CACC 101/2014

**IN THE HIGH COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

# **COURT OF APPEAL**

CRIMINAL APPEAL NO. 101 OF 2014

(ON APPEAL FROM DCCC NO. 860 OF 2011)

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BETWEEN

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| HKSAR | Respondent |
| and |  |
| YEUNG KA SING, CARSON (楊家誠) | Appellant |
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Before : Hon Lunn VP, Macrae and McWalters JJA in Court

Date of Hearing : 1 June 2015

Date of Decision : 1 June 2015

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|  | D E C I S I O N |  |

Hon Lunn VP (giving the Decision of the court) :

On 13 May 2015 we handed down judgment refusing the appeal of the appellant against his convictions on 28 February 2014 after trial by District Court Judge Douglas Yau of five charges of dealing with property known or believed to represent the proceeds of an indictable offence in five different bank accounts, contrary to section 25(1) and (3) of the Organized and Serious Crimes Ordinance, Cap. 455.

By notices of motion, filed with the Court by the respective parties on 20 May 2015, each of them invited the Court to certify that there are different points of law of great and general importance involved in our judgment.

On behalf of the respondent, Mr William Tam SC invited the Court to certify the following question:

“ In the context of the offence of money laundering under section 25 of the *Organized and Serious Crimes Ordinance*, Cap. 455 (‘the Ordinance’), how does the rule against duplicity operate? In particular, whether the offence of money laundering, capable of being committed in any of the modes of ‘dealing’ as included in its definition under section 2 of the Ordinance, is or could be a continuing offence so that the rule against duplicity does not apply; and how do the exceptions to the rule against duplicity (namely ‘one transaction’ as in *DPP v Merriman* [1973] AC 584, ‘general deficiency’ as in *R v Tomlin* [1954] 2 QB 274 and the ‘continuous course of conduct as in *Barton v DPP* [2001] 165 JP 779) apply to a charge of money-laundering which alleges multiple dealings some of which involve money from known and different sources.”

Mr Tam acknowledged in his written submissions that the respondent does not seek leave to appeal. However, he seeks certification of the question on the contingent basis that the appellant is seeking leave to appeal and, if that application is granted, the respondent seeks to have the question addressed in the Court of Final Appeal.

There is no dispute that the issues identified in the question were issues addressed by the Court in its judgment. Further, he reminded the Court that similar issues were addressed in the judgment of this Court in *HKSAR v Salim*[[1]](#footnote-1), in which two of the members of this Court also sat, and that this Court had certified a question in similar terms as being points of law of great and general importance, following which the Appeal Committee of the Court of Final Appeal had granted leave to appeal on that point on 10 February 2015.[[2]](#footnote-2)

Finally, Mr Tam drew our attention to the directions given by Ribeiro CJ Ag on 13 May 2015 in *Salim v HKSAR* in which, in vacating the hearing date of 9 June 2015, he said that was done in light of the possibility that the instant case might go beyond the Court of Appeal in which event “…it would be highly desirable that common issues raised in *Salim Majed* and *Carson Yeung* should be heard and decided simultaneously”.

Mr Tam told the court today that the respondent has not filed an application for leave to appeal against the judgment of this Court. Further, it is not clear to us on what basis the respondent, who was not dissatisfied with the decision, could seek leave to appeal. Mr Plowman SC has told us today that no application for leave to appeal has been filed by the appellant, and it is not known whether or not the appellant will pursue an application to the Court of Final Appeal for leave to appeal. In those circumstances, we are satisfied that it is not appropriate for this Court, acting on a contingent basis, to certify the question posed by the respondent. If an application is made to the Court of Final Appeal by the appellant, no doubt the respondent could invite the Court, if it grants leave, to do so, in addition, on the basis of the question posed of this Court by the respondent. In those circumstances, we refuse to certify the question posed by the respondent.

By the notice of motion filed on behalf of the appellant, the Court is asked to certify that two points of law of great general importance are involved in our decision, which points are set out in two questions:

“ 1. On a charge of dealing with proceeds of crime contrary to s. 25(1) of the Organized and Serious Crimes Ordinance (Cap. 455) (“OSCO”), is it necessary for the prosecution to prove, as an element of the offence, that the proceeds being dealt with were in fact proceeds of an indictable offence? Was *Oei Hengky Wiryo* (2007) 10 HKCFAR 98 wrongly decided on this issue?”

“ 2. In considering the *mens rea* element of a charge contrary to s. 25(1) of OSCO, to what extent does a trial judge need to make positive findings as to a defendant’s belief, thoughts, intentions at the material time even though the judge rejects the defendant’s testimony? In particular, where the trial judge rejects the defendant’s testimony, to what extent can the judge remain oblivious to the defendant’s actual reason(s) for dealing with the specified proceeds in making the finding that the defendant had reasonable grounds to believe that the proceeds he dealt with were proceeds of crime?”

As is apparent from our judgment, although the issues addressed in question 1 were reflected in one of the grounds of appeal against conviction, it was acknowledged by the appellant that the matter could not be canvassed in this Court, because this Court was bound by the judgment of the Court of Final Appeal in *Oei Hengky Wiryo v HKSAR*. In those circumstances, we refuse to certify that questions of law of great and general importance, as stipulated in question 1, are involved in our judgment.

In our judgment we said that the judge was entitled to determine that the applicant was lying in respect of the reasons for and the purposes of various deposits into the bank accounts. In that context, we noted that the judge had also considered, but rejected, the appellant’s asserted beliefs in respect of some of those transactions. We found that he was entitled to make those determinations. In doing so, we noted that the judge’s approach was consistent with the approach to be taken by a judge in assessing the weight to be given to the accused’s beliefs described in the judgment of Spigelman NPJ in the Court of Final Appeal in *Pang Hung Fai v HKSAR*.[[3]](#footnote-3) Further, we were satisfied that the judge’s statement that he did not know the “real reason” for a particular deposit merely resulted in the transaction being unexplained, which did not preclude the judge from determining that he was satisfied that the appellant had reasonable grounds to believe that the monies were the proceeds of an indictable offence. We are satisfied that no point of law of great and general importance, as stipulated in question 2 arises, and we refuse to so certify.

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| (Michael Lunn)  Vice-President | (Andrew Macrae)  Justice of Appeal | (Ian McWalters)  Justice of Appeal |
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Mr William Tam, SC, DDPP and Anthony Chau, SPP of the Department of Justice, for the respondent

Mr Gary Plowman, SC, and Mr Derek C. L. Chan, instructed by Bough & Co., for the appellant

1. *HKSAR v Salim* [2014] 6 HKC 678. [↑](#footnote-ref-1)
2. *Salim v HKSAR* (FAMC 71 /2014; unreported, 10 February 2015). [↑](#footnote-ref-2)
3. *Pang Hung Fai v HKSAR* (2014) 17 HKCFAR 778, paragraph 85 : “When assessing the evidence, the judge or jury can give such weight to an accused’s belief, perception or prejudice as s/he believes is warranted. No doubt, in many cases the decision maker will entirely discount such evidence of the accused.” [↑](#footnote-ref-3)