

《2003年聯合國(反恐怖主義措施)(修訂)條例草案》委員會

目的

本文件旨在回應委員會在二零零三年十一月二十六日的委員會會議上提出的事項。

按照《販毒(追討得益)條例》和《有組織及嚴重罪行條例》第 25A 條舉報的責任

2. 《販毒(追討得益)條例》(第 405 章)在一九八九年制定，目的是藉追查、限制和沒收從販毒而來的得益，以及懲處協助販毒者清洗販毒得益的行為，以加強香港打擊本地和國際販毒活動的能力。因應這些目的和販毒者的運作模式，第 405 章原來的第 25 條訂明須就與販毒有關連的資金或投資作出披露。

3. 原來的第 25 條是以英國的《販毒罪刑法令》(《英國法令》)第 24 條(副本載於英文版的附件 A)為藍本。《英國法令》第 24(1)條訂明，處理販毒得益屬於違法；不過，第 24(3)(b)條訂明，任何人如懷疑或相信任何資金或投資是從販毒而來或與販毒有關連，而向警方作出披露，該人不得視作干犯第 24(1)條所指的罪行。該條的目的是鼓勵任何處理該等資金或投資的人向獲授權人員作出披露。

4. 《有組織及嚴重罪行條例》(第 455 章)在一九九四年制定，以訂明更有效的執法權力以對付有組織及嚴重的罪行。為了處理清洗從該等罪行而來得益的問題，第 455 章訂明與第 405 章第 25 條相類的條文。

5. 為了加強和改善條例，從而使執法更為有效，第 405 章原來的第 25 條在一九九五年被廢除，代之以新訂的第 25 和 25A 條。新訂的第 25 條訂明，如處理已知道或相信為代表販毒得益的財產，即屬違法。新訂的第 25A 條訂明，如未能披露對財產是直接或間接代表販毒得益，或擬在與販毒有關的情況下使用的知悉或懷疑，即屬違法。為了維持條文的一致性，並使執法更為有效，《有組織及嚴重罪行條例》(第

455 章)有關沒收和清洗黑錢的條文亦同時作出類似的修訂。

按照《聯合國(反恐怖主義措施)條例》第 12 條舉報的責任

6. 我們在回應立法會助理法律顧問二零零二年五月二日信件的文件(CB(2)1930/01-02(03)號文件)中，提到二零零二年的《聯合國(反恐怖主義措施)條例草案》第 11 條(即《聯合國(反恐怖主義措施)條例》現行第 12 條)所訂明的舉報責任，與第 405 章和第 455 章有關披露與清洗販毒或其他可公訴罪行得益有關連的可疑交易等條文一致。

7. 聯合國安全理事會(安理會)第 1373 號決議第 4 段亦關切地注意到國際恐怖主義與跨國有組織犯罪、非法藥物、洗黑錢和其他有組織及嚴重罪行，並強調必須加緊協調國家、分區域、區域和國際各級的努力，以加強對國際安全受此嚴重挑戰和威脅的全球應變。

8. 新加坡亦採納類似的條文，訂明每個人均須履行反清洗黑錢的責任。新加坡的《恐怖主義(制止資助)法令》第 8 條規定，每一個人均須披露任何有關屬恐怖分子/恐怖主義實體的任何財產的所有交易或擬議交易的資料。

打擊清洗黑錢財務行動特別組織(特別組織)第 IV 項特別建議中的“須要在打擊清洗黑錢活動方面履行責任的實體”

9. 特別組織的第 IV 項特別建議訂明須要在打擊清洗黑錢活動方面履行責任的財務機構，或其他商業機構或實體，如懷疑或有合理理由懷疑有關資金與恐怖活動相關連或有關，或將會用作進行恐怖主義、恐怖主義行為或供恐怖組織使用，必須即時向主管當局舉報其懷疑。正如就有關披露清洗黑錢活動所採用的方式，每一個人均須履行舉報的責任。《聯合國(反恐怖主義措施)條例》(《條例》)(第 575 章)第 12(1)條實施此規定。

新訂的第 10 條 禁止為恐怖分子團體招募

10. 《2003 年聯合國(反恐怖主義措施)(修訂)條例草案》新訂的第 10 條訂明

- (a) 任何人如明知或有合理理由相信某團體是按第 4 或 5 條被指明的恐怖分子團體，則不得成為該團體的成員，或招募另一人成為該團體的成員；以及
- (b) 任何人如屬某團體的成員，須在他明知或有合理理由相信該團體是按第 4 或 5 條被指明的恐怖分子團體後，使自己不再是該團體的成員。

11. 新訂的第 10 條只涵蓋被指明的恐怖分子團體，用意是使條文更為清晰確定，以便公眾遵行。待委員會進一步討論，我們可接受將該條擴及所有恐怖分子團體(即不論該等團體是否按第 4 或 5 條被指明)的建議，使條文與現行第 7、8 和 9 條更趨一致。

“有合理理由相信”

12. “相信”指思想上傾向於同意而非反對某項觀點；而令思想上合理地產生這個傾向的理由，可視乎情況留有推測或猜測的餘地(George v Rockett (1990) 179 CLR 104 at 116 (H.C. Aust.)). 正如香港特區政府訴成少明與其他人((1999) 2 HKC 818)和香港特區政府訴任浩強(CACC 555/2001)(兩項判詞載於英文版的附件 B 和 C)兩案所說明，“有合理理由相信”要求控方證明客觀和主觀兩項元素

- (a) 客觀元素 須證明有理由令有常識和思想健全的社會人士相信；以及
- (b) 主觀元素 須證明被告知悉該等理由。

如法庭信納被告不知悉該等理由，即控方未能證明上述(b)項的思想元素，則被告並不干犯任何罪行。

13. “有合理理由相信”是行之有效的思想元素，按照現行的刑事法例須承擔刑事責任。我們認為將這項思想元素應用於《條例》是適當的安排。控方須承擔毫無疑點地證明上文第 12(a)和(b)段所述兩項元素的責任。

第 7 和 8 條 禁止向恐怖分子和與恐怖分子有聯繫者供應或提供資金等

14. 第 7 和 8 條實施聯合國安理會第 1373 號決議第 1(b) 和(d)段的規定。第 1(b)段和第 1(d)段有所重疊，兩者均載有有關提供資金的規定，而第 1(d)段要求所有成員國“禁止本國國民或本國領土內任何人和實體直接間接為犯下或企圖犯下或協助參與犯下恐怖主義行為的個人、這種人直接間接擁有或控制的實體以及代表這種人或按其指示行事的個人和實體提供任何資金、金融資產或經濟資源或金融或其他有關服務”，所強調的是禁止向恐怖分子和與恐怖分子有聯繫者提供資金，目的是切斷對恐怖分子和與恐怖分子有聯繫者的財務資助。有建議訂明犯罪者須意圖將有關資金用於作出恐怖主義行為，但這建議不能符合上述有關懲處向所有恐怖分子和與恐怖分子有聯繫者提供資金的規定，並會造成漏洞，容許提供資金者只要沒有意圖將有關資金用於作出恐怖主義行為，便可合法地提供資金予恐怖分子和與恐怖分子有聯繫者。

