

CRIMEWATCH

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RECENT PUBLICATIONS

Report on the Creation of a Substantive Offence of Fraud - The Law Reform Commission of Hong Kong, (July 1996)

This Report commences by considering the extent of the problem of fraud and refers to a survey carried out by KPMG Peat Marwick in 1995 of the top 1000 companies in Hong Kong. The survey found that 32% of the respondents were aware of frauds within their organisations during the previous year; of those which had experienced fraud, 65% had suffered losses of over HK \$100 000, while 34% reported frauds aggregating HK \$100 000.

Modern commercial crime now takes many forms and has no territorial boundaries. The Report states that jurisdictions do not share a common definition for the fraud offence. In fact, some, like England and Hong Kong have no definition of fraud at all.

In this Report, consideration is given to the background to fraud in Hong Kong, the present law of fraud together with its shortcomings and deficiencies, the law of fraud in other jurisdictions and a new offence of fraud.

The Report concludes by stating that the introduction of a fraud offence would improve Hong Kong's existing law. It proposes that the new offence of fraud should be complete when a person by deceit induces another to act or make an omission resulting in either prejudice or a substantial risk of prejudice (financial or proprietary) to another or benefit (financial or proprietary) to the fraudster or another. "Deceit" could be both by a positive misrepresentation of the facts and by a deliberate concealment of the true position. It is interesting to note that in devising this formulation of a possible fraud offence, examples from South African and Scottish criminal law were examined. Finally, the Report recommends that the present common law conspiracy to defraud should be specifically repealed and replaced by a conspiracy to commit the new substantive offence.

Problems of Criminal Procedural Law Connected with Information Technology - Recommendation No. R (95) 13 and explanatory memorandum, (Council of Europe Publishing, printed at the Council of Europe, 1996)

The Committee of Ministers of the Council of Europe, on 11 September 1995, adopted a recommendation to deal with the problems of the criminal procedural laws of member states connected with information technology. To the Ministerial recommendation are appended a number of principles which are to guide member states when they review their internal laws and practices.

The Recommendation recognises that an increasing part of economic and social relations will take place through or by the use of electronic information systems and notes that such systems can be used to commit crime and to store and retrieve evidence of criminal offences. The principles cover the subjects of search and seizure, technical surveillance, electronic evidence, the imposition of obligations to co-operate with investigating authorities, minimisation of the negative effects of encryption of information and international co-operation.

The publication contains the text of Recommendation No. R (95) 13 and the explanatory memorandum prepared by the Committee of Experts, as amended by the European Committee on Crime Problems.

CASE NOTES

EVIDENCE

Criminal evidence - tape recorded conversation - installation involving civil trespass, damage and invasion of privacy - importation of heroin - admissibility of tape recorded conversation - exclusion of evidence

An electronic listening device was secretly installed by police at the home of a man who was suspected of involvement in heroin traffic.

The defendant visited the house and during his conversation with the householder, revealed that he was involved in the illegal importation of drugs. This was the only evidence against him.

At trial the defendant admitted that it was his voice on the tape recording but contended that the tape recording was inadmissible as evidence because

- (i) the installation of the listening device was a civil trespass;
- (ii) the admission of the tape recording as evidence would breach the right to respect for private and family life protected by Art. 8 of the European Convention of Human Rights; and
- (iii) if the evidence had been obtained by means of telephone tapping it would have been inadmissible under the Interception of Communications Act 1985 (UK) and even if the evidence were admissible the judge should exercise his discretion under the Police and Criminal Evidence Act (UK) to exclude it.

The judge ruled that the tape recording was admissible. The appellant appealed to the Court of Appeal, which dismissed his appeal. He appealed to the House of Lords.

Held, dismissing the appeal :

Under English law, there was in general nothing unlawful about a breach of privacy. At common law, relevant evidence obtained by the police by improper or unfair means was admissible in a criminal trial even if it is obtained improperly or unlawfully. This rule applies to evidence obtained by the use of surveillance devices which invade a person's privacy.

