Legislative Council Subcommittee on the draft Criminal Jurisdiction Ordinance (Amendment of Section 2(2)) Order 2002

Purpose

This note provides information in respect of the issues raised by the Subcommittee on the draft Criminal Jurisdiction Ordinance (Amendment of Section 2(2) Order) 2002 at its meeting on 13 October 2003.

Proof of dishonest intent in section 161 (access to computer with criminal or dishonest intent) of Crimes Ordinance

2. Some cases where there were difficulties in proving the dishonest intent of the alleged offender pursuant to section 161[Note] of the Crimes Ordinance (Cap. 200) are set out in paragraphs 3 to 5 below. We note that the Court of Final Appeal commented in one of the cases that the prosecution could have proved that the accused was dishonest, but there could reasonably be an opposite conclusion (paragraphs 16, 19 and 25 in Li Man Wai v Secretary for Justice, FACC No. 6 of 2003), and the case was ruled in favour of the defendant. The principles of establishing dishonesty in the Ghosh case are therefore not constructed in favour of the prosecution. (For details of the case, please refer to paragraphs 6 and 7 below).

Case 1

3. A man posted a list of non-existent merchandise for sale on the Internet. Many customers did not receive the goods after making payments, and even lost contact with the man. When the man was arrested, he admitted not having the ordered items in his hands, but

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Note Section 161 of the Crimes Ordinance states that "any person who obtains access to a computer -

(a) with intent to commit an offence;
(b) with a dishonest intent to deceive;
(c) with a view to dishonest gain for himself or another; or
(d) with a dishonest intent to cause loss to another,

whether on the same occasion as he obtains such access or on any future occasion, commits an offence."

claimed that he would only look for the items concerned from the market upon receipt of the orders and arrange delivery accordingly. There were difficulties in establishing the man's dishonest intent, despite the monetary loss suffered by the many victims who reported the case.

Case 2

4. An online game player complained that he was deceived by another player when playing the game on the Internet. He stated that during the game, the deceiver offered his game character a game tool in exchange for certain game units. When he transferred the game units to that another player, the latter did not transfer the tool as offered. It is noted that the game units concerned have cost the complainant significant time and money to accumulate.

5. As the alleged "deception" took place in a virtual world, general deception offences under the Theft Ordinance (Cap. 210) may not be applicable. There were also difficulties in proving that another game player's dishonest intent under section 161 of the Crimes Ordinance (Cap. 200).

Court ruling

6. The most recent case in respect of section 161 of the Crimes Ordinance is Li Man Wai v Secretary for Justice. The defendant was charged with obtaining access to a computer, namely, the Inland Revenue Department's computer system, with a view to dishonest gain for himself or another contrary to section 161(1)(c) of the Crimes Ordinance. The magistrate ruled that there was no dishonest intent or gain in the matter and acquitted the defendant. The prosecution appealed to the Court of First Instance where the judge ruled that the defendant was dishonest according to the Ghosh test and ordered the case to be remitted to the magistrate with a direction that the defendant be convicted.

7. The defendant appealed to the Court of Final Appeal. It was ruled that the magistrate's original verdict was reasonable. The appeal was allowed, and the conviction and sentence were set aside. A copy of the Court of Final Appeal's judgement is at the **Annex**.

Comments on the draft Order

8. We consulted the public on the recommendations of the Inter-departmental Working Group on Computer Related Crime (including the recommendation to cover computer offences under the Criminal Jurisdiction Ordinance) from December 2000 to February 2001. Among the submissions received, there was general support that extended jurisdiction should be established over computer offences.

