### FAMC No 60 of 2019

[2020] HKCFA 13

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MIsCELLANEOUS PROCEEDINGS nO 60 OF 2019 (CRIMINAL)

(ON APPLICATION FOR LEAVE TO APPEAL FROM

HCMA NO 190 OF 2018)

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BETWEEN

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|  | HKSAR | Respondent |
|  | and |  |
|  | SETO KIN KWAN FRANCO (司徒健群) | Applicant |

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| Appeal Committee: | Chief Justice Ma, Mr Justice Fok PJ and  Mr Justice Cheung PJ |
| Date of Hearing and Determination: | 30 March 2020 |
| Date of Reasons for  Determination: | 16 April 2020 |

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| REASONS FOR DETERMINATION |

Mr Justice Cheung PJ:

1. At the conclusion of the hearing, we dismissed this application for leave to appeal. We now give our reasons.
2. The applicant was employed as a chauffeur by an interior design company.[[1]](#footnote-1) The company had two directors, Mr Chan[[2]](#footnote-2) and Ms Lai.[[3]](#footnote-3) Mr Chan was the company’s only shareholder. At the time of his interview for employment, the applicant was told by Ms Lai that the responsibility of a chauffeur included the handling of all matters relating to the vehicles owned by Mr Chan and his wife,[[4]](#footnote-4) to which the applicant agreed. After he was employed, the applicant was asked by Mr Chan to handle the sale of a Porsche which he had bought in the name of his wife, and which the company had already put up for sale in the second hand market. In due course, the car was sold to a car trading company[[5]](#footnote-5) for $850,000.
3. The transaction was handled by the applicant who took instructions from and reported to Mr Chan. Unbeknown to Mr Chan and the company, the applicant asked for a “lai see” of several thousand dollars from the buyer company’s representative, a Mr Tai,[[6]](#footnote-6) and was eventually paid $10,000 after completion of the transaction.
4. The applicant was charged with and convicted in the magistrates’ court of two offences under section 9(1)(a) of the Prevention of Bribery Ordinance,[[7]](#footnote-7) for soliciting, as agent, an advantage as an inducement to or reward for the sale of the car; and for accepting such an advantage.[[8]](#footnote-8) His appeal to the Court of First Instance having failed,[[9]](#footnote-9) he now applied for leave to appeal to this court on a certified point of law and also on the basis of “substantial and grave injustice”.
5. First, the certified point of law:

“What is the *mens rea* for the offence of solicitation of an advantage under s.9(1) of the Prevention of Bribery Ordinance; in particular, how should paragraphs 21 and 70 of the judgment of *Secretary for* *Justice v Chan Chi Wan Stephen* (2017) 20 HKCFAR 98 be understood?”[[10]](#footnote-10)

1. The certified question only related to the first charge of solicitation, but not the second charge of acceptance of an advantage. In paragraphs 21 and 22 of this court’s judgment in *Chan Chi Wan Stephen*, the *mens rea* requirements for the solicitation offence and acceptance offence were explained as follows:

“21. It follows that in cases involving the offering or solicitation of an advantage, the prosecution must prove that the accused *intended* that, if provided, the advantage should be accepted as an inducement or reward for or otherwise on account of the agent’s act or forbearance in relation to his principal's affairs or business (in the sense discussed below).

22. And in cases involving the accused agent’s acceptance of an advantage, the prosecution must prove that he *knew or believed* it to have been provided as an inducement or reward for or otherwise on account of his act or forbearance in relation to his principal's affairs or business (in the aforesaid sense).”

(emphasis added)

1. In paragraphs 69 and 70 of the same judgment, this court, summarising its discussion on the *mens rea* requirements of the different variants of section 9 offences, said:

“69. In offering cases, the prosecution must prove that the offeror intended that the advantage would be accepted as an inducement or reward for or otherwise on account of the agent’s act or forbearance which is aimed at and intended to influence or affect the principal’s affairs or business.

70. In soliciting or accepting cases, the prosecution must prove that the accused agent *knew or believed* that the advantage was provided as an inducement or reward or otherwise on account of his actual or contemplated act or forbearance as conduct aimed at or intended to influence or affect the principal’s affairs or business.”

(emphasis added)