The fact that evidence is obtained in circumstances which amount to a breach of the provisions of Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was relevant to, but not determinative of, the judge's discretion to admit or exclude such evidence under the Police and Criminal Evidence Act 1984 (UK). The judge's must exercise his discretion according to whether the admission of the evidence would render the trial unfair. The use at a criminal trial of material obtained in breach of the rights of privacy in Art 8 did not in itself mean that the trial would be unfair. On the facts, the trial judge had been entitled to hold that the circumstances in which the relevant evidence was obtained, even if they constituted a breach of Art 8, were not such as to require the exclusion of the evidence.

R v Khan (Sultan) [1996] 3 All ER 289

DRUG TRAFFICKING

International drug trafficking - sentence - intended destination of drugs

Section 19(2) of the Criminal Justice (International Co-operation) Act 1990 (UK) makes it an offence on a ship to possess or be knowingly concerned in carrying controlled drugs knowing or having reasonable grounds to suspect that the drug is to be imported to or has been exported from the United Kingdom or is to be imported or exported contrary to the law of any other state. The appellants were sentenced to terms of 12 years and 9 years for offences against this provision - it having been found that the drugs were intended to be imported into Holland. On an appeal against sentence it was argued that the appellants' sentences should be substantially reduced because other people apparently at the centre of the organisation in which the appellants were involved, had received sentences of 4 or 5 years in Holland.

Held :

The policy of the Criminal Justice (International Cooperation) Act 1990 was to see that those involved in international drug trafficking on the high seas were subject to the penalties set out in the Act and to impose punishment, subject to the maxima set out in S 19, irrespective of the intended destination of the drugs. As a matter of principle, the fact that the drugs were intended for a country where maximum sentences which could be imposed were significantly lower than in England was irrelevant. Inevitably, there being different domestic systems coping with the problem of drug trafficking, there would be different consequences according to which jurisdiction defendants found themselves in.

Regina v Wagenaar; Regina v Pronk. The Times July 10 1996

POLICE

Convictions - allegation of false record of incriminating interview - civil claim for conspiracy to pervert the course of justice and misfeasance in public office - public policy immunity for police

The plaintiff, who had been convicted of the murder of a police constable and of the offence of riot was sentenced to life imprisonment and ten years imprisonment respectively. Following an investigation into the interview conducted by the police (an interview upon which the conviction was based), the convictions were subsequently quashed on the ground that they were unsafe and unsound.

The plaintiff brought a civil action against the police for conspiracy to pervert the course of justice and misfeasance in public office. He alleged that the notes of the police interview, containing admissions of his guilt, were a false record which harmed him by contributing to his conviction for murder; that the intention of the interviewing officers was to pervert the course of investigation into the murder; and that in creating the false notes the officers acted maliciously and in the knowledge that they were abusing the office of constable.

The main issue was whether the alleged actions of the police officers are protected from any civil action for conspiracy to pervert the course of justice or misfeasance in a public office by reason of a cloak of absolute immunity conferred as a matter of public policy.

Held:

That a person whose conviction for a crime was subsequently quashed on the ground that it was unsafe and unsatisfactory could not bring any civil action for conspiracy to pervert the course of justice and misfeasance in public office against police officers investigating the crime because the officers were protected by a rule of absolute immunity conferred as a matter of public policy. Immunity covered all conduct that could fairly be said to be part of the investigatory and preparatory process.

Silcott v Commissioner of Police of the Metropolis. Court of Appeal, The Times 9 July 1996

Police - negligence - duty of confidentiality - informant - whether special relationship of proximity between informant and police giving rise to duty of care

The plaintiff, in confidence, gave certain information to the police about a suspect and requested that any contact with her be made in confidence because she did not want the information traced back to her. This information was recorded by the police in a document and left in a van, which was subsequently broken into by criminals. The document was later obtained by the person implicated. Thereafter, the plaintiff and her husband, the second plaintiff, were threatened with violence and arson and suffered psychiatric damage.

The plaintiffs brought proceedings against the chief constable alleging negligence in failing to keep the confidential information secure, on the basis that it was reasonably foreseeable that they might be harmed if the information was obtained by the criminal fraternity. The claim was struck out as disclosing no reasonable cause of action and the plaintiffs appealed. The appeal was allowed.