將恐怖分子和與恐怖分子有聯繫者的名稱刊登憲報

15. 《條例》並沒有推定任何人知悉憲報刊登的通知或命令的存在或內容。第 4(5)及 5(4)條所述的推定，目的是使控方在沒有相反證據的情況下，無須證明被指明的人或財產是恐怖分子、與恐怖分子有聯繫者或恐怖分子財產(視屬何情況而定)。而當任何人被指控干犯涉及恐怖分子或與恐怖分子有聯繫者的罪行(例如第 7、8 或 9 條所指的罪行)，控方仍須證明該人知悉或有合理理由相信其服務的對象是恐怖分子或與恐怖分子有聯繫者。有關指明已於憲報刊登，並不推定或證明被告人懷有該等思想元素。

保安局
二零零四年一月

Annex A

476

c. 32

Drug Trafficking Offences Act 1986

Proof in
Scotland of
High Court
Orders.

23. A document purporting to be a copy of an order under or for the purposes of this Act by the High Court and to be certified as such by a proper officer of that Court shall, in Scotland, be sufficient evidence of the order.

Offence of assisting drug traffickers

Assisting
another to
retain the
benefit of
drug
trafficking.

24.—(1) Subject to subsection (3) below, if a person enters into or is otherwise concerned in an arrangement whereby—

(a) the retention or control by or on behalf of another (call him "A") of A's proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise), or

(b) A's proceeds of drug trafficking—

(i) are used to secure that funds are placed at A's disposal, or

(ii) are used for A's benefit to acquire property by way of investment,

knowing or suspecting that A is a person who carries on or has carried on drug trafficking or has benefited from drug trafficking, he is guilty of an offence.

(2) In this section, references to any person's proceeds of drug trafficking include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of drug trafficking.

(3) Where a person discloses to a constable a suspicion or belief that any funds or investments are derived from or used in connection with drug trafficking or any matter on which such a suspicion or belief is based—

(a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract, and

(b) if he does any act in contravention of subsection (1) above and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if the disclosure is made in accordance with this paragraph, that is—

(i) it is made before he does the act concerned, being an act done with the consent of the constable, or

(ii) it is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it.

Drug Trafficking Offences Act 1986

c. 32

477

(4) In proceedings against a person for an offence under this section, it is a defence to prove—

- (a) that he did not know or suspect that the arrangement related to any person's proceeds of drug trafficking, or
- (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1) above, or
- (c) that—
 - (i) he intended to disclose to a constable such a suspicion, belief or matter as is mentioned in subsection (3) above in relation to the arrangement, but
 - (ii) there is reasonable excuse for his failure to make disclosure in accordance with subsection (3)(b) above.

(5) A person guilty of an offence under this section shall be liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine or to both, and
- (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.

(6) In Part II of Schedule 1 to the Criminal Justice Act 1982 1982 c. 48 (persons convicted of offences under certain enactments not eligible for early release), after paragraph 25 there is inserted—

“ DRUG TRAFFICKING OFFENCES ACT 1986 (c. 32)

26. Section 24 (assisting another to retain the benefit of drug trafficking).”

Enforcement of external orders

25—(1) Her Majesty may by Order in Council provide that, *Enforcement for the purposes of sections 7 to 19 of this Act, this Act shall of Northern Ireland orders* have effect as if—

- (a) references to confiscation orders included a reference to orders made by courts in Northern Ireland which appear to Her Majesty to correspond to confiscation orders,
- (b) references to drug trafficking offences included a reference to any offence under the law of Northern Ireland (not being a drug trafficking offence) which appears to Her Majesty to correspond to such an offence,

HKSAR v SHING SIU MING & ORS

COURT OF APPEAL
CRIMINAL APPEAL NO 415 OF 1997
POWER VP, MAYO AND STUART-MOORE JJA
4 SEPTEMBER 1998, 23 OCTOBER 1998 (on conviction)
29 OCTOBER, 11 NOVEMBER 1998 (on sentence)

Criminal Law and Procedure - Summing up - Counsel not to interrupt delivery of summing up to make submissions on judge's direction on law - Submissions to be made at natural break or after summing up - Unless mistakes of fact in summing up - No irregularity to give jury copies of sections of relevant Ordinance when judge had explained to jury how the law should be applied

Criminal Law and Procedure - Drug trafficking - Conspiracy to traffic - Dealing with proceeds of drug trafficking - Separate and distinct charges - Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) s 25(1)(a)

Criminal Law and Procedure - Mens rea - Assisting another to retain benefit of drug trafficking - Meaning of 'having reasonable grounds to believe' - Involving subjective and objective elements - Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) s 25(1)(a)

Criminal Law and Procedure - Sentencing - Assisting another to retain benefit of drug trafficking - Considerable assistance to substantial scale and lengthy period of trafficking activities - Seven years' imprisonment not wrong in principle or manifestly excessive - Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) s 25(1)(a)

Words and Phrases - 'Having reasonable grounds to believe' - Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) s 25(1)(a)

刑法與刑事訴訟程序 - 總結 - 大律師不應打斷法官的總結以作出有關法律上的指示的陳詞 - 陳詞應在自然的中斷或總結後作出 - 除非在總結中出現事實方面的錯誤 - 當法官已向陪審團解釋法律應如何被引用, 向陪審團提供有關條例的條文的副本並無不符合規定之處

刑法與刑事訴訟程序 - 販毒 - 串謀販毒 - 處理販毒得益 - 各別和獨立的控罪 - 《販毒(追討得益)條例》(第405章)第25(1)(a)條

刑法與刑事訴訟程序 - 犯罪意圖 - 協助他人保留販毒得益 - 「有合理理由相信」的涵義 - 涉及主觀及客觀的元素 - 《販毒(追討得益)條例》(第405章)第25(1)(a)條

A

B

C

D

E

F

G

H

I

A 刑法與刑事訴訟程序 - 判刑 - 協助他人保留販毒得益 - 對大宗以及長時期的販毒活動提供相當的協助 - 七年監禁並非原則上有錯誤或明顯地過重 - 《販毒(追討得益)條例》(第405章)第25(1)(a)條

B 拘禁 - 「有合理理由相信」 - 《販毒(追討得益)條例》(第405章)第25(1)(a)條

C The first applicant was charged with conspiracy to traffic in dangerous drugs and for dealing with property known or reasonably believed to represent the proceeds of drug trafficking contrary to s 25(1)(a) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405). The second and third applicants were charged with assisting the first applicant to retain the benefit of drug trafficking, contrary to the old section s 25(1)(a) of the same Ordinance. At trial the issues were whether the first applicant was part of the conspiracy and whether the second and third applicants knew or had reasonable grounds to believe that the person assisted was a drug trafficker or had benefited from drug trafficking. The applicants were convicted by a judge and a jury. On appeal, it was argued, inter alia, that

(i) there was a material irregularity in the trial as the jury was supplied with a copy the Drug Trafficking (Recovery of Proceeds) Ordinance thereby enabling them to interpret and direct themselves on law;

(ii) in respect of the case of the first applicant, the judge erred in failing to require the prosecution to elect to proceed on either the conspiracy count or the substantive count contrary to s 25(1);

(iii) the trial judge misdirected the jury in respect of the meaning of the phrase 'knowing or having reasonable grounds to believe' which was the requisite mental element in proving an offence under s 25(1).

