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**Summary of Judicial Decision**

**HKSAR v Kwan Ka Hei (“the Appellant”)  
FACC 8/2019; [2020] HKCFA 21**

**Decision** : **Final appeal against conviction dismissed**  
**Date of Hearing** : **16 June 2020**  
**Date of Judgement** : **9 July 2020**

**Background**

1. On 16 December 2015, the Appellant was carrying 16 smoke cakes in his backpack when he was stopped and searched by the police in a public place. The smoke cakes weighed about 1 kilogramme, which consisted of potassium chlorate and ammonium chloride in equal proportion. He was subsequently charged with, and convicted of, possession of an explosive substance, contrary to section 55(1) of the Crimes Ordinance, Cap. 200 (“CO”). The bomb disposal expert gave his opinion that upon ignition, the smoke cakes did not produce a practical effect by explosion, but rather they produced a pyrotechnic effect (the rapid production of dense white smoke).

**Issue in dispute**

2. The single issue of statutory construction is whether the definition of “explosive” in section 2 of the Dangerous Goods Ordinance, Cap. 295 (“DGO”) applies to the offence of possession of an explosive substance under section 55(1) of CO, such that possession of “smoke cakes” that do not produce an explosion when ignited may amount to an offence under that section.

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

(full text of Court’s judgement at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=129287&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=129287&QS=%2B&TP=JU))

3. The Court considered the provisions in Part VII of CO in detail and noted that the definition of “explosive substance” is expanded by section 52. Furthermore, while causing an explosion is an element of offence under sections 52, 53 and 54(a), the same cannot be said for section 54(b). Besides, section 58 envisages that an act may be caught under Part VII of CO and under some other law, so long as there is no double punishment. (paragraphs 17-25)



4. On the other hand, DGO and its regulations established a regulatory regime to control dangerous goods, which includes explosives and pyrotechnic substances. Similar to section 58 of CO, section 20 of DGO also recognizes the potential applicability of other statutes dealing with different aspects of the same act or subject matter. (paragraphs 31-33)
5. The Court also noted that Part VII of CO and the relevant provisions in DGO can be traced to English provisions enacted in the 19<sup>th</sup> century. The English Court of Appeal in *R v Wheatley* [1979] 1 ALL ER 954 held that the Explosives Act 1875 and the Explosive Substances Act 1883 (on which the Hong Kong provisions were modelled) are *in pari materia*, so that the definition of “explosive” in the 1875 Act is applicable under the provisions of the 1883 Act. (paragraph 36)
6. The Court held that as from 1956, the relevant position in Hong Kong is no different from the United Kingdom. The subject matters of Part VII of CO and DGO obviously overlap in that both are concerned with explosive substances. It is reasonable to assume that there is continuity of legislative approach and uniformity in the use of language so that the same word “explosive” bears the same meaning under the two Ordinances. The fact that Part VII of CO is penal and DGO is regulatory in nature does not follow that they are not *in pari materia*. Rather, it only means that they form parts of a complete code concerning with explosive substances in Hong Kong. (paragraphs 46, 50-51)
7. The exemption of a licensing requirement for storing under 5 kilogrammes of potassium chlorate under section 153(6)(a) of the Dangerous Goods (General) Regulations, Cap. 295B has nothing to do with the Appellant, who was carrying the smoke cakes in a public place. Furthermore, it would be up to the Appellant to prove that he was possessing the smoke cakes for a lawful object. (paras. 56-59 and 61)

**Prosecutions Division**  
**Department of Justice**

**July 2020**