The chief constable appealed, contending that the police owed no duty of care to the plaintiffs or alternatively, that public policy precluded the prosecution of the plaintiffs' claim, since the police were immune from prosecution for claims arising out of their activities in the investigation or suppression of crime.

Held :

It is arguable that a special relationship exists between the police and an informant who passes on information in confidence implicating a person known to be violent which distinguishes the informant from the general public as being particularly at risk. In such a case a duty of care arises and the police must keep such information secure.

While the police were generally immune from suit on the grounds of public policy in relation to their activities in the investigation of crime, that immunity had to be weighed against other considerations of public policy. On the facts the police had assumed a special relationship existed between the plaintiffs and the police and that rendered the plaintiffs particularly at risk. Bearing in mind all the relevant public policy factors, the prosecution of the plaintiffs' claim was not precluded by the principle of immunity. The appeal was dismissed.

Swinney and another v Chief Constable of the Northumbria Police. [1996] 3 All ER 449

Entrapment - whether conduct of Police was illegal and constituted an abuse of process - drug trafficking - money laundering.

(This decision was given in interlocutory proceedings - CCU is advised that the trial continues - this judgment may therefore be the subject of an appeal)

The defendant (M) was charged with possession of the proceeds of crime, trafficking in a narcotic, possession of cocaine for the purpose of trafficking and laundering the proceeds of crime. He sought a stay of the proceedings and submitted that the reverse sting operation (Project Mercury) was illegal and constituted an abuse of process.

Project Mercury was a joint forces operation involving the United States Customs Service, the United States Internal Revenue Service and the Royal Canadian Mounted Police. In Canada, the undercover operation operated through incorporated entities established for the purpose of gathering evidence and intelligence on criminal organisations or individuals.

The defendant was introduced to certain undercover police officers who posed as financial advisers and portrayed themselves as having access to foreign bank

accounts and the ability to launder money. M told them that he had a vast sum of money which he needed to legitimize and that the money was from drugs. M then decided to accept the services of the "financial advisers" and also entered into a loan back agreement. Surveillance was also conducted on M by the RCMP and M gave additional money to be invested.

The issues for decision on the application for a stay were:

- (i) was the conduct of the RCMP illegal and
- (ii) was the conduct of the RCMP so shocking and outrageous as to bring the administration of justice into disrepute ?

Held :

1. The provisions of the criminal law apply to the police regardless of whether they are engaged in a bona fide investigation. There must be legislation that specifically exempts the police before such an exemption applies or a grant of immunity.

2. The investigators involved with Project Mercury did launder the money that was given to them by M. Project Mercury was an illegal operation that laundered the money of M; and

3. Illegality of police conduct does not, by itself, constitute an abuse of process. Prior to the establishment of Project Mercury the police consulted the Crown legal advisers over the legality of the proposed operation. The police were not motivated by bad faith or improper motives in launching Project Mercury and there was no abuse of process. In balancing individual rights and the interest of society in maintaining order, this is not the clearest of cases which warrants the imposition of a judicial stay of proceedings.

Her Majesty the Queen v Craig Bendt Matthiessen. Queen's Bench of Alberta, Canada: Judicial District of Edmonton, Action No 9203-3966-C4: 30 June 1995

RIGHTS AND FREEDOMS

Hong Kong - Bill of Rights - Freedom of expression - statutory offence of disclosing details of corruption investigation - disclosure by newspaper before target of investigation ascertained - whether Statute inconsistent with right to freedom of expression

The defendants, a newspaper company, published an article referring to an investigation by the Independent Commission Against Corruption, but stating that the target of the investigation had not yet been ascertained. They were charged under s.30 (1) of the Prevention of Bribery Ordinance (HK) with disclosing details of an investigation into a suspected offence.

The magistrate upheld the defence submission at the conclusion of the prosecution case that there was no case to answer on the ground that s. 30(1) had been repealed

by s. 3(2) of the Hong Kong Bill of Rights Ordinance because it did not admit of a construction consistent with the right to freedom of expression in Art 16(2) of the Hong Kong Bill of Rights and he dismissed the informations.

On appeal by the Attorney-General of Hong Kong by way of case stated the Court of Appeal of Hong Kong reversed that decision and remitted the case to the magistrate for trial. The defendants appealed to the Judicial Committee of the Privy Council.