F On 23 October 1998 the Court of Appeal dismissed all three applicants' applications for leave to appeal against sentence. The second and third applicants proceeded to their applications for leave to appeal against their respective sentences of seven years' imprisonment.

G Held, dismissing the applications for leave to appeal against conviction and sentence:

(1) The jury had only received copies of the relevant sections of the Ordinance. Further, the judge had given a detailed explanation on the sections and directions on how the law should be applied. The provision of copies was a matter of providing an aide memoire. There was no irregularity (at 823I-824C).

H (2) The conspiracy count and the related substantive count contrary to s 25(1) were not alternative charges. They were separate and distinct charges and independent of each other. A person could be charged with both drug trafficking and dealing with the proceeds of the trafficking (at 824C-B).

I (3) 'Having reasonable grounds to believe' involved subjective and objective elements. It required proof that there were grounds that a common sense, right-thinking member of the community would consider were sufficient to lead a person to believe that the person being assisted was a drug trafficker or had been assisted therefrom. This was the objective element. It also had to be proved that

06-JAN-2004 17:08
02/ST/01/1
03-DEC-2003 P.09
03-DEC-2003 P.09
DEFENCE/INTELLIGENCE UNIT
+852 2524 3762
02/ST/01/1
03-DEC-2003 P.09

these grounds were known to the defendant. This was the subjective element. The judge had set too high a burden of proof in directing that there must be belief by the defendant (the subjective element) and that a reasonable man would have held such a belief (the objective element). While there were misdirections, there was no injustice to the applicants as the judge placed a higher burden on the prosecution. The directions favoured the defence (at 825H-I, 829G-830B).

(4) The trafficking activities were of a substantial scale and over a lengthy period. Both the second and third applicants gave considerable assistance to the first applicant. In the light of the facts, it was not realistic to attempt to differentiate between their criminality. Both were aware or in a position to have been aware of the implications of their involvement. The judge was mindful of the necessity of bringing home to anyone who contemplated rendering assistance in this way the dire consequences which would ensue if they were brought to justice. It could not be said these sentences were either wrong in principle or manifestly excessive (at 832C/D-F).

Obiter

It was most inappropriate for counsel to interrupt the judge and complain about directions on the law when the judge was in the course of delivering the summing-up. It was for the judge to structure and present his summing-up. If it was incorrect or incomplete as to the law these matters should be pointed out to him in the absence of the jury at a natural break or after the summing-up had been completed. If the judge had made an error of fact, however, it was proper for counsel to immediately draw the judge's attention to it (at 827C/D-F).

Legislation referred to

Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) as 4(1)(a), 25(1), (4) (former sections superseded by No 89 of 1995), 25(1), 25A

(Editorial note: as to summing up to the jury in trials before the Court of First Instance generally see Halsbury's Laws of Hong Kong Vol 9, Criminal Law and Procedure [130.780] et seq.)

Applications

There were applications for leave to appeal against conviction and sentence. At a trial before Sated J and a jury, the first applicant was convicted of conspiracy to traffic in dangerous drugs and of dealing with property known or reasonably believed to represent the proceeds of drug trafficking and was sentenced to 30 years' imprisonment. The second and third applicants were each convicted of assisting another to retain the benefit of drug trafficking and sentenced to seven years' imprisonment. The facts appear sufficiently in the following judgment.

Jerome Matthews and Raymond Yu (Paul Kwong & Co) for the first and second applicants (on conviction only).

Christopher Grounds (Oldham Li & Nie) for the third applicant.

First applicant in person (on sentence).

Second applicant in person (on sentence).

Michael Stanchflower and Alex Lee (Director of Public Prosecutions) for the respondent.

A Mayo JA: The first applicant who was tried before Sated J and a jury seeks leave to appeal against his conviction for a conspiracy to traffic in dangerous drugs and for dealing with property known or reasonably believed to represent the proceeds of drug trafficking. He also seeks leave to appeal against the sentence of 30 years' imprisonment imposed upon him in respect of these offences.

B The second applicant who is the common law wife of the first applicant seeks leave to appeal against her conviction for assisting another to retain the benefit of drug trafficking and leave to appeal against the sentence of seven years' imprisonment imposed upon her for this.

C The third applicant who is the younger sister of the first applicant seeks leave to appeal against her conviction for a similar offence to the second applicant and leave to appeal against the sentence imposed upon her of seven years.

Particulars of the offences in question are as follows:

Count 1

SHING Siu-ming, between about the 15th day of November, 1994 and the 25th day of November, 1995 in Hong Kong and in Australia, conspired with LEE Cheung-wah, CHAN Chung-kan, WONG Kong-loong, CHAN Man-shan, LAM Vi (also known as Vi LAM), HONG Lu (also known as Lu HONG), LI Yi (also known as Yi LI), TAN Min-jing (also known as Min Jing TAN) and persons unknown to traffic in a dangerous drug, namely heroin.

Count 2

KWONG Pu-yin, between about the 6th day of February, 1995 and the 31st day of August, 1995 in Hong Kong, was concerned in an arrangement whereby the retention or control by or on behalf of SHING Siu-ming of the said SHING Siu-ming's proceeds of drug trafficking was facilitated, in respect of: (I) Hong Kong currency \$834,734.93, (II) Hong Kong currency \$1,310,975.00, and (III) Hong Kong currency \$500,000.00, knowing or having reasonable grounds to believe that the said SHING Siu-ming carried on or had carried on drug trafficking or had benefited from drug trafficking.

Count 3

SENG Yuet-seng, between about the 9th day of May, 1995 and the 31st day of August, 1995 in Hong Kong, was concerned in an arrangement whereby the retention or control by or on behalf of SHING Siu-ming of the said SHING Siu-ming's proceeds of drug trafficking was facilitated, in respect of Australian currency \$1,527,000.00, knowing or having reasonable grounds to believe that the said SHING Siu-ming carried on or had carried on drug trafficking or had benefited from drug trafficking.

