of Offenders Ordinance (Cap.297). *You are therefore required to make such a declaration in any circumstances*.” [Emphasis added]

1. However, as already noted, it is common ground that the requirement on the appellant in completing the Declaration Form was to state whether he had any disclosable previous convictions. There is no equivalent of the provision in section 37(5) of the Social Workers Registration Ordinance in the Nurses Registration Ordinance. Instead, section 15 of the Nurses Registration Ordinance relevantly provides:

“**15.** **Enrolment**

(1) Any person who considers himself qualified to be enrolled in any part of the roll may apply in the manner prescribed to the secretary for enrolment.

…

(3) If, after due inquiry, the Council is satisfied that a person applying under subsection (1) has in Hong Kong or elsewhere –

(a) been convicted of an offence punishable with imprisonment; or

(b) been guilty of unprofessional conduct,

the Council may, in its discretion, refuse to enter the name of that person upon the roll.”

1. The Declaration Form constitutes a form of “due inquiry” by the Council under section 15(3) of the Nurses Registration Ordinance as to whether an applicant has any previous convictions. However, there is no corresponding note in the Declaration Form for nurses to that in paragraph 2 of the notes forming part of Exhibit MFI-1 which excludes the ROO.
2. The advice given to Ms Fan was understood by the appellant as meaning that the exclusion of the ROO in Exhibit MFI-1 meant that any previous conviction had to be disclosed in that application form, regardless of the ROO, but if the form had no such express exclusion, he could properly state that he had no previous conviction. On the face of Exhibit D1, recording the advice given to Ms Fan, that would appear to be a correct construction of the legal advice she obtained on behalf of the appellant.
3. That this was his understanding of the legal advice is supported by his evidence in cross-examination where, in answer to the suggestion that Ms Fan had been advised “to disclose her record”, the appellant answered, “This is only the case for social worker.” He agreed that the inquiry had been about both social workers and nurses but disagreed with the suggestion that the advice did not mention nurses, presumably on the basis of his understanding that they fell into a category in which the form did not have a statement excluding the operation of the ROO. The appellant accepted in cross-examination that, taken literally, his declaration was false but that he understood the legal advice to mean that he did not have to disclose his previous convictions.
4. In paragraph 9 of the Statement of Findings, the Deputy Magistrate stated:

“However, the content of exhibit D1 did not convey what the defendant said at all nor did it support his account. … I am also certain that he understood the content of D1. The legal advice at D1 indicated that if applicants are required to disclose their previous convictions on a form, they are then required to make disclosure. The defendant also made it clear that he understood that the legal advice at D1 was applicable to not only nurse applications but also social worker applications as his enquiry covered both professions.”

1. With respect, this was not correct. The Deputy Magistrate did not take any account of the differences in the statutory provisions referred to above or the respective forms for social workers and nurses and did not attempt to construe the second part of the legal advice dealing with the case where an applicant could legitimately declare that he did not have any previous conviction.[[29]](#footnote-29) To make sense, that advice must have meant that an applicant might be able to declare that he had no previous conviction even though he actually did. In that advice, “such declaration” and “such provision” must have referred to the note excluding the operation of the ROO in Exhibit MFI-1.
2. Although, on the intermediate appeal, the appellant did not challenge the Deputy Magistrate’s refusal to accept his evidence,[[30]](#footnote-30) it was incumbent on the Deputy Judge to consider whether the evidence was sufficient to convict the appellant of the offence. The Deputy Judge’s understandably brief conclusion (since this was not challenged on appeal) that the Deputy Magistrate “is right in finding that the appellant shall not rely on the legal advice he obtained to believe that he is not required to disclose his past conviction record” (see paragraph [14] above) is, with respect, an incorrect assessment of the evidence concerning the legal advice obtained and the belief which the appellant claimed he formed as a result of that advice.
3. In the circumstances, we consider that the appellant has established that the Deputy Magistrate and Deputy Judge both materially misapprehended the evidence concerning the legal advice obtained by him and that their respective conclusions that the appellant’s evidence (as to his belief that he was excused from the need to disclose his previous convictions in the Declaration Form) was to be disbelieved were fundamentally flawed. As a consequence, substantial and grave injustice was done to the appellant by reason of his conviction on this flawed basis.