Held allowing the appeal

1. On the proper construction of s.30(1) of the Prevention of Bribery Ordinance, the offence of disclosing details of an investigation in respect of an alleged offence to a person other than the subject of the investigation could only be committed where the identity of the person under investigation was known. Since the commission had only been conducting a general investigation and had no actual suspect when the articles were published, the defendants could not be guilty of the offence charged and the magistrate had properly dismissed the informations preferred against them.

2. Per curiam (and obiter) that once it is accepted that the aims of the first limb of s. 30(1) are proportionate to the legitimate aims of the section, the second limb cannot be considered disproportionate and has not been repealed by the Hong Kong Bill of Rights Ordinance.

Ming Pao Newspapers Ltd and Others v Attorney-General of Hong Kong. Privy Council. [1996] 3 WLR 272

Marijuana - police search - Canadian Charter of Rights and Freedoms - Whether evidence admissible

An anonymous tip was received by the police that the appellants were growing marijuana at their home. The police investigated, and, in the course of their investigations, visited the home, where the aroma of marijuana was detected. The police, who were in plain clothes, then identified themselves and arrested the appellants. A search warrant was obtained and marijuana plants being cultivated in the basement were seized.

The issues for consideration were whether the conduct of the police in knocking at the door of the appellants' home and "sniffing" for marijuana constituted a "search" within the meaning of s.8 of the Canadian Charter of Rights and Freedoms and whether, if the police conduct was a search, it was reasonable within the meaning of s.8. The court also considered whether evidence obtained in violation of s 8 be excluded pursuant to s. 24(2) of the Charter. (s.8 of the Charter provides that everyone has the right to be secure against unreasonable search or seizure.)

The trial judge found that there had been no violation of s. 8. The Court of Appeal dismissed the appeal and upheld the conviction. An appeal was then filed.

Held (unanimously) that the appeal should be dismissed.

On the question whether "sniffing" by the police did constitute a search within the meaning of S 8, the Court divided 4-3 with the majority deciding the question in the affirmative. The same majority determined that the search was not reasonable, but that the evidence although obtained in violation of the Charter was not to be excluded as its admission would not cast the administration of justice into disrepute. *R v Evans*. Supreme Court of Canada: January 25, 1996.(Report drawn from a summary supplied by the Department of Justice, Canada).

BANKING

Bank/client relationship - duty of bank - confidentiality - bank required to produce client's bank statement to court under subpoena

In order to prove receipt of a certain sum of money by the appellant, a third party obtained a subpoena *duces tecum* against the appellant's bank, ordering it to attend the trial and to give evidence on behalf of the third party and to produce certain bank statements of the appellant's account. The subpoena was served on the bank two working days before the trial of the action was due to begin. The bank unsuccessfully tried to contact the client to obtain his consent to disclosure.

The appellant brought an action against the bank claiming that it was an implied term of his contract with the bank that the bank would not divulge to third persons without his consent any of his transactions with the bank and that the bank had acted in breach of contract and was negligent in failing to obtain his consent.

The judge held that the disclosure of the appellant's bank statement was covered by the absolute privilege which attaches to the testimony of a witness and therefore his claim failed. On appeal, the Eastern Caribbean Court of Appeal affirmed the judge's decision. The appellant then appealed to the Privy Council.

Held : dismissing the appeal

The subpoena *duces tecum* was an order of the court compelling disclosure. The bank was under no compulsion to withhold knowledge of the subpoena from the appellant. While there was no absolute duty on the bank to inform the customer of the subpoena the bank was under an obligation to use its best endeavours to inform the appellant of the receipt of the subpoena. On the question whether the bank was negligent in not claiming the privilege afforded the customer in the banker/customer relationship the Board held that there was no head of legal privilege which the appellant or the bank on his behalf, could claim.

The Board expressly left open two issues which did not require decision given the facts of this case. Those issues are (a) whether a particular banker/client relationship could include an implied term or duty of care requiring a bank to advise a court that documents were being produced without consent and whether a bank in breach of its duty of care would be protected by the absolute immunity which attaches to the testimony of witnesses.

Robertson v Canadian Imperial Bank of Commerce. [1995] 1 All ER 824