



Summary of Judicial Decision

HKSAR v Cheng Wing Kin (“the Appellant”)

FACC 5/2019; [2020] HKCFA 3

Decision : Appeal against conviction to the Court of Final Appeal
Date of Hearing : 7 January 2020
Date of Judgment : 11 March 2020

Background

1. The Appellant approached various persons with localist ideologies in Hong Kong prior to the 2015 District Council Election (“the 2015 Election”), offering them money in the range of HK\$150,000 to HK\$200,000 for them to stand as candidates at the 2015 Election in designated constituencies, which were traditionally considered as pan-democratic voter base stronghold. The Appellant said he was a middleman acting on the instructions of a mastermind whose identity he refused to disclose. He offered that the money would be paid in cash and he did not care if the money was spent on the promotion of one’s candidature. He also said he did not care if the localists would lose at the 2015 Election so long as they could get around 200 votes in their designated constituencies. The amount of money offered by the Appellant far exceeded the statutory maximum election expenses of HK\$63,000 which a candidate might incur for the 2015 Election.
2. The Appellant was charged with seven offences under section 7(1) of the Election (Corrupt and Illegal) Conduct Ordinance, Cap. 554 (“the ECICO”). He was tried in the District Court. In gist, each of the charges alleged that the Appellant engaged in corrupt conduct at the 2015 Election by corruptly offering advantages to other persons as inducements for the other persons to stand, or not to stand at the 2015 Election, or for the other persons to get a third party to stand, or not to stand at the 2015 Election.
3. At trial, the main issue was whether the Appellant offered advantages to others “corruptly” for the purposes of section 7(1) of the ECICO. His defence was that he did not genuinely intend to induce them to stand as candidates but that his offer was a pretence to enable him to uncover and expose on his online radio station “shady affiliations” between localist organisations and pan-democratic political parties. The trial judge held that to establish the element of “corruptly”, the prosecution must prove an accused offered advantage intending to induce others to stand or not to stand at an election, and by doing so, the accused intended to hinder an election in Hong Kong from being conducted fairly, openly and honestly as stated in section 3 of the ECICO.
4. On the facts of the case, the trial judge took the view that the aim of the sponsorship was not to help the localists win the 2015 Election. Rather, it was to induce them to stand as candidates at the 2015 Election to snatch votes from



the pan-democratic parties, or in other words, to “eliminate” or to reduce the chance of success of the Appellant’s “targets” in certain constituencies and that the Appellant was using money to manipulate the 2015 Election and to prevent it from being conducted fairly, openly and honestly, otherwise he would not have tried to distance himself from the scheme by, for example, offering to pay the localists in cash and by using a voice changer on himself when talking to one of the chosen localists.

5. The trial judge found that the Appellant offered advantages to others “corruptly” for the purposes of section 7(1) of the ECICO. He was convicted of all seven charges and sentenced to a total of 4 years’ imprisonment.
6. The Appellant appealed against conviction to the Court of Appeal, which was dismissed. But the Court of Appeal held a different view on how the element of “corruptly” under section 7(1) of the ECICO should be proved (full text of the CA’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=124002&QS=%2B&TP=JU). The Appellant made an application to the Court of Final Appeal (“CFA”) for leave to appeal to the CFA from the CA’s judgment.

Issue in dispute

7. What is the meaning of the word ‘corruptly’ in section 7(1) of the ECICO?

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

(full text of CFA’s judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127031&QS=%2B&TP=JU;

press summary issued by the Judiciary at

https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2019/FACC000005_2019_files/FACC000005_2019ES.htm)

8. Section 3 of the ECICO sets out the objects of the Ordinance; a positive objective, conducting elections “fairly, openly and honestly” and a negative objective, keeping elections “free from corrupt conduct and illegal conduct”. The word “corruptly” under s.7(1) of the ECICO should be interpreted in the light of these statutory objectives. “Corrupt activity” should be understood as any conduct having a tendency to subvert “fair, open and honest” elections. (paragraphs 14 and 15)
9. The insertion of “corruptly” in section 7(1) indicates a legislative intention to introduce a purposive limit on the broad definition of “advantage”. The word “corruptly” in section 7(1) operates to confine the offence to conduct which has an objective tendency to undermine “fair, open and honest” elections. If a



defendant is charged with offering an advantage to another person as an inducement for that person to stand or not to stand as a candidate at an election, one has to examine the alleged advantage and ask whether it was ‘corruptly offered’, meaning, an advantage of such a nature and offered in such circumstances as to have a tendency to undermine fair, open and honest elections. (paragraphs 21, 24 and 25)

10. Although the word ‘corruptly’ does not appear in other sections under Part 2 of the ECICO, those sections (ss.8-21) are to be construed purposively as creating offences which advance and are confined by the statutory objectives, both positive and negative, set out in s.3. (paragraph 26)
11. The word ‘corruptly’ functions in section 7(1) to confine dealings involving the offering, soliciting or receipt of “advantages” to conduct which carries an objective tendency to undermine “fair, open and honest” elections. It does not introduce an additional mens rea requirement. (paragraph 30)
12. One can conceive of conduct which falls within the definition of advantage but does not affect the integrity of an election. For example, a member of the Legislative Council offers employment to a young member of the same party as his research assistant at a modest salary because he finds the young person a promising potential candidate for election to the legislature and would like to give him insights into the work of a legislator to prepare the young person for possible candidature in elections due to be held a year later. Such employment qualifies as an “advantage”. While the offer of such employment might be thought to fall within section 7(1)(a) as an inducement for the young person to stand as a candidate at an election, it may be difficult to see how criminalisation of such an arrangement would be justified (paragraph 23).

**Prosecutions Division
Department of Justice**

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