Count 4

SHING Siu-ming, between the 1st day of September, 1995 and the 27th day of November, 1995 both dates inclusive, in Hong Kong, knowing or having reasonable grounds to believe that property of a value of Australian currency

A the judge giving the jury copies of the Ordinance to consider. The jury only received copies of the relevant sections which were under consideration. Over and above this, the judge had himself given a detailed explanation on the sections and had directed them upon how the law should be applied.

B This was not a question of the judge supplying the material to the jury to make what they could of it. They had already received detailed directions and the provision of the copy of the sections was a matter of providing an aide memoire. This did not amount to an irregularity and these grounds of appeal cannot be sustained.

C The first applicant's second ground is that the judge erred in that he wrongly failed to require the prosecution to make an election to proceed on either the conspiracy count (count 1) or the related substantive count contrary to s 25(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) (count 4).

D This ground appears to be misconceived. Charges 1 and 4 are not laid in the alternative. They are separate and distinct charges and independent of each other.

E By s 25(1) a person can be charged with drug trafficking and dealing with the proceeds of the trafficking.

F The obtaining of a conviction for drug trafficking is not a pre-requisite for a conviction for dealing with the proceeds of any trafficking. The essential question for determination is whether a defendant had reasonable grounds to believe that the moneys were indeed the proceeds of drug trafficking. This ground cannot succeed.

G Ground 3 is that the judge's directions on law in relation to conspiracy to traffic in dangerous drugs were deficient, confusing and contradictory.

H There is no merit in this ground. The judge's direction was sufficient in the circumstances of the case. It was generally accepted that there was an overwhelming case that there had been a conspiracy along the lines charged. The only issue was whether the first applicant had been a party to it. There was a plenitude of circumstantial evidence implicating the first applicant. The jury heard all the evidence and accepted that the first applicant had been a participant.

I Ground 4 is that the judge's directions on law in relation to dealing with property known or reasonably believed to represent the proceeds of drug trafficking were deficient and confusing.

J The second and third applicants have made similar complaints in their grounds. It is, however, necessary to bear in mind an important distinction.

K The second and third applicants each faced a count (counts 2 and 3) brought under s 25(1)(a) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405). This Ordinance was amended in 1995 but we are concerned with the Ordinance as it was at the time of the offences. The first applicant was charged (count 4) under the amended Ordinance. The

A original Ordinance can be paraphrased making it applicable to the facts in the charges faced by the second and third applicants as follows:

D A person who enters into or is otherwise concerned in an arrangement whereby the retention or control by or on behalf of another's proceeds of drug trafficking is facilitated, knowing or having reasonable grounds for belief that that other person is a person who carries on or who has carried on drug trafficking, or has benefited from drug trafficking, commits an offence.

C The amended s 25 under which the first applicant was charged retained the words 'knowing or having reasonable grounds to believe'. It created a new statutory defence in s 25A but it is not necessary to refer to that defence as it played no part in these proceedings.

D Under both the old section and the new section the onus is on the prosecution to prove an arrangement of the type specified entered into by a person 'knowing or having reasonable grounds to believe' that the person to whom assistance is being given has been a drug trafficker or has benefited from drug trafficking. It is for the prosecution to prove beyond reasonable doubt that (1) there was such an arrangement; (2) that the person who entered into it participated knowing or having reasonable grounds to believe that the person assisted was a drug trafficker or had benefited from drug trafficking.

E The old s 25(4) provides that it is a defence to prove that the person charged did not know or suspect that the arrangement related to the proceeds of drug trafficking.

F It is important to give separate consideration to the matters which the prosecution must prove and, as regards the second and third applicants, to the statutory defence. There is no real difficulty in the present case as regards the proof of entry into an arrangement by the two applicants to help, in one case the husband and in the other the brother, to retain or control money. As the jury were clearly satisfied that the first applicant was involved in drug trafficking, that matter also occasions no difficulty when considering these two offences.

G The difficulty arises from the use of the words 'knowing or having reasonable grounds to believe'. Knowledge if proved would simply resolve the matter. Difficulty, however, arises from the use of the words 'having reasonable grounds to believe'. This phrase, we are satisfied, contains subjective and objective elements. In our view it requires proof that there were grounds that a common sense, right-thinking member of the community would consider were sufficient to lead a person to believe that the person being assisted was a drug trafficker or had benefited therefrom. That is the objective element. It must also be proved that those grounds were known to the defendant. That is the subjective element.

I We turn now to the summing-up to ask whether the jury were properly directed on these elements.

The judge commenced his direction as regards counts 2 and 3 at p 107 setting out s 4(1)(a) of the Ordinance, which provides that:

4(1) For the purposes of this Ordinance —

- (a) any payments or other rewards received by a person at any time (whether before or after the commencement of this Ordinance) in connection with drug trafficking carried on by him or another, are his proceeds of drug trafficking; and
- (b) the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards.

He then directed the jury as follows:

So the Crown for this count two and three must prove firstly, that the amounts mentioned in count two and three are Shing Siu-ming's proceeds of drug trafficking, he being mentioned there as the relevant person. Secondly, that D2 and D3, in their respective counts, knew or had reasonable grounds to believe that Shing Siu-ming carried on drug trafficking and thirdly, that D2 and D3 individually, in respect of their counts, were concerned in an arrangement whereby retention or control by or on behalf of Shing Siu-ming of his proceeds of drug trafficking was facilitated, and the relevant person, as I've said, who is mentioned in section 25(1)(a) in this case is Shing Siu-ming.

He went on to say:

The burden lies on the Crown to prove all these matters and it must do so beyond reasonable doubt. If you are so sure — if you are sure about that — you will then go on to consider section 25(4), which is the statutory defence ...

He then went on to read s 25(4)(a) and (b):

25. (4) In proceedings against a person for an offence under this section, it is a defence to prove —

- (a) that he did not know or suspect that the arrangement related to any person's proceeds of drug trafficking; or
- (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of the relevant person of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in sub-section (1).

He then pointed out to the jury that the burden on the defendant was discharged by evidence satisfying the jury of the probability of that which the defendant was called upon to establish. He said:

In other words, on the balance of probabilities and that is it is more likely than not that they did not know or suspect. That is the burden on the defendant. Quite distinct and quite apart from the burden on the Crown. The burden on the Crown is to prove their charges beyond reasonable doubt, not so with the defence with respect of the proof of the statutory defence. They can do it on the basis of the balance of probabilities — more likely than not.

He then turned to the facts relating to count 2. He had, however, barely embarked upon them when Mr Blanchflower indicated that he wanted an adjournment. In the absence of the jury he then told the judge, inter alia:

Now, to a lawyer these sections are difficult. You can imagine what it would be like to a layman. But with respect, my Lord, I find that direction somewhat confusing, but it was deficient. Your Lordship did not explain the proceeds from drug trafficking in laymen's terms, meaning that it could be proceeds from actual drug trafficking, or a laundering, a money-lauder laundering a money-lauder's money.