Security Bureau
November 2003

Annex

FACC000006/2003

FACC No. 6 of 2003

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 6 OF 2003 (CRIMINAL)

(ON APPEAL FROM HCMA NO. 723 OF 2002)

Between:

LI MAN WAI Appellant

AND

SECRETARY FOR JUSTICE Respondent

Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Mr Justice Litton NPJ

Date of Hearing: 27 October 2003

Date of Judgment: 6 November 2003

J U D G M E N T

Chief Justice Li:

1. I agree with the judgment of Mr Justice Chan PJ.

Mr Justice Bokhary PJ:

2. I agree with the judgment of Mr Justice Chan PJ.

Mr Justice Chan PJ:

Introduction

3. The appellant was charged with obtaining access to a computer, namely, the Inland Revenue Department's (IRD) computer system, with a view to dishonest gain for himself or another, contrary to s.161(1)(c) of the Crimes Ordinance, Cap 200. He was acquitted after trial before a magistrate, Ms J M Livesey.

4. Upon an application by the prosecution pursuant to s.105 of the Magistrates Ordinance, Cap 227, the magistrate stated a case for the opinion of a judge of the Court of First Instance. Beeson J, having heard submissions from the parties, ordered the case to be remitted to the magistrate with a direction that she convict the appellant and pass sentence accordingly.

5. As directed by the judge, the magistrate subsequently convicted the appellant and fined him $1,000. The appellant appeals to this Court on the ground of substantial and grave injustice.

The facts

6. The facts are not in dispute. Since the end of 1996, the appellant has been employed as an Assistant Assessor of the IRD. As required for the discharge of his duties, he made an Affirmation of Secrecy under s.4(2) of the Inland Revenue Ordinance, Cap 112, stating, among other things, that he would at all times preserve and aid in preserving secrecy with respect to all matters that may come to his knowledge in the performance of his duties under that Ordinance.

7. For the purpose of gaining access to the IRD's computer system, the appellant was assigned a user identity and a password which he used in the performance of his duties. All staff of the IRD, including the appellant, received regular reminders of the importance of observing the official secrecy provisions.

8. On 11 July 2000, using his user identity and password, the appellant gained access to the IRD computer system and obtained the identity card number and address of the complainant who was one of his colleagues and whose record as a taxpayer was kept in that system. He had no business in handling the complainant's tax matters and he obtained such information without the authority of the IRD or the complainant's consent.

9. The appellant then made use of such information in applying for membership of the World Wide Fund for Nature Hong Kong on behalf of the complainant. In the

application form, he also included his own name and credit card number to enable payment of the entrance fee and he signed to authorize payment through his credit card. The complainant had not requested the appellant to make the application on her behalf.

The magistrate's decision

10. At the end of the prosecution case, the defence did not make any submission of no case to answer. But after an exchange with counsel for the parties on what was to be considered the dishonest gain in this case, the magistrate ruled there was a case to answer. Thereafter the appellant decided not to give or call any evidence. After hearing final submissions from the parties, the magistrate dismissed the charge and acquitted the appellant.

11. The magistrate's reasons for acquitting the appellant were set out in the Stated Case as follows:

> "I found
>
> (1) The (appellant) did obtain access to the computer system of the Inland Revenue Department.
>
> (2) This was a serious breach. However there was no dishonest intent or gain in this matter. I was satisfied that there was no dishonesty. Accordingly, I dismissed the charge and acquitted the (appellant).
>
> (3) I found that it was not a criminal matter as there was no evidence of dishonest intent or dishonest gain.
>
> (4) The (appellant) was still employed by the Inland Revenue Department."

The judge's decision

12. In the Stated Case, the magistrate posed the following question of law for the opinion of the Court of First Instance :

> "Did I err in law in finding that it was a mere unauthorized access to the IRD computer, and it could not be regarded as dishonest when applying the principle in R v. Ghosh."

13. In answering that question, the judge applied the two-stage test as stated by Lord Lane CJ in **R v. Ghosh** [1982] 1 QB 1053, to the facts of this case and came to the following conclusion: "I am satisfied that there was dishonesty established according to both limbs of the Ghosh test and am satisfied that the question posed by the Magistrate must be answered in the affirmative." As mentioned earlier, the judge remitted the case to the magistrate with a direction that she convict the appellant and impose such sentence as appears appropriate given all the circumstances.

