



Summary of Judicial Decision

**HKSAR v Seto Kin-kwan Franco (“the Applicant”)
FAMC 60 of 2019; [2020] HKCFA 13**

Decision : **Application for leave to appeal to the Court of Final Appeal refused**
Date of Hearing : **30 March 2020**
Date of Reasons for Determination : **16 April 2020**

Background

1. The Applicant was employed as a chauffeur by an interior design company. At the time of his interview for employment, the Applicant was told that the responsibility of a chauffeur included the handling of all matters relating to the vehicles owned by Mr Chan, the sole shareholder and a director of the company, and also that of his wife, to which the Applicant agreed. After he was employed, the Applicant was asked by Mr Chan to handle the sale of a Porsche which he had bought in the name of his wife, and which the company had already put up for sale in the second hand market. In due course, the car was sold to a car trading company for \$850,000.
2. The transaction was handled by the Applicant who took instructions from and reported to Mr Chan. Unbeknown to Mr Chan and the company, the Applicant asked for a “lai see” of several thousand dollars from the buyer company’s representative, a Mr Tai, and was eventually paid \$10,000 after completion of the transaction.
3. The Applicant was charged with and convicted in the magistrates’ courts of two offences under section 9(1)(a) of the Prevention of Bribery Ordinance, for soliciting, as an agent, an advantage as an inducement to or reward for the sale of the car; and for accepting such an advantage. The Applicant was sentenced to 10 weeks’ imprisonment, suspended for two years and ordered to make a compensation of \$10,000 to the wife of Mr Chan.
4. The Applicant’s appeal against conviction to the Court of First Instance was dismissed (full text of the CFI’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=123456&QS=%2B&TP=JU). He subsequently applied to the CFI for certificate to appeal to the Court of Final Appeal and a point of law was certified by the CFI (full text of the CFI’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=124652&QS=%2B&TP=JU). The Applicant proceeded to apply for leave to appeal to the Court of Final Appeal on the certified point of law and also on the basis of “substantial and grave injustice”.



Issues in dispute

5. The point of law upon which leave to appeal was sought was “What is the *mens rea* for the offence of solicitation of an advantage under s.9(1) of the Prevention of Bribery Ordinance; in particular, how should paragraphs 21 and 70 of the judgment of *Secretary for Justice v Chan Chi Wan Stephen* (2017) 20 HKCFAR 98 be understood?”. In particular, the interplay between intention, knowledge and belief in construing the *mens rea* (“the Point of Law Limb”).
6. The Applicant argued that he was not the agent of the company for the Porsche was registered under the name of Mr Chan’s wife. The Applicant contended that the trial magistrate had misunderstood *Chan Chi Wan Stephen* and did not properly consider and make findings on the required *mens rea* for the charges. It was further argued that the prosecution had adopted a different stance in calling the Applicant as a prosecution witness in the trial of Mr Tai and in prosecuting the trial of the Applicant. Finally it was argued that Mr Chan’s evidence could not be trusted because he gave a supplemental statement after the CFA’s decision in *Chan Chi Wan Stephen* (“the Substantial and Grave Injustice Limb”).

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

(full text of the Appeal Committee’s judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127411&QS=%2B&TP=JU)

7. On the Point of Law Limb, the Appeal Committee held that debate on the *mens rea* element in the instant case was wholly academic on the facts as found by the trial magistrate (paragraph 9).
8. The Appeal Committee gave a clarification on the *mens rea* for the offence of soliciting or accepting an advantage.
9. The Appeal Committee held that for the solicitation offence, the criminality lies in the agent soliciting an advantage. It does not matter whether the other party is prepared to offer the advantage solicited or not. It is the agent who takes the initiative to solicit the advantage. The requirement of *mens rea* therefore focuses on what he intends the advantage to be. In other words, the appropriate *mens rea* is the agent’s intention that the advantage that he solicits has the prohibited character. Knowledge or belief, on the other hand, is the appropriate *mens rea* requirement when the agent is at the receiving end of an offer of an advantage. In such event, it is the acceptance by the agent of the advantage offered, knowing that the advantage offered to him has the prohibited character or believing that it has such a character, that attracts criminal liability (paragraph 10).



10. The Appeal Committee opined that the various points made under the Substantial and Grave Injustice Limb were not reasonably arguable. On the facts found by the trial magistrate, the Applicant was acting as an agent for the company in the sale of the car, and clearly had the requisite *mens rea* for the solicitation offence (paragraphs 12 and 14). The trial magistrate was entitled to make findings of facts and accept the evidence of Mr Chan as a prosecution witness on the evidence before her (paragraphs 16 and 18).

**Prosecutions Division
Department of Justice**

May 2020