***G. Conclusions and disposition***

1. In the light of the conclusions that: (i) in answer to the question of law for which leave to appeal was granted, a defendant’s state of mind as to the falsity of the declaration was relevant and that the mental element of the offence would not be made out where a defendant held an honest and genuine belief that the declaration was not false (Section E.3 above); and that, (ii) substantial and grave injustice was done to the appellant in disbelieving his evidence that he held such an honest and genuine belief (Section F above), it follows that the appeal must be allowed and his conviction set aside.
2. Although there was no determination by the Deputy Magistrate or Deputy Judge as to whether, on a proper understanding of the legal advice, the appellant’s evidence as to his belief that the declaration he made was not false should be believed, it was not suggested by the respondent that a re-trial should be ordered. Once the evidence concerning the legal advice he obtained is properly understood, there is no proper basis for disbelieving the appellant. In the light of his honest and genuine belief that he was excused from disclosing his previous convictions by reason of the ROO, he could not be said to know that the Declaration Form contained a false or fraudulent statement and so he could not be guilty of the offence charged. Since, additionally, the appellant has already served the sentence imposed by the Deputy Magistrate, a re-trial would not be appropriate.
3. These are the Court’s reasons for our orders, made at the conclusion of the hearing of the appeal, to (1) allow the appellant’s appeal; (2) quash the appellant’s conviction below; and (3) order the respondent to pay the appellant’s costs of trial and of this appeal, to be taxed if not agreed.

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| (Geoffrey Ma)  Chief Justice | (R A V Ribeiro)  Permanent Judge | (Joseph Fok)  Permanent Judge |

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| (Andrew Cheung)  Permanent Judge | (Lord Hoffmann)  Non-Permanent Judge |

Mr Robert Pang SC and Mr Joseph Lee, instructed by Wat & Co., assigned by the Director of Legal Aid, and Mr Lawrence Pang, instructed by Wat & Co., on a *pro bono* basis, for the Appellant

Mr Ned Lai SADPP and Mr Nicholas Wong SPP, of the Department of Justice, for the Respondent

1. (Cap.200). [↑](#footnote-ref-1)
2. The form follows the requirements of rule 4 of the Enrolled Nurses (Enrolment and Disciplinary Procedure) Regulations (Cap.164B) made under the Nurses Registration Ordinance (Cap.164). [↑](#footnote-ref-2)
3. This was Exhibit P4 at trial and its contents follow the requirements of section 15(3) of the Nurses Registration Ordinance. [↑](#footnote-ref-3)
4. (Cap.297) (“ROO”). [↑](#footnote-ref-4)
5. The Appellant’s Case at [19], read with [35]-[37]. [↑](#footnote-ref-5)
6. In TWCC 2202/2015, before Deputy Magistrate, Mr Jim Chun Ki. [↑](#footnote-ref-6)
7. (Cap.505). [↑](#footnote-ref-7)
8. In HCMA 113/2016, before Deputy High Court Judge Johnny Chan. [↑](#footnote-ref-8)
9. Judgment dated 13 March 2017 (“CFI Judgment”). [↑](#footnote-ref-9)
10. CFI Judgment at [46]. [↑](#footnote-ref-10)
11. HCMA 113/2016, Decision dated 16 May 2017. [↑](#footnote-ref-11)
12. (Cap.484A). [↑](#footnote-ref-12)
13. FAMC 38/2017, [2018] HKCFA 36, Determination dated 8 August 2018 at [1]. [↑](#footnote-ref-13)
14. *Ibid.* at [2]. [↑](#footnote-ref-14)
15. Ordinance No.21 of 1922. [↑](#footnote-ref-15)
16. See the speech of the Attorney General in Hong Kong Hansard, 21 September 1922, at p.84. [↑](#footnote-ref-16)
17. The Respondent’s Case at [44], [51]-[52] and [56]. [↑](#footnote-ref-17)
18. The Appellant’s Case at [24], [38] and [41]. [↑](#footnote-ref-18)
19. Concerning section 1(1) of the Criminal Damage Act 1971. [↑](#footnote-ref-19)
20. Affirmed on appeal, see *R v Taaffe* [1984] 1 AC 539 and concerning section 170(2) of the Customs and Excise Management Act 1979. [↑](#footnote-ref-20)
21. Concerning section 13 of the Companies Act 1976. [↑](#footnote-ref-21)
22. Concerning section 24(1)(b) of the Immigration Act 1971. [↑](#footnote-ref-22)
23. Concerning the offence of consenting to the acceptance of a deposit contrary to sections 3 and 96 of the Banking Act 1987. [↑](#footnote-ref-23)
24. It is unnecessary in this appeal to consider if the mental element of the offence can also be satisfied if the defendant is reckless as to whether the statement in question is true or false. [↑](#footnote-ref-24)
25. The Respondent’s Case at [38]. [↑](#footnote-ref-25)
26. [1998] 2 Cr. App. R. 355 per Potter LJ at 358D-F. [↑](#footnote-ref-26)
27. See paragraph [11] above and paragraph [41] below. [↑](#footnote-ref-27)
28. (Cap.505). [↑](#footnote-ref-28)
29. “I advised Ms Fan to disclose her record if such form had such declaration but if other forms do not have such provision, she would declare she has no previous conviction.” [↑](#footnote-ref-29)
30. CFI Judgment at [10]. [↑](#footnote-ref-30)