

CASE UPDATE

19 July 2019

TRANSFER OF BENEFITS FROM CRIMINAL CONDUCT – THE DISTINCTION BETWEEN PRIMARY AND SECONDARY OFFENDERS

Yap Chen Hsiang Osborn v PP [2019] SGCA 40

SUMMARY

Last week, the Court of Appeal in *Yap Chen Hsiang Osborn v PP* [2019] SGCA 40, had the opportunity to clarify that secondary offenders (*ie* someone who does not himself commit the offence from which the proceeds were originally derived but launders the proceeds of another person's crime) cannot be charged under s47(1) Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("**CDSA**").

This decision reinforces Parliament's intention to draw a distinction between primary offenders (*ie* someone who launders the benefits of his own criminal conduct) and secondary offenders.

BACKGROUND

In May 2013, Osborn Yap ("**Yap**") received USD420,000 from a HSBC bank account in Bermuda into his DBS bank account. He proceeded to deal with the monies according to the instructions he received from an online acquaintance known only as "Laura". In particular, he withdrew and transferred various sums of money on five different occasions to three individuals. He was informed by Laura that these transactions were for the purposes of paying

customs duties and various bills, including hospital bills.

During this time, the owner of the Bermuda bank account discovered that USD420,000 had been fraudulently transferred out from his bank account without his consent and lodged a complaint.

On 5 June 2013, the Commercial Affairs Department contacted Yap for more information on the transactions. Yap did not know about the fraud. Laura eventually stopped contacting Yap.

Yap was tried and convicted by the District Court of one charge of dishonestly receiving stolen property under s411 of the Penal Code and five charges of dealing with the stolen property under s47(1)(b) of the CDSA. He was sentenced to a total of 30 months' imprisonment.

Yap appealed against both conviction and sentence while the Prosecution appealed against sentence.

The High Court dismissed both appeals.

Yap then applied to refer various questions of law of public interest to the Court of Appeal. Leave was granted for the following two questions to be referred:

- (1) Can a secondary offender [like Yap], who does not himself commit the offence from which the proceeds were originally derived but launders the proceeds of another person's crime, be properly charged under s47(1) instead of s47(2) of the CDSA? If not, how would the outcome be affected if the applicant were to be convicted under s47(2) instead?
- (2) If the answer to Question 1 is that the applicant can be charged under s47(1) of the CDSA, do "his benefits from criminal conduct" under s47(1) refer to the entire proceeds from the criminal conduct or the actual rewards or advantage gained by him (if any)?

COURT OF APPEAL'S DECISION

The Court of Appeal answered Question 1 in the negative and declined to convict Yap of the s47(2) offence in place of his convictions for the s47(1) offence. The Court of Appeal proceeded to acquit Yap of the five CDSA charges which he was convicted on.

Yap was ordered to serve the 24-month sentence imposed by the District Judge for the s411 Penal Code offence.

COURT OF APPEAL'S REASONING

The Court of Appeal noted that a key difference between a s47(1) and a s47(2) offence is that s47(2) refers to the accused "having reasonable grounds to believe" that the relevant property represents another person's benefits from criminal conduct while s47(1) does not refer to any *mens rea* requirement. The lack of a *mens reas* requirement in s47(1) makes sense if that provision applied only to primary offenders. Accordingly, s47(1) cannot be interpreted to cover a secondary offender like Yap.

The Court of Appeal then considered if Yap could be convicted under s47(2) instead. As the offences were committed in May 2013, prior to the 2014 amendments to the CDSA, the Prosecution was required by legislation to tender a foreign certificate showing that the bank fraud in Bermuda amounts to a "foreign serious offence". In the present case, no such certificate was tendered by the Prosecution.

The Court of Appeal also observed that s47(2) requires "another person" (the foreign criminal in this case) to benefit from Yap's criminal conduct. On the evidence, the Court of Appeal found it difficult to see how the foreign criminal had benefited from Yap's receipt of stolen property, which was the s411 Penal Code offence which Yap was convicted of. The Court also observed that it was Yap's laundering of the stolen property, and not his mere receipt of the same, which may have benefitted the foreign criminal.

COMMENT

Notwithstanding the outcome in Yap's case, secondary offenders can still expect to be dealt with severely under the CDSA, even with respect to a foreign predicate offence. In arriving at its decision, the Court of Appeal emphasised that the offences that were the subject of Yap's case were committed in 2013, and therefore, a foreign certificate was required to show that a "foreign serious offence" had taken place. Precisely because it was difficult to obtain such certificates as it was not an internationally established practice to issue them, the CDSA was amended in 2014 to allow a wider range of evidence to be adduced to prove the foreign law which gives rise to the foreign predicate offence.

It also bears noting that as it undertook the exercise of interpreting s47(1) and s47(2) of the CDSA, the Court of Appeal rejected several interpretations advanced by the Prosecution which while "literally possible", were ultimately untenable

in the broader context of the CDSA. In this regard, the Court of Appeal noted that a literal approach to statutory interpretation is not always conclusive and even broadly-worded legislative provisions must be interpreted sensibly, in a manner which is consistent with Parliament's intention and the overall context of the statute as a whole.

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