He then went on to complain that the judge had not explained the meaning of 'drug trafficking', of 'benefit from drug trafficking', of 'reasonable grounds to believe' and of 'knowledge, belief and suspicion as is found in the defence — section 25(4)'. It was a most inappropriate intervention. Mr Blanchflower, before this court, has suggested that the judge had directions on these matters ready as, after the jury was recalled, he appeared to read from his notes which related thereto and he has submitted that the omission of the directions may have been an oversight. However that may be, an intervention such as this should not have come until the completion of the summing-up. It is for the judge to structure and present his summing-up. If it is incorrect or incomplete as to the law these matters should be pointed out to him in the absence of the jury at a natural break or after the summing-up has been completed. Interruptions such as were made in the course of a summing-up are not only inappropriate but are likely to do more harm than good. It is otherwise if the judge has made a mistake of fact. In such circumstances, it is proper for counsel immediately to draw his attention to it.

After this intervention the judge proceeded with his summing-up again referring to s 4(1)(a) saying:

So what the Crown is saying, is that Shing's proceeds of drug trafficking would be any payments or rewards received by him in connection with drug trafficking carried on by him or by another person. So there it is not only restricted to Shing, but another person also, any other person, and then that may be taken together with 25(2), which reads this way. That is part of section 25(2). In this section, reference to any person's proceeds of drug trafficking include a reference to any property which in whole or in part, directly or indirectly represented in his hands his proceeds of trafficking. Now, there the reference relates to an arrangement and talks of partly the proceeds of drug trafficking, any person's proceeds will include any property, which in whole or in part, directly or indirectly, was in his hands as being proceeds from his drug trafficking.

The judge then returned to s 25(1)(a) and pointed out that:

So if in this present case, the 1st defendant at any time received any payment or reward connected with drug trafficking, carried on by him or by another

person, anywhere in Hong Kong, in Australia, then he would have benefited from that drug trafficking. In other words, the whole emphasis is that here, you are dealing with one man, but he may have benefited by receiving payments, rewards, from other people. And then, this is what it comes to, if D1 at any time, received a payment or reward connected with drug trafficking, carried on by him or another anywhere, he may be sitting right in front of me, he may be sitting in another corner of the world, anywhere, then he would have benefited from that. He may have benefited even from the drug trafficking by another because he gets the money in his hand.

A

B

C

D

E

F

G

H

I

He there dealt properly with the words 'benefited from drug trafficking'. He was concentrating as regards these two charges on 'benefited from drug trafficking' rather than upon 'carried on drug trafficking'.

He went on to deal with the 'arrangement which facilitates the retention or control of this man Shing's proceeds of the drug trafficking'. There was no real issue as to the applicants' involvement in an arrangement which facilitated the retention or control of money. The issue was, as the judge then told the jury, whether 'they were concerned in this arrangement for retention or control by Shing of the proceeds of his drug trafficking — they did that — they entered into that arrangement while knowing or having reasonable grounds to believe that Shing had carried on or was carrying on drug trafficking or had benefited from drug trafficking'. He told the jury that 'benefiting from drug trafficking' meant simply obtaining 'a benefit or reward from any other person'. He went on to say that the arrangement had to be entered into as 'a conscious act'. This strayed a little from the wording of the section but the judge immediately went on to say:

So the main thing is that, as I have explained all this, the mental element — mens rea — mental element of the offence is knowing or having reasonable grounds to believe that these ladies, when they entered or concerned themselves with this arrangement, that they did that knowing or having reasonable grounds to believe that Shing, D1, was connected with or had benefited from drug trafficking.

No objection can be taken to the summing-up to this point. The judge then went on to tell the jury that when considering the words 'knowing or having reasonable grounds to believe' they:

must distinguish, keep these two things apart — believing, belief and knowledge — these are two different things. Belief is mental element which is lesser than knowledge. Knowledge is when you know something yourself ... Belief is something less than knowledge. So this belief, in the minds of these two ladies, in counts two and three, they must have had reasonable grounds to believe that D1 was involved in and carrying on in drug business and drug trafficking or had carried on drug trafficking, or had benefited from drug trafficking. That is number one.

Here the judge was wrong as he was directing that it was incumbent upon the prosecution to prove either knowledge or belief, which he characterised

as 'something less than knowledge', in the minds of the defendants. The test is, in fact, not so high. The prosecution has to prove knowledge of trafficking or that a defendant had reasonable grounds to believe that there was trafficking. The prosecution is not called upon to prove actual belief. It would be sufficient to prove reasonable grounds for such a belief and that the defendant knew of those grounds.

The judge went on:
And number two is that their belief must be based upon reasonable grounds. So these are the two things there in believing. They believed, they may have believed, or under the law, they believed or they must have formed this belief in their minds, that D1 carried on or had carried on drug trafficking or had benefited from drug trafficking. And for that belief, there must be reasonable grounds upon which it is based.

The judge, having given an example of the way in which a belief could be formed, went on:

Then the question that becomes relevant is whether looking at those factors, having that information which these two ladies, D2, D3, had at the time they formed that belief in their minds, whether a reasonable person would also be of that same opinion, same view. And looking at the information which they had when they formed this belief in their heads and their minds, that D1 was carrying on or had carried on drug trafficking or had benefited from drug trafficking, whatever a reasonable person would have formed that belief on the same information. That also comes into your consideration. You have got to consider all that.

In the passage above, the judge again incorrectly indicates that the question for the jury is whether 'these two ladies ... had ... formed that belief in their minds'. He then poses a second matter for resolution — 'Whether a reasonable person would also be of that same opinion, same view... Whatever a reasonable person would have formed that belief on the same information'.

He has here recognised that he is dealing with subjective and objective elements. He has placed the former, ie that there must be belief by the defendant, too high. It is necessary only to prove that the defendant knew of the grounds. In this trial there was no issue in this regard as both defendants admitted knowledge of the grounds upon which the prosecution was relying. He has similarly placed too high a burden on the prosecution as regards the 'objective element, i.e. the belief of the reasonable man. The jury did not have to be satisfied that a reasonable person would have held such a belief but only that such a person would be satisfied that there were grounds sufficient to sustain such a belief. Clearly if the jury was satisfied that a reasonable person would have held such a belief, in accordance with the direction given by the judge, then they must have been satisfied that the grounds were sufficient to sustain such a belief.

As to both the subjective and the objective element, the judge placed too high a burden on the prosecution by telling the jury that they had to be

06-JAN-2004 17:13 FROM GOVERNMENT SECRETARIAT TO 25099055 P.14/34

02/08/01 P.0001 6091 5482 258 + 30115017 FO DEPARTMENT OF JUSTICE 99% 25:14 03-DEC-2003 P.14

satisfied that the applicants had formed that belief 'in their heads and their minds' and that, when considering that, they had to take into account whether 'a reasonable person would have formed that belief on the same information'. There was, however, no injustice done to the applicants by these directions as they placed a higher burden of proof upon the prosecution than is stipulated by the section. In fact, they favoured the defence.