The arguments before this Court

14. Section 161(1)(c) of the Crimes Ordinance with which the appellant was charged provides:

> "(1) Any person who obtains access to a computer -
>
> (c) with a view to dishonest gain for himself or another;
>
> whether on the same occasion as he obtains such access or on any future occasion, commits an offence ..."

15. It is accepted that there was an unauthorised access by the appellant to IRD's computer system. It is further accepted (although the appellant argued to the contrary in the courts below) that he had obtained a gain within the meaning of s.161(2) from the system by extracting the relevant information relating to the complainant. The remaining issue is whether there was dishonesty on the part of the appellant. It is common ground that this issue is to be determined by the application of the Ghosh test to the facts.

16. In this appeal, Mr Clifford Smith SC for the appellant makes a short point: Apart from any question of jurisdiction (which is not in issue), an appeal by way of case stated under s.105 of the Magistrates Ordinance can only be lodged, and was lodged in the present case, on the ground that the magistrate's decision was erroneous in point of law. There is no legal definition of dishonesty and whether there is dishonesty in a particular case is essentially a matter of fact for the jury. The magistrate sitting as both judge and jury had made a finding on the facts concluding that there was no dishonesty on the part of the appellant. What the judge did, it is submitted, was effectively to reverse the verdict of the magistrate on the facts. The judge was not entitled to do that unless it can be said that there can be no other conclusion except that the appellant was dishonest but this is not the case here.

17. The argument of the Director of Public Prosecution, Mr I G Cross SC, leading Mr Cheung Wai-sun and Mr Eddie Sean for the prosecution, is equally short. It is accepted that the issue of dishonesty is a matter for the jury. But where a decision on the facts is one which no reasonable tribunal could have come to an appellate court is entitled to intervene. The conclusion of the magistrate in the present case is such a decision. The magistrate had erred in suggesting that while what the appellant did was wrong, it was not criminal dishonesty, that she was distracted by the appellant's motivation and that she was wrong to say there was no evidence of dishonesty.

When would court intervene in appeal by way of case stated

18. An appeal by way of case stated under s.105 of the Magistrates Ordinance is not an appeal by way of rehearing. (See Lord Widgery CJ in **Harris Simon & Co. Ltd v. Manchester City Council** [1975] 1 All ER 412, 417b dealing with a similar provision in England.) It is a review by the appellate court on the limited ground that there is an error of law or an excess of jurisdiction.

19. Where a magistrate has come to a conclusion or finding of fact which no reasonable magistrate, applying his mind to the proper considerations and giving himself the proper directions, could have come to, this would be regarded as an error

of law. Such a conclusion or finding is often described as "perverse" (See Lord Goddard CJ in **Bracegirdle v. Oxley** [1947] 1 KB 349 at 353; Lord Widgery CJ in **Harris Simon & Co. Ltd v. Manchester City Council** at 417d; and Lord Bingham of Cornhill CJ in **R v. Mildenhall Magistrates' Court, ex parte Forest Heath District Council** (161) JP 401 at 410 E-F.) This is the case where the court is satisfied that the magistrate, in reaching his conclusion or finding, has misdirected himself on the facts or misunderstood them, or has taken into account irrelevant considerations or has overlooked relevant considerations. (See Lord Denning MR in **Re D J M S (a minor)** [1977] 3 All ER 582 at 589c-e.) In such a case, the court is entitled to intervene and the magistrate's conclusion or finding would not be allowed to stand.

20. The judge in the present case, being aware of course that this was an appeal by way of case stated, said at paragraph 31 of her judgment:

> "It is for the tribunal of fact to decide whether the accused was dishonest and an appellate court does not lightly interfere with decisions of fact, but it is also the case that an erroneous decision by such tribunal may be reversed if the conclusions drawn from the determination of the facts are unreasonable."

21. It is said by counsel for the appellant that the judge had applied the wrong test. It would seem that by "unreasonable" conclusion, the judge must be referring to a conclusion which no reasonable tribunal applying the proper considerations and given the proper directions, would have come to. Whether she had correctly applied this to the facts in this case is of course another matter.

