



Summary of Judicial Decision

HKSAR v Lui Tsun-sum (“the 1st Applicant”), Ko Shing-ho (“the 2nd Applicant”) and Lu Chun-lam (“the 3rd Applicant”) (collectively “the Applicants”)
CACC 331/2018; [2020] HKCA 516

Decision : Application for leave to appeal against conviction of 2nd and 4th Counts were refused but the appeal against conviction of 1st and 3rd Counts were allowed

Date of Hearing : 29 April 2020

Date of Judgment : 26 June 2020

Background

1. Section 3 of the Juvenile Offenders Ordinance, Cap. 226, provides that it shall be conclusively presumed that no child under the age of 10 years can be guilty of an offence as they are *doli incapax* (incapable of committing a crime). Under the common law, there is a rebuttable presumption that a child from 10 to 13 years of age is *doli incapax*. It means that a child of that age cannot be convicted unless the Prosecution rebuts the presumption by proving that, at the time of the offence, the child was well aware that his act was seriously wrong, and not merely naughty or mischievous.
2. This case arises out of an incident where a group of teenagers declared themselves to be ‘Tor Tei’ and demanded to ‘watch / protect’ two shops. After trial, the 3 Applicants, who were 13 years of age at the time of offence, were convicted of acting as member of a triad society and/or claiming to be a member of a triad society. These Applicants were sentenced to probation order of 24 months.
3. On appeal against conviction, various grounds of appeal against conviction were raised by the Applicants. The key ones were that (1) the Prosecution had adduced insufficient evidence to rebut the presumption of *doli incapax* and (2) the trial Judge (the “**Judge**”) had erred in amending the 1st and 3rd Counts from conspiracy to blackmail to the substantive offence of acting as member of a triad society before the delivery of verdict on the original charges.



Issues in dispute

4. The issues in dispute are (i) whether there was sufficient evidence to rebut the presumption of *doli incapax* and (ii) whether the amendment to 1st and 3rd Counts had resulted in unfairness to the Applicants.

Department of Justice's Summary of the Court's rulings

(full text of Court of Appeal's judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=129041&QS=%2B&TP=JU)

5. The Court of Appeal, at §§28-37 of the judgment, set out the relevant principles in deciding whether the presumption of *doli incapax* is rebutted:
 - (a) the Prosecution must prove to the criminal standard that the child knew that his act was seriously wrong as distinct from an act of mere naughtiness or childish mischief (§28). Clear positive evidence is needed (§31);
 - (b) the commission of the acts amounting to the offence, however shocking or obviously wrong it might be, is not in itself evidence of the child's knowledge that his act was seriously wrong (§28);
 - (c) it is unnecessary to prove that the child appreciated that his or her action was morally wrong. An act which a child knew to be morally wrong is regarded as being but one type of those acts which a child can appreciate to be seriously wrong (§30);
 - (d) even if the *doli incapax* presumption had been overlooked in the course of the trial, provided that the appellate Court is satisfied that had the issue been left to the jury they would inevitably have found that the defendant knew his act was seriously wrong, the verdict will still be found safe (§31);
 - (e) the older the child is and the more obviously wrong the act, the easier it will generally be to rebut the presumption (§32);
 - (f) the Court may consider all relevant evidence, including the child's family and upbringing background, education level, statement under caution and even his criminal records (§32);



- (g) the Prosecution may adduce evidence from the child's family, teacher, psychiatrist or psychologist but such evidence is not indispensable (§32);
 - (h) proof that the child is a normal child for his age is relevant but will not necessarily prove that he knew his action was seriously wrong. No presumption of normality should be applied (§32);
 - (i) the surrounding circumstances, including the child's conduct before and after the incident, are relevant evidence (§32);
 - (j) the child's flight or lie does not necessarily mean that he knew that his act was seriously wrong. On the other hand, there must be cases where running away would indicate guilty knowledge, especially where an act is either wrong or innocent and there is no room for mere naughtiness (§32);
 - (k) in this day and age, it may require relatively little evidence in a straightforward case to justify the Court in finding a child does know what he is doing is wrong (§§33-34); and
 - (l) it is permissible for the Court to consider conduct closely associated with the child's impugned act for the purpose of deciding whether the presumption is rebutted (§§35-37).
6. The Court of Appeal applied the relevant principles in affirming the Judge's decision in this regard (§§38-47).
7. On the Judge's decision to amend 1st and 3rd Counts before the delivery of verdict on the original charges, the Court of Appeal examined a number of authorities in which the Courts were required to determine whether an amendment of the indictment had resulted in injustice to the accused (§§51-61). The Court emphasized that where an amendment is substantive in nature and has the effect of thwarting an otherwise meritorious submission of no case to answer, the chance that such an amendment would be upheld is slim.
8. In this case, the amendment was made after closing but before verdict was delivered on the original 1st and 3rd Counts. The Applicants would have been acquitted of these two counts if the amendment had not been made. The amendment trimmed down what the Prosecution had to prove to what had already been proven to effectively secure the conviction on these two counts.



For these reasons, the Court of Appeal found that the amendment had resulted in injustice to the Applicants. Accordingly, the convictions on 1st and 3rd Counts were quashed.

**Prosecutions Division
Department of Justice**

July 2020