The judge went on to deal with the facts relating to count 2. He said:

And you will consider that on the basis of the law that I explained to you, whether Kwong, the 2nd defendant, had actually at that particular time during those seven months, formed a genuine belief in her own mind that Shing, with all that money that was coming in, had carried on or was carrying on, or had benefited from proceeds of drug trafficking by another person. And if you come to that conclusion, then, of course, she had concerned herself with that arrangement which is stated in count two, acting on that belief which she formed on information that she had at that particular time, and you will ask yourself, well, she formed that belief, all right, but would any other reasonable person having that information come to the same conclusion?

In the first part of this passage when the judge mentioned 'genuine belief' he is clearly speaking of a knowledge rather than belief. The words 'a genuine belief in her own mind' could mean nothing else. In the latter part of the direction he turns to 'belief formed on information' and again tells the jury that they must ask themselves did she form that belief and would a reasonable person have formed it. What we have already said applies equally to this direction and to the further reference made shortly thereafter to 'a genuine belief'. He then dealt with the statutory defence telling the jury that they had to:

also consider whether the evidence gives rise to the statutory defence which is open to her, and that is whether she did not know or suspect that the arrangement related to any person's proceeds of drug trafficking, any person's proceeds, or two, that she did not know or suspect that by arrangement, the retention or control on behalf of the relevant person — that is Shing — of any property was facilitated.

So if you are satisfied that she knew, then, of course, this defence is negatived. Remember that this is a statutory defence. The lesser burden as I explained is on the defendant. Now, she says, I did not know, all right? She says it was Ah Mo's money. She is not denying that she had received this money, but she says it was Ah Mo's money.

He said finally:

You will keep in mind this concept of benefiting from drug proceeds. And if you are satisfied so that you are sure, having considered all the evidence, and that includes the evidence for the defence, taking all that into account, if you reach the conclusion that she concerned herself with this arrangement, with that knowledge and mental element that I explained to you earlier on the basis of the information which was available to her at that time, then you will find her guilty of count two because then all the ingredients of the offence would

A have been proved. You would have considered her defence. You would have been alive to the fact that the defence, the burden on her to make out that defence is on the basis of balance of probabilities, and having done all that, if you arrived at the conclusion that the charge has been proved beyond a reasonable doubt, then you convict her.

B The judge then went on to conclude, and this passage is subjected to criticism by the applicants, saying:

C But if you come to the conclusion that you accept her evidence, then you say to yourself, well, we have looked at everything, we have tried to peep into her mind, and we have considered what a reasonable man with all that information might think, if you come to the conclusion that she is telling the truth, or that her version might be true or you are left in any doubt about the prosecution case, then you will give her the benefit of that doubt and find her not guilty.

D It is suggested that the words 'we have considered what a reasonable man with all that information might think' are a misdirection. The judge was here repeating his objective test to which we have already referred. It is true, as we have already said, that it is a misdirection but it was one which favoured the applicant. It was not necessary to prove either that the defendant had actually held the belief or that a reasonable man would have held it but only that the defendant knew of the grounds and that they were such as a common sense, right-thinking member of the community would have said were sufficient to establish such a belief. If it were proved that such a person would have held that belief, then it must also have been proved that he was satisfied that there were grounds for the holding of it.

F The judge then told the jury to apply all he had said in relation to the second count to their consideration of the third count.

G It is true that there were misdirections but they were such as would have worked to the benefit of the applicants. We are satisfied that the jury, following the directions that were given, must have been satisfied that the applicants either knew or had reasonable grounds to believe that Shing was a person who carried on or had carried on drug trafficking or had benefited therefrom.

In count 4 which concerned the first applicant, the judge told the jury when dealing with that applicant:

H ... It is for you to be satisfied that he did deal with that property knowing or having reasonable grounds to believe that the property was any person's proceeds of drug trafficking. You have heard on that evidence, the Australian part of it, and you have heard of his connection with that. You will keep that in mind and think, well would a reasonable person come to that conclusion.

I He did not go on to explain again the words 'knowing or having reasonable grounds to believe' but they must have had fresh in their minds the explanation which he had just given. What we have said above applies. The direction erred only in so far as it placed too high a burden on the prosecution.

02/501-D 6091 5482 258 +
06-JAN-2004 17:11
+852 2524 3762
DEPARTMENT OF JUSTICE
03-DEC-2003 15:41
P.15

06-JAN-2004 17:14 FROM GOVERNMENT SECRETARIAT TO 25099055 P.15/34

All of the applications are dismissed.

The first applicant's application for leave to appeal against sentence is dismissed upon abandonment on 23 October 1998. The second and third applicants seek leave to appeal against their sentences of seven years' imprisonment for assisting another to retain the benefit of drug trafficking.

It has been accepted by Mr Blanchflower for the prosecution and Mr Grounds for the third applicant that it is not feasible to attempt to lay down guidelines for sentences for this type of offence. The reason for this is the wide range of criminality encountered.

Our judgment in respect of the applications for leave to appeal against conviction contained a detailed description of the nature of the conspiracy to traffic in dangerous drugs and the involvement of each of these ladies. Suffice it to say that the trafficking activities were undertaken on a very substantial scale over a lengthy period of time. Also it can be said that these ladies rendered considerable assistance to the first applicant. The second applicant received benefits from her involvement. The third applicant who was an accountant was closely involved in the first applicant's financial affairs. In the circumstances of the case it is not realistic to attempt to differentiate between the criminality of these two ladies.

What can be said is that both ladies were aware or were in a position to have been aware of the implications of their involvement. The judge was mindful of the necessity of bringing home to anyone who contemplates rendering assistance in this way the dire consequences which will ensue if they are brought to justice. It cannot be said that these sentences were either wrong in principle or manifestly excessive. These applications are dismissed.

Reported by Lindy Course

~~SEUNG YUET FONG v HKSAR~~

APPEAL COMMITTEE OF THE COURT OF FINAL APPEAL
MISCELLANEOUS PROCEEDINGS (CRIMINAL) NO 26 OF 1998
(LITTON, CHING AND BOKHARY JJ)
23 JANUARY, 1 FEBRUARY 1999

B Criminal Law and Procedure - Mens rea - Assisting another to retain benefit of drug trafficking - Meaning of 'having reasonable grounds to believe' - Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) s 25(1)(a)

C Criminal Law and Procedure - Sentencing - Assisting another to retain benefit of drug trafficking - Imprisonment of seven years - Whether substantial and grave injustice - Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) s 25(1)(a)

D 刑法與刑事訴訟程序 - 犯罪意圖 - 協助他人保留販毒得益 - 「有合理理由相信」的涵義 - 《販毒(追討得益)條例》(第405章)第25(1)(a)條

B 刑法與刑事訴訟程序 - 判刑 - 協助他人保留販毒得益 - 判監七年 - 是否實質及嚴重的不公平情況 - 《販毒(追討得益)條例》(第405章)第25(1)(a)條