1. Counsel for the applicant argued that properly understood, the *mens rea* for the solicitation offence depended on whether the advantage solicited was in respect of an act or forbearance contemplated or one that had already been performed. In the former case, “intent” was the appropriate *mens rea* requirement; in the latter, “knowledge or belief”.
2. We agree with the respondent that this debate was wholly academic on the facts as found by the deputy magistrate.[[11]](#footnote-11) The applicant asked for a reward from the intending buyer in the course of negotiations for the sale of the car on behalf of his employer. His story that the lai see money he asked for was merely some lucky money for the introduction of future business to the buyer company was rejected by the deputy magistrate,[[12]](#footnote-12) who found that he asked for the lai see money (and accepted the sum of $10,000) as an inducement or reward for the sale of the car to the buyer at the price agreed.[[13]](#footnote-13) On those facts, as the deputy judge observed,[[14]](#footnote-14) it does not matter whether the *mens rea* required to be proved was intent, knowledge or belief – he would be equally guilty under any of them.
3. There was therefore no substance in this ground. However, for the sake of clarification, we would point out that for the solicitation offence, the criminality lies in the agent soliciting an advantage. It does not matter whether the other party is prepared to offer the advantage solicited or not. It is the agent who takes the initiative to solicit the advantage. The requirement of *mens rea* therefore focuses on what he intends the advantage to be. In other words, the appropriate *mens rea* is the agent’s intention that the advantage that he solicits has the prohibited character. Knowledge or belief, on the other hand, is the appropriate *mens rea* requirement when the agent is at the receiving end of an offer of an advantage. In such event, it is the acceptance by the agent of the advantage offered, knowing that the advantage offered to him has the prohibited character or believing that it has such a character, that attracts criminal liability.
4. Turning to the substantial and grave injustice ground, counsel for the applicant first argued that the applicant was not the agent of the company, but that of Mr Chan or his wife, in selling the car, for the reason that the car belonged to Mr Chan’s wife.
5. This point was not reasonably arguable. It was premised on the assumption that it could form no part of the business of the company to help Mr Chan, its director and sole shareholder, to sell his wife’s car. As was pointed out by the deputy magistrate,[[15]](#footnote-15) many companies and their staff do, as part of the company’s business and affairs, provide all sorts of services for its senior management, including taking care of their personal matters. On the evidence, when the applicant was first recruited, he was told and accepted that part of his job, if employed, would be to take care of Mr Chan’s and his wife’s cars.[[16]](#footnote-16) As found below, he acted as the company’s agent in helping its director and shareholder, Mr Chan, to sell his wife’s car.[[17]](#footnote-17)
6. Counsel then argued that the deputy magistrate misunderstood *Chan Chi Wan Stephen* and did not properly consider and make findings on the required *mens rea* for the charges.
7. As explained, on the facts as found by the deputy magistrate, the applicant clearly had the requisite *mens rea* for the solicitation offence, and counsel’s submission was, with respect, not reasonably arguable.
8. Counsel then argued that the applicant’s evidence in Mr Tai’s trial for offering an advantage to him contrary to section 9(2) of the Ordinance was accepted by the court which acquitted Mr Tai of the charge.[[18]](#footnote-18) The applicant was called as a prosecution witness (at that time he had pleaded guilty to the charges) and in his evidence, he put forward his lai see explanation, which was accepted by the court. Counsel argued that the prosecution in the applicant’s own trial took a different stance to his evidence after he had successfully reversed his plea.
9. The short answer to counsel’s contention is that the deputy magistrate[[19]](#footnote-19) hearing Mr Tai’s trial was entitled to his findings of fact in accordance with the evidence before the court. The prosecution in that case called the applicant to give evidence because he had pleaded guilty to the solicitation/acceptance charges. They certainly did not accept his story about his reasons for asking for the lai see money. In the applicant’s own trial, the deputy magistrate made her findings of fact, including her rejection of the applicant’s lai see explanation, according to the evidence before her, as she was entitled to do. There was no reasonably arguable departure from established norms.
10. Finally, counsel for the applicant argued that Mr Chan provided a supplemental witness statement detailing how the integrity of the agency relationship between the company as principal and the applicant as agent was undermined by the advantage solicited and accepted by the applicant and gave evidence accordingly at the trial, only after this court had pointed out in *Chan Chi Wan Stephen* that that was a relevant matter to consider for a section 9(1) offence. Counsel therefore argued that Mr Chan’s evidence could not be trusted.
11. The circumstances and the reasons for giving the further witness statement were explained by Mr Chan during cross examination at trial. They were considered by the deputy magistrate and accepted by her, who found Mr Chan to be an honest and credible witness.[[20]](#footnote-20) It was entirely a matter for the trial court. There was no arguable departure from established norms.
12. For these reasons, the application for leave to appeal was dismissed.

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| (Geoffrey Ma) | (Joseph Fok) | (Andrew Cheung) |
| Chief Justice | Permanent Judge | Permanent Judge |

Mr Andy Hung, instructed by Yung & Au, assigned by the Director of Legal Aid, for the applicant

Mr William Tam, SC, DDPP and Ms Clara Ma, SPP, of the Department of Justice, for the respondent

1. Legend Interiors Limited. [↑](#footnote-ref-1)
2. Mr Chan Kam Leung. [↑](#footnote-ref-2)
3. Ms Lai Fung Ching. [↑](#footnote-ref-3)
4. Madam Zhou Mei Ling. [↑](#footnote-ref-4)
5. Glorious Motors Limited. [↑](#footnote-ref-5)
6. Mr Tai Ming Chung, an employee of an associated company of the buyer company. [↑](#footnote-ref-6)
7. Cap 201. [↑](#footnote-ref-7)
8. KTCC 4866/2016. [↑](#footnote-ref-8)
9. HCMA 190/2018, [2019] HKCFI 1833. [↑](#footnote-ref-9)
10. [2019] HKCFI 2395, para 9. [↑](#footnote-ref-10)
11. Ms Jolie Chao. [↑](#footnote-ref-11)
12. Statement of findings, paras 44-50. [↑](#footnote-ref-12)
13. Statement of findings, paras 59-61. [↑](#footnote-ref-13)
14. Deputy High Court Judge CP Pang; [2019] HKCFI 1833, para 53. [↑](#footnote-ref-14)
15. Statement of findings, para 56. [↑](#footnote-ref-15)
16. Statement of findings, para 55. [↑](#footnote-ref-16)
17. Statement of findings, para 58. [↑](#footnote-ref-17)
18. KTCC 785/2017. [↑](#footnote-ref-18)
19. Mr Chu Man Hon Gary. [↑](#footnote-ref-19)
20. Statement of findings, paras 39-41. [↑](#footnote-ref-20)