



Summary of Judgment

Secretary for Justice v Leung Kwok Hung (“the Appellant”) FACC 3/2021; [2021] HKCFA 32

Decision : **Appeal dismissed**
Date of Hearing : **31 August 2021**
Date of Judgment : **27 September 2021**

Background

1. This appeal arises out of the prosecution of the Appellant, a then member of the Legislative Council (“**LegCo**”), for an alleged offence of contempt contrary to section 17(c) of the Legislative Council (Powers and Privileges) Ordinance, Cap. 382 (“**LCPPPO**”).
2. The Prosecution alleged that on 15 November 2016, during a joint meeting of the LegCo Panel on Housing and the Panel on Development, the Appellant, then a member of the Panel on Housing, snatched the Under Secretary for Development’s folder from the bench in front of him. He then passed the folder containing confidential documents to another LegCo member to read. The Appellant ignored the Chairperson’s repeated demands for him to return the folder and return to his seat. Eventually, the Chairperson ordered the Appellant to withdraw from the meeting and temporarily suspended the meeting.
3. At the Appellant’s request, arguments for preliminary legal issues in respect of the ambit of section 17(c) of LCPPPO were heard before the Magistrate, who ruled that the section did not apply to the Appellant as a LegCo member. The Prosecution appealed against the ruling by way of case stated which was reserved for consideration by the Court of Appeal (“**CA**”). CA held that section 17(c) of LCPPPO did apply to LegCo members, and that the privilege under section 3 of LCPPPO did not apply to conduct contrary to section 17(c) of LCPPPO.
4. The Appellant appealed against CA’s judgment to the Court of Final Appeal (“**CFA**”), raising the question of the extent to which a member of LegCo may be subject to criminal prosecution for disorderly conduct interrupting proceedings.



Issues in Dispute

5. The Appeal Committee of CFA granted leave to appeal in respect of the following questions of law, namely:
 - (1) Whether what is said and done during proceedings of LegCo and its committees falls within the privilege enjoyed by LegCo provided that it does not amount to an ordinary criminal offence;
 - (2) Upon the true interpretation of LCPPO:
 - (a) Whether section 17(c) applies to a member of LegCo;
 - (b) Whether “proceedings” in section 17(c) is confined to proceedings involving the taking of evidence under oath;
 - (3) Whether CA was correct in respect of the following:
 - (a) That the absolute freedom of speech and debate of LegCo under section 3 of the LCPPO does not extend to conduct caught by section 17(c) of the LCPPO;
 - (b) That LegCo had, by enacting section 17(c) of the LCPPO, in fact relinquished to and/or conferred upon the courts a penal jurisdiction over the conduct and discipline of members of LegCo during the proceedings of LegCo and its committees; and
 - (c) That section 17(c) of the LCPPO as applicable to a member of LegCo is not unconstitutional.

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=138998&QS=%2B&TP=JU)

6. The offence under section 17(c) of LCPPO is committed when a defendant (including a LegCo member having regard to the context and purpose of LCPPO) creates a disturbance which interrupts or breaks up the proper functioning of LegCo or its committees and, in particular, occurs when the resulting interruption involves interference with the rights of others. On its face, the Appellant’s alleged conduct is caught by s.17(c) LCPPO. (paras. 13-16)
7. Acknowledging the privilege accorded to LegCo members under section 3 of LCPPO, it remains for the Court to determine, on its true construction, where the boundaries of the section lie. This entails a consideration of section 17(c) of LCPPO, being part of the context of section 3; and the question of how the two sections intersect as a matter of statutory construction. (paras. 21-23)



8. The question of whether any particular conduct falls within the protected freedom of speech and debate depends on a proper construction of the relevant provisions of the LCPPO as a whole. The LCPPO is designed to protect the freedom of speech and debate in LegCo, allowing members to express their opinions without inhibition. Equally, the LCPPO provisions which create offences are designed to achieve the statutory purpose of creating a secure and dignified environment in LegCo, allowing it to perform its constitutional functions without disruption or disturbance. (paras. 24-29)
9. There may be cases where it is difficult to see the division between conduct which falls within the protection of speech and debate and that which does not. However in the present case, while the Appellant was participating in the committee meeting of LegCo, his conduct at issue plainly did not fall within the speech and debate protected by sections 3 or 4 of LCPPO or Article 77 of the Basic Law. Crossing the floor of the chamber during a debate and snatching property belonging to someone else which he passed to a third party over the owner's objection, the Appellant had created a disturbance which interfered with the ability of other members of LegCo to carry out their proper functions. He was not making a speech, nor participating in debating any business that was before the meeting. (paras. 29-31)
10. In exercising jurisdiction in respect of the Appellant's prosecution under section 17(c), the Court is carrying out its judicial function of applying primary legislation enacted by LegCo. There is no issue of separation of powers, as the LegCo has carried out its constitutionally allotted function to enact the offence provision conferring jurisdiction on the Courts, and the Courts carry out their constitutionally allotted function in trying prosecutions for the offence so enacted. (para. 35)
11. In relation to the overlapping jurisdiction over misconduct of the type covered by section 17(c) of LCPPO, the fact that internal LegCo disciplinary proceedings might have been commenced in respect of a particular incident will be a relevant factor in any decision of the Secretary for Justice to grant consent pursuant to section 26 for the institution of a prosecution under LCPPO in respect of the same incident. (paras. 36-37)
12. For the reasons set out above:
 - (1) Where, by conduct not forming part of any speech or debate, a LegCo



member has created a disturbance which interrupts proceedings within the meaning of section 17(c), the freedom of speech and debate conferred on him by sections 3 and 4 of the LCPPO or BL77 does not provide the member with an immunity from prosecution for the offence of contempt under section 17(c);

- (2) The non-intervention principle does not require that the courts refuse to exercise criminal jurisdiction over a member of LegCo in a prosecution under section 17(c); and
- (3) It is not necessary to address more specifically the separate questions for which leave to appeal was granted. In particular, it was not argued on behalf of the Appellant that the Court of Appeal was wrong to conclude that proceedings in section 17(c) were confined to proceedings involving the taking of evidence under oath. Nor did the Appellant pursue the argument that the Court of Appeal was wrong in holding that section 17(c) is not unconstitutional. (para. 38)

13. The Appeal is dismissed. The Appellant is not immune from prosecution for the alleged offence and the Courts are not precluded from exercising jurisdiction in respect of the charge. (para. 39)

Prosecutions Division
Department of Justice
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