F The applicant was charged with assisting her brother to retain the benefit of drug trafficking contrary to the old section 25(1)(a) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405). She was the third defendant at trial, her brother being the first defendant charged with conspiracy to traffic in dangerous drugs and dealing with proceeds of drug trafficking. The second defendant was the first defendant's common law wife and faced a similar charge as the applicant. All three defendants were convicted at trial. The applicant was sentenced to seven

G years' imprisonment. Their applications for leave to appeal against conviction and sentence were dismissed by the Court of Appeal (see *HKSAR v Shing Siu Ming & Ors* [1999] 2 HKC 818, the applicant was the third applicant in that case). The Court of Appeal however certified two questions of law posed by the applicant for consideration of the Court of Final Appeal. The first question was concerned with the meaning of 'having reasonable grounds to believe' under s 25(1) of the Ordinance. The second question was whether the approach adopted by *R v Ghosh* [1982] QB 1053 was to be applied as the appropriate test in determining whether a defendant had 'reasonable grounds to believe' that the person being assisted was a drug trafficker or had benefited therefrom. The applicant applied to the Appeal Committee for leave to appeal to the Court of

H Final Appeal against conviction and sentence.

Held, dismissing the application:
(1) To convict, the jury had to find that the accused had grounds for believing that she was assisting a drug trafficker. There was the additional requirement that

06-JAN-2004 17:11
6091 5482 2845 258 +
30151516 DEPARTMENT OF INTELLECTUAL PROPERTY
99%
14:41
03-DEC-2003 P.16

06-JAN-2004 17:15 FROM GOVERNMENT SECRETARIAT TO 25099055 P.16/34

Annex C

CACC000555/2001

CACC 555/2001

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CRIMINAL APPEAL NO. 555 OF 2001
(ON APPEAL FROM DCCC 621 OF 2001)

BETWEEN

HKSAR
AND
YAM HO-KEUNG

Respondent

Applicant

Coram: Hon Stuart-Moore VP, Mayo VP and Stock JA in Court

Date of Hearing: 28 August 2002

Date of Judgment: 24 October 2002

J U D G M E N T

Hon Mayo VP (giving the judgment of the Court):

1. The applicant (D4 at trial), aged 34, was convicted after a trial in the District Court before His Honour Judge Line of dealing with property knowing or having reasonable grounds to believe in whole or in part directly or indirectly represented any person's proceeds of an indictable offence contrary to section 25(1) of the Organised and Serious Crimes Ordinance, Cap. 455 (the Ordinance).
2. He seeks leave to appeal against his conviction.
3. There were three other defendants in his trial. They were charged with two conspiracies and D1 was additionally charged with two counts of being in unauthorised possession of other people's identity cards.

4. The first conspiracy referred to a conspiracy to lend money at excessive interest rates contrary to section 24(1) of the Money Lenders Ordinance, Cap. 163. The second was a conspiracy to deal with property in a similar manner to the charge which faced the applicant.
5. On the evidence which was before him the Judge convicted the applicant's co-defendants as charged.
6. The Judge made a finding of fact that during the relevant period, namely from August 1998 to April 2000, a criminal enterprise was conducted at premises at Kwai Fong Court which took the form of money lending where grossly excessive interest rates were charged.
7. Part of the *modus operandi* was to open bank accounts in the names of Miranda Chan and Yiu Yuk-lan into which payments made by borrowers would be paid. Withdrawals of moneys from these accounts would be made from ATM machines. Between July 1999 and April 2000 a total of \$2,701,600 was withdrawn from these accounts.
8. The Judge made a finding of fact that \$500,000 which had been in D1's account No. 132-30-07197-7 at the Bank of East Asia had come from the accounts of Miranda Chan and Eva Yiu Yuk-lan and that the applicant had dealt with these moneys. This fact had not been disputed and the applicant did not give evidence at the trial.
9. In a cautioned statement dated 27 April 2000 the applicant stated: "Ah Sir, it really is the case that my friend Ho Sui-yan (D1) told me to keep this sum of money temporarily for her. When required, I would return the money to her. However, I don't know how she has obtained the money".
10. The Judge was satisfied, having regard to the provisions contained in section 25 of the Ordinance, that there was sufficient evidence for the applicant to be found guilty as charged.
11. Section 25 provides:
 - "25. *Dealing with property known or believed to represent proceeds of indictable offence.*
 - (1) Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property.
 - (2) In proceedings against a person for an offence under subsection (1), it is a defence to prove that-
 - (a) he intended to disclose to an authorized officer such knowledge, suspicion or matter as is mentioned in section 25A(1) in relation to the act in contravention of subsection (1) concerned; and
 - (b) there is reasonable excuse for his failure to make disclosure in accordance with section 25A(2).
 - (3) A person who commits an offence under subsection (1) is liable-
 - (a) on conviction upon indictment to a fine of \$5,000,000 and to imprisonment for 14 years; or
 - (b) on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.

(4) In this section and section 25A, references to an indictable offence include a reference to conduct which would constitute an indictable offence if it had occurred in Hong Kong."

12. This application is fairly narrowly circumscribed. Although there are three separate grounds it is convenient to deal with them all together. They are as follows:

"1. The Learned Judge erred in determining that the offence under Section 25 of Cap. 455 is proved if the Prosecution only establish that a Defendant may have believed he 'may be dealing in the proceeds of an indictable offence'.

2. The Learned Judge erred in deciding in circumstances where there were a number of potential sources and/or explanations for the provenance and/or intended use of the money that he could safely infer that a reasonable man must inevitably have concluded that it was indeed the proceeds of an indictable crime.

3. The Learned Judge erred in concluding that a 'suspicion' was the same as a 'belief.'"

13. The Judge proceeded upon the basis that there was insufficient evidence to prove at the appropriate level that the applicant knew that he was dealing with the proceeds of an indictable offence.

14. He considered, therefore, that what he had to determine was whether the prosecution had proved that the applicant had reasonable grounds to believe that he was dealing with such proceeds.

15. In his Reasons for Verdict, he said:

"50. To answer the question involves two stages. Firstly one asks objectively whether reasonable grounds existed for the belief. If they did then one goes on, secondly, to ask subjectively whether the defendant was aware of the existence of those reasonable grounds.

51. To be given a sum as large as \$500,000 in cash and to be asked to keep it temporarily, without further explanation, when you do not know how the money was obtained would prompt a reasonable man to ask himself what was going on. I further judged that a reasonable man would, after only a little thought, come to the conclusion that:

- It was the proceeds of crime.
- It was for investment in crime.
- It was to be hidden from creditors.
- It was to be hidden from the taxman.
- It was to be hidden from a spouse.

There is some overlap in these categories and it may be that greater imagination may add further categories. However, I judged that in the absence of an explanation (and I stress that) these are the matters that must come to the mind of a reasonable man.