Evidence of dishonesty

22. Counsel for the prosecution submits that the magistrate was wrong to say there was no evidence of dishonesty. On the contrary, he says, the evidence was overwhelming and that the only conclusion open to the magistrate was that the appellant was dishonest in obtaining access to the IRD's computer and extracting the relevant information therefrom; and he did this knowingly, having been reminded by the IRD's circulars of the importance of confidentiality in the department.

23. Any ordinary reasonable person would be aware that members of the public, particularly taxpayers, expect that their personal information kept by the IRD is protected and not released without their permission. Any public officer would be aware of the need and importance of maintaining such confidentiality. It was precisely for this purpose that the appellant was provided with a user identity and password for gaining access to the computer and was required to and did make an Affirmation of Secrecy under s.4(2) of the Inland Revenue Ordinance. IRD staff including the appellant were reminded of the importance of this obligation by the IRD's regular circulars. The appellant must have known that his access to the computer was unauthorized and that the IRD would not have given approval. He must be aware that this would be a breach of the trust which the IRD had placed in him as an employee and which the public had placed in him as a public officer. He must be aware that this would seriously affect the integrity of the IRD computer system and was an abuse of his position.

24. On the other hand, it is not disputed that the appellant did not intend to obtain and had not obtained any personal financial gain. On the contrary, he paid the entrance fee to join the WWF and he did what he did for purely personal or benevolent reasons. What is more significant is that in the application form for membership, he had put down his own name and credit card number. It is thus clear that he never intended to conceal his own identity or involvement in it. He did not try to cover his tracks. Indeed it might well be that he wanted the complainant (and possibly other people as well) to know that it was he who had done it. This is a conduct which could reasonably be regarded as inconsistent with dishonesty.

Correctness of judge's intervention

25. Considering the evidence as a whole, I would accept that a reasonable tribunal of fact, bearing in mind the proper considerations and the proper directions, could have concluded that the prosecution have proved that the appellant was dishonest. On the other hand, such a tribunal could easily have come to the opposite conclusion as the magistrate did in this case. Where it is sought to draw a conclusion or make a finding which is different from that of the tribunal of fact, particularly a conclusion of guilt, the appellate court would have to be satisfied that the conclusion which the court is invited to draw is the only reasonable conclusion in the circumstances. In the present case, it cannot, in my view, be said that the only reasonable conclusion which could have been open to a tribunal of fact was that the appellant was dishonest. It cannot be said that the magistrate's verdict is perverse.

26. The type of offence punishable under s.161 of the Crimes Ordinance is no doubt very serious - it could be viewed as a kind of theft, very often with serious consequences but without the victim ever knowing what has happened and why. With the widespread use of computers and the advancement of technology, this valuable equipment has become part of our daily life. It is therefore all the more important to protect the integrity of computers, particularly the integrity of the IRD computer system. But the law as it now stands does not punish all kinds of unauthorized access to computers, it only prohibits the unauthorized and dishonest extraction and use of information. And it is essentially a question of fact for the jury to decide whether there is dishonesty in each case.

Conclusion

27. For these reasons, I take the view that there has been a departure from the accepted norm: the judge was not entitled to intervene. I would therefore allow the appeal and set aside the conviction and sentence.

Mr Justice Ribeiro PJ:

28. I agree with the judgment of Mr Justice Chan PJ.

Mr Justice Litton NPJ:

29. I agree with Mr Justice Chan PJ's judgment.

Chief Justice Li:

30. The Court unanimously allows the appeal and sets aside the conviction and sentence.

(Andrew Li)	(Kemal Bokhary)	(Patrick Chan)
Chief Justice	Permanent Judge	Permanent Judge

(R A V Ribeiro)	(Henry Litton)
Permanent Judge	Non-Permanent Judge

Representation:

Mr Clifford Smith, SC (instructed by Messrs Yip, Tse & Tang and assigned by the Legal Aid Department) for the appellant

Mr I. Grenville Cross, SC, Mr Cheung Wai-sun and Mr Eddie Sean (of the Department of Justice) for the respondent

(month=11-2003)