Summary of Judicial Decision

HKSAR v Lai Kam Fat ("the Appellant")
FACC 1/2019; [2019] HKCFA 36

Decision	:	**Appeal against conviction dismissed**
Date of Hearing	:	**3 September 2019**
Date of Judgment	:	**18 October 2019**

Background

1. In September 2014, German customs officers intercepted three postal parcels *en route* from Bolivia to Hong Kong. The three parcels each contained a similar quantity of powder containing a total of 4.23 kilogrammes of cocaine, with an aggregate market value of approximately HK$4.8 million. The parcels, shipped under three separate air waybills, were addressed to three different recipients in Hong Kong.

2. On 8 October 2014, Hong Kong Customs officers carried out a controlled delivery operation of one of the parcels and arrested one Tang Kwong Ho ("Tang") who received the parcel. During the operation, Customs officers noticed that the Appellant was wandering in the streets nearby and acting suspiciously. Upon arrest, five mobile phones were found on the Appellant. One of those phones had screenshots tracking the three parcels. One had records of 10 calls with Tang's mobile phone. Two others were the contact numbers shown on two of the parcels and had call records showing incoming calls from the Customs officer who had called to set up the delivery of the parcel. Further, three pieces of paper, which showed the air waybill numbers and the names of the recipients of the three parcels, were also found on the Appellant.

3. The Appellant was charged with one count of conspiracy with Tang, a person called "Ko Lo" and other persons unknown to traffic in a dangerous drug, namely cocaine. At trial, the Appellant claimed that he was asked by "Ko Lo" to receive the parcels, and that he did not know the parcels contained dangerous drugs. The trial judge directed the jury that the prosecution only needed to prove that the Appellant knew the parcels contained a dangerous drug and that the prosecution did not need to prove knowledge of the specific type of drug as particularised in the indictment. On 24 March 2017, the jury unanimously found the Appellant guilty. On 27 March 2017, the trial judge sentenced him to 29 years' imprisonment.

4. The Appellant's application for leave to appeal against conviction was dismissed by the Court of Appeal on 26 June 2018. On 18 January 2019, the Appeal Committee granted the Appellant leave to appeal against conviction on a point of law (see below).

Issue in dispute

5. Where an indictment or charge of conspiracy to traffic in a dangerous drug (contrary to sections 4(1)(a), 4(3) and 39 of the Dangerous Drugs Ordinance, Cap. 134, and sections 159A and 159C of the Crimes Ordinance, Cap. 200), particularises a specific drug alleged to be the subject of the conspiracy, whether or not the prosecution must prove that the defendant charged with that conspiracy knew that that specific drug was the subject of the conspiracy or it is sufficient for the prosecution to prove that he knew that what was agreed to be trafficked was a dangerous drug.

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

(full text of the CFA's judgment at *https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=124937&QS=%2B&TP=JU*;
press summary issued by the Judiciary at *https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2019/FACC000001_2019_files/FACC000001_2019ES.htm*)

6. Section 4 of the Dangerous Drugs Ordinance provides for the substantive offence of trafficking in a dangerous drug. The particular type of dangerous drug is not an essential element of the offence. The prosecution is only required to prove that the defendant trafficked in a dangerous drug. For the mental element, the prosecution must prove that the defendant knew that he was trafficking in a dangerous drug. It is not necessary to prove that he knew which particular type of dangerous drug he was trafficking in. (paragraphs 22 & 25)

7. Section 159A(1) of the Crimes Ordinance provides for the statutory offence of conspiracy. Under section 159A(2), where the mental element of a substantive offence is less than knowledge or intention (such as recklessness or negligence), the prosecution must prove that a defendant charged with conspiracy had knowledge or intention that a fact or circumstance necessary for the commission of the substantive offence will exist. (paragraphs 33 & 40)

8. The substantive offence of trafficking in a dangerous drug does not have a lesser mental element than knowledge. The only fact or circumstance which is necessary for a person to know for the commission of the offence of drug trafficking is knowledge that what is being trafficked in is a dangerous drug, not any particular type of dangerous drug. Section 159A does not operate to require the prosecution to prove any additional mental element in respect of a charge of conspiracy to traffic in a dangerous drug. The particulars of the offence in the indictment, specifying the drug as cocaine, were given to inform

the Appellant of the case against him. (paragraphs 48-51)

9. Where an indictment or charge of conspiracy to traffic in a dangerous drug particularises a specific drug alleged to be the subject of the conspiracy, it is sufficient for the prosecution to prove that the defendant knew that what was agreed to be trafficked was a dangerous drug rather than the specific drug particularised. Depending on the circumstances, however, this principle may be subject to qualifications in order to ensure the defendant is afforded a fair trial. Where there are multiple charges on an indictment alleging different conspiracies involving different types of dangerous drug, the requirements of a fair trial may require the prosecution to prove knowledge of the specific dangerous drug that is the subject of each separate conspiracy in order that the defendant will know the nature of each charge against him. (paragraph 75)

Prosecutions Division
Department of Justice

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