52. The fourth defendant did not give evidence. I thus have no direct evidence of what was in his mind at the time. I am obliged to infer it. He appears to be an adult of sound mind. There is no suggestion or evidence that there is anything wrong with him. In those circumstances I naturally inferred that his state of mind was the same as that of a reasonable man.

53. I thus inferred that he was aware that the explanation for his being asked to deal with so much cash had to be one or more of the above listed matters. That is because there were reasonable grounds to infer so.

54. Does the fact that there were reasonable grounds to believe a limited number of scenarios mean that the defendant did not have reasonable ground to believe in any one of them? To pose the question is really to answer it. It seems clear to me that when an event can reasonably be explained on the basis of a few grounds, the man contemplating the issue holds reasonable ground for belief in them all. By using the term 'having reasonable grounds to believe' the draftsman and the legislature clearly made a conscious departure from the old phrase 'knowing or believing'. The effect is to make the offence a wide one. It means that people who deal in cash in circumstances which produce the limited list of inferred explanations as arises here are caught by the section. Another way of putting it is that the words of the section are aimed at condemning the man who reasonably foresees that he may be dealing in the proceeds of an indictable offence yet nonetheless goes on to do it. I do not consider that such a man was not within the sights of those who promoted the Organised and Serious Crimes Ordinance." (Appeal bundle pp. 42-43)

16. The issue on this application is whether this analysis by the Judge was well founded.

17. Mr McGowan contended that it was not.

18. He submitted that when the Judge was, near the conclusion of the passage cited, referring to what a reasonable man might foresee he used the word "may" rather than the word "would". This would indicate that what the Judge had in mind was only a suspicion rather than a belief in the state of affairs.

19. Mr McGowan submitted that this was insufficient if the approach which was adopted by the High Court of Australia in *George v Rockett* 93 ALR 483 at 490 was followed:

"3. The facts to be established.

In considering the sufficiency of a sworn complaint to show reasonable grounds for the suspicion and belief to which s 679 refers, it is necessary to bear in mind that suspicion and belief are different states of mind (*Homes v Thorpe* [1925] SASR 286 at 291; *Seven Seas Publishing Pty Ltd v Sullivan* [1968] NZLR 663 at 666) and the section prescribes distinct subject matters of suspicion on the one hand and belief on the other. The justice must be satisfied that there there are reasonable grounds for suspecting that 'there is in any house, vessel, vehicle, aircraft, or place - Anything' and that there are reasonable grounds for believing that the thing 'will ... afford evidence as to the commission of any offence'.

Suspicion, as Lord Devlin said in *Hussien v Chong Fook Kam* [1970] AC 942 at 948, 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove."' The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, a question

was raised as to whether a payee had reason to suspect that the payer, a debtor, 'was unable to pay [its] debts as they became due' as that phrase was used in s 95(4) of the Bankruptcy Act 1924 (Cth). Kitto J said (at 303):

'A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to "a slight opinion, but without sufficient evidence", as *Chambers' Dictionary* expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which "reason to suspect" expresses in sub-s (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes - a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.'

The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

20. Here, the court was pointing out the difference between, on the one hand, reasonable grounds to suspect, and on the other, reasonable grounds to believe. Mr McGowan's argument was that the Judge had found evidence supporting grounds for suspicion falling short of reasonable grounds to believe. There are two things which can be said about Mr McGowan's assumption that the Judge's phraseology in the passage which reads: "... the words of the section are aimed at condemning the man who reasonably foresees that he may be dealing in the proceeds of an indictable offence", revealed that suspicion, in the Judge's mind, was enough.

21. Firstly, grounds can exist to support a reasonable belief that X has happened even though X has not in fact happened. In such a situation the person who has reasonable grounds to believe that, for example, goods are stolen but who does not know that they are, may well say to himself: "I believe that I may well be dealing in goods that have been stolen, as there are good grounds for such a belief. I cannot say that I believe I am in fact dealing in stolen goods, as there are other possibilities. Yet the grounds for believing they are stolen are present." The use of the word 'may' in such a context is not inconsistent with the correct test.

22. Secondly, the criticized passage in the Reasons for Verdict must be taken in its full and proper context. We see that the Judge has correctly stated the question, namely whether there were reasonable grounds to believe. He went on correctly to specify the two questions to be asked, namely whether, objectively, reasonable grounds existed for the belief and, if so, whether subjectively the defendant was aware of the existence of those reasonable grounds. When addressing the first of these two questions the Judge concluded that a reasonable man would conclude, after only a little thought, that there were several inferences which could be drawn for which there was a reasonable factual basis. As such, the Judge was merely, again rightly in our view, saying that for each inference drawn there was a reasonable ground. It is not without importance that the Judge never used a phrase which implied that the applicant had grounds for mere suspicion and we can see no justification in Mr McGowan's concern that this is what the Judge was really saying.

23. The next question is whether the evidence supported the finding that there was a reasonable ground to believe, rather than, as Mr McGowan contended, to suspect that the \$500,000 represented the proceeds of an indictable offence. What we have in this case is the handing over of a very large sum in cash. According to the applicant's statement to the police, no explanation was given to him as to the provenance of this sum or why it was that D1 was asking him to hold onto the money temporarily. If this was correct, then either the applicant asked no questions when questions would in innocent circumstances be asked, or if he did ask, D1 declined to answer when in innocent circumstances an answer would be given. It is also apparent from the Judge's Reasons for Verdict that within two days of the delivery of this cash to the applicant, he handed over half of it (\$250,000) to the wife of D2. Applying common sense to these facts, the finding that, objectively, there were reasonable grounds for a belief that these funds were tainted by criminality of some significance cannot in our judgment be criticized, nor the finding that the applicant was aware of those grounds.

24. Plainly, if the applicant had been the custodian of this money in innocent circumstances or felt the need to transfer some of the cash to D2, he would have been able to provide the reasons, but none emerged at the trial. The Judge was, in such circumstances, as the court said in **Li Defan and Anor v HKSAR** [2002] 1 HKLRD 527, at 540:

"perfectly entitled to regard the failure of the accused to give any explanation on oath as strengthening the inference to be drawn from the prosecution case."

In fact, as the passage cited from the Reasons for Verdict shows, the Judge felt able to draw an inference which was adverse to the applicant without using his failure to give evidence to add strength to the inference he had drawn.

25. Applying common sense to the facts of this case, the Judge's findings were not open to valid criticism.

26. The application is dismissed.

(M. Stuart-Moore)
Vice-President

(Simon Mayo)
Vice-President

(Frank Stock)
Justice of Appeal

Representation:

Mr Robert S.K. Lee, SADPP, and Mr Kelvin Lee, GC, of the Department of Justice, for the Respondent.

Mr James H.M. McGowan, assigned by the Legal Aid Department, for the Applicant.