Hin Lin Yee and Another v. Hksar

FACC No. 7 of 2009

Country: China
Region: Asia
Year: 2010
Court: Court of Final Appeal of the Hong Kong Special Administrative Region
Health Topics: Medical malpractice, Medicines

Facts

The First Appellant was a medical practitioner who, on four separate occasions, prescribed medicine that was unfit for human use as it had been contaminated with isopropyl alcohol. The Second Appellant (the First Appellantâ€™s assistant) had, on one of those occasions, finalized the prescription of the medicine and transferred it to the patient for payment.

Following reports of contamination, the First Appellantâ€™s clinic was inspected by officers of the Hong Kong Department of Health. Proceedings were brought against both appellants by the Government of Hong Kong.

In the Magistrate Court, the First Appellant was convicted of selling medicine unfit for human consumption, contrary to section 54(1) of the Public Health and Municipal Services Ordinance (â€œPHMSOâ€•). He was also convicted of possessing for sale a drug which had not been registered by the manufacturer with the Pharmacies and Poisons Board, contrary to regulation 36(1) of the Pharmacy and Poisons Regulations (PPR). The Court also found against the Second Appellant.

On appeal, the High Court of the Hong Kong Special Administrative Region held that the Magistrate had unfairly drawn a number of highly damaging inferences against the First Appellant, including (a) that the First Appellant (and the Second Appellant on the First Appellantâ€™s instructions) had deliberately contaminated medicine prescribed and sold to the First Appellantâ€™s patients; and (b) that the First Appellant had destroyed contaminated bottles to avoid further liability. These allegations had not been made by the prosecution. Nonetheless, the Court found against both appellants.

On appeal, two main issues were addressed: firstly, the criminal liability of agents to principal offenders; and secondly, the mental element in statutory offences.

Decision and Reasoning

As the agent of a principal offender, the Second Appellant had been charged on the basis of section 73 of the PHMSO, which held persons and their agents liable for selling drugs. The question in the Court was whether there was a proper basis for treating the Second Appellant as someone who had â€œsoldâ€• the contaminated medicine.Â The Court held that there was a separation between the First Appellantâ€™s medical services and the provision and sale of the medicines prescribed (after the patientâ€™s consultation, the First Appellant would write a prescription and, in a separate part of the clinic, the Second Appellant would fill the prescription and transfer the medicine to the patient for payment). The Court concluded that â€œit cannotâ€¦be doubted that she comes within section 73 as a person who sold the medicine as the servant or agent of the First Appellantâ€•. Accordingly, both appellants were held to have performed the illegal act.

Regarding mens rea, the question for the Court was whether, if an individual performs an act which is prohibited by statute, but does so in the mistaken but honest and reasonable belief that certain circumstances exist (which, if true, would mean he were not guilty of an offence) than the individual should not be held liable.

The Court concluded that the Appeal Judge had been wrong to hold that the defence of honest and reasonable belief is never available where the offence involves health and safety legislation.

The Court concluded that the proper starting point for establishing the mental elements of any statutory offence is a presumption that the prosecution must prove that the defendant had the necessary mental

element for that offence. The Court further held that this presumption could be rebutted either within the wording of the legislation (for example using words such as â€œwilfullyâ€•, â€œknowinglyâ€•, â€œnegligentlyâ€•) o

Where the presumption has been rebutted, three possible alternatives arise under Hong Kong law. Namely whether the intention of the legislation was:

i. to allow a defence where the defendant can prove that the prohibited act was done in the honest and reasonable belief that the circumstances were such that, if true, he would not be guilty of the offence; or

ii. to restrict the defences open to the accused to the defences expressly provided for in relation to the offence; or

iii. to make the offence one where no mental element is required.

The First Appellant had been charged under s.54(1)(a) of the PHMSO, which read that â€œSubject to the provisions of this section, any person who â€“ sellsâ€¦any drug intended for use by man but unfit for that purpose, shall be guilty of an offenceâ€•. The offence fell within (ii) above since the intent of the legislation was to limit the defences available to those expressly provided for by statute. These defences are:

where a defendant proves that the contravention of the law was due to the act or default of any other party; or
where the defendant received a warranty from a third party as to the quality of the drugs.

On the facts, neither of the appellants fell within either of those sections. This was because the First Appellant admitted that he had committed the act that led to the contravention; however, his defence was that he had simply not known that the medicines had been contaminated.

The Court therefore held that there was â€œno basis for thinking that the appellants [would be] able to discharge the burden of bringing themselves within either of the statutory defences or that the First Appellant has any reasonable prospect of doing [so] on any retrialâ€•.

Accordingly, the appeals of both the First Appellant and the Second Appellant were dismissed.

Decision Excerpts

â€œThe nature and subject-matter of the offence were said to be of great importance in deciding whether mens rea is required. The more serious the offence, the less likely it is that the presumption will be held to have been displaced.Â Where the intention of legislation is to ensure the protection of public health and safety, the court should conclude more readily that the presumption of mens rea has been displaced.â€•Para. 141.

â€œThe conduct being regulated generally forms an essential part of social life â€“ the provision of food and drink, the operation of machinery, working on construction sites, selling pharmaceuticals and so forth. The policy of the law is not to say: â€˜Proceed with these activities at your perilâ€™, but to say: â€˜When doing these things, you must meet proper standards aimed at promoting public health, safety and well-beingâ€™. Para. 160.

â€œThere was some discussion as to whether there is any social utility in imposing liability on a person in the 2nd appellantâ€™s position, acting as an assistant in a doctorâ€™s clinic. In my view such utility clearly exists. The self-evident policy is to promote public health and safety by imposing a regime of diligence and care to avoid supplying medicines which are unfit for use.Doctors will commonly rely on their nurses or clinical assistants to place orders for medicines kept in stock, to prepare them for use and to dispense them to patients. Doctors are seldom if ever likely to be concerned in ensuring that the medicines delivered properly match those ordered; that they come from reputable sources and are properly prepared for use by patients. The imposition of such liability promotes careful handling of the medicines by the assistant and diligent supervision by the doctor.â€• Para. 187.

â€œâ€¦there is a long line of cases in which it has been held with regard to less serious offences that absence of mens rea was no defence. Typical examples are offences under public health, licensing and industrial legislation. If a person sets up as say a butcher, a publican, or a manufacturer and exposes unsound meat for sale, or sells drink to a drunk man or certain parts of his factory are unsafe, it is no defence that he could not by the exercise of reasonable care have known or discovered that the meat was unsound, or that the man was drunk or that his premises were unsafe.â€• Para. 202.