

**Convicting secondary offenders of money laundering:
Yap Chen Hsiang Osborn v Public Prosecutor [2019] SGCA 40**

I. Executive summary

In *Yap Chen Hsiang Osborn v Public Prosecutor* [2019] SGCA 40, the Court of Appeal (“CA”) clarified that section 47(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) (“CDSA”), which essentially makes it an offense to launder proceeds which represents one’s (i.e. the offender’s) benefits from criminal conduct, applies *only to primary* offenders (someone who launders the benefits of his or her own criminal conduct) and not *secondary* offenders (someone who does not himself or herself commit the offence from which the proceeds were originally derived, but launders the proceeds of another person’s crime).

In 2013, Mr Osborn Yap Cheng Hsiang (“Osborn”), chatted and grew intimate with someone known only as “Laura” (“Laura”) on an online dating website. At Laura’s request, Osborn received about US\$420,000 from a HSBC bank account in Bermuda into his bank account. Subsequently, Osborn followed her instructions to withdraw and transfer various sums of this money. The fraudulent transfer was discovered when the account owner was informed by the HSBC bank in Bermuda that there were insufficient funds left in his account to effect a legitimate transfer.

Osborn was subsequently tried and convicted of one charge of dishonestly receiving stolen property, under section 411 of the Penal Code (Cap 224, 2008 Rev Ed) (“PC”), as well as a further five charges of dealing with the stolen property under section 47(1)(b) of the CDSA.

Osborn then filed a criminal reference to the CA regarding the proper interpretation of sections 47(1) and (2) of the CDSA.

- Section 47(1) states that any person who “(a) conceals or disguises any property which is, or ... represents, his benefits from criminal conduct” or “(b) converts or transfers that property or removes it from the jurisdiction”, shall be guilty of an offence.
- Section 47(2) states that any person who “knowing or having reasonable grounds to believe that any property is, or ... represents, another person’s benefits from criminal conduct”, then “(a) conceals or disguises that property” or “(b) converts or transfers that property or removes it from the jurisdiction”, shall be guilty of an offence.

“Criminal conduct” is defined as “doing or being concerned in” any act constituting a “serious offence”¹ (including section 411 PC) or “foreign serious offence.”²

Regarding the interpretation of these two sections, the key issue before the CA was whether a secondary offender could be properly charged under section 47(1), instead of section 47(2) of the CDSA. The CA held that section 47(1) could not be interpreted to cover a secondary offender, such as Osborn. This was because such an interpretation would render section 47(2) redundant.

II. Material facts

A month after meeting Laura on an online dating website, Osborn agreed to Laura’s request to receive into his bank account about USD \$100,000; she explained that she needed to pay customs duties unexpectedly incurred for goods that she had bought for a customer. Later the

¹ A list of acts that constitute “serious offences” is listed in the Second Schedule of the CDSA.

² This is defined below under section IIIA(i).

same month, she requested that Osborn receive about US\$420,000 for her, to pay the full price for a new order as well as a condominium apartment. The next day, Osborn received the US\$420,000 (which amounted to S\$520,590) from a HSBC bank account in Bermuda into his DBS bank account.

Osborn then dealt with this S\$520,590 according to Laura's instructions: he ended up withdrawing and transferring various sums of money on five different occasions to three different individuals. Laura gave Osborn a different explanation for each of these transactions, ranging from the customs duties that she had mentioned earlier, to hotel bills as well as hospital bills. During this time, the owner of the HSBC Bermuda account discovered the transfer of US\$420,000 from his account, and that the transfer had been procured by fraud perpetrated on HSBC. Thereafter, a complaint was made.

Osborn was shocked when the Commercial Affairs Department ("CAD") contacted him to ask for more information, and contacted CAD when Laura re-contacted him. Laura soon stopped messaging him. Osborn was subsequently charged as stated above.

The District Judge ("DJ") convicted Osborn of all charges. Regarding the section 411 PC charge, while the court found that Osborn did not have actual knowledge that the property was stolen, he nonetheless had reason to believe that it was in fact stolen, due to red flags in Laura's behaviour and his being well-versed in basic commercial transactions.

Regarding the remaining section 47(1)(b) CDSA charges, the DJ held that the *act* required under the charges – of transferring or removing from the jurisdiction stolen property – was satisfied. The *intent* required was also satisfied, because the court had already found (under the section 411 PC charge) that Osborn had reason to believe that the property was stolen. Consequently, Osborn was then sentenced to 24 months' imprisonment for the section 411 PC charge and six months' imprisonment for one of the section 47(1)(b) CDSA charges, resulting in a total of 30 months' imprisonment.³ The High Court dismissed Osborn's subsequent appeal.

Osborn then applied to refer various questions of law of public interest to the CA, and the CA granted leave for two questions to be referred.

III. Questions Referred

The two questions were:

- (a) Question 1: Can a secondary offender like the applicant [Osborn], 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 section 47(1) instead of 47(2) of the CDSA? If not, how would the outcome be affected if the applicant were to be convicted under section 47(2) instead?
- (b) Question 2: If the answer to Question 1 is that the applicant [Osborn] can be charged under section 47(1) of the CDSA, do "his benefits from criminal conduct" under section 47(1) refer to the entire proceeds from the criminal conduct or the actual reward or advantage gained by him (if any)?

A. Question 1: Conviction under section 47(1)

(i) Can a secondary offender be properly charged under section 47(1) instead of 47(2)?

³ Sentences ranging from 2-12 months were imposed for the remaining four CDSA charges, but those sentences would run concurrently with the sentences for the abovementioned charges.

Both parties, and the CA, agreed that section 47(1) was targeted at *primary* offenders, while section 47(2) was targeted at *secondary* offenders. Section 47(1) states that any person who “(a) conceals or disguises any property which is, or ... represents, his benefits from criminal conduct” or “(b) converts or transfers that property or removes it from the jurisdiction” shall be guilty of an offence. The CA referred to the fact that section 47(1) referred to “*his* [i.e. the accused’s] benefits from criminal conduct”, while section 47(2) referred to “*another person’s* benefits from criminal conduct”.

However, the Prosecution argued that a secondary offender who had been convicted of the section 411 PC offence, was *also* a primary offender for the purposes of section 47(1). It claimed that the section 411 PC offence was a “serious offence” under section 47(1); thus someone who was convicted under section 411 PC was “*transformed*” into a primary offender, and could also be charged under section 47(1).

The CA rejected this argument. While the Prosecution’s interpretation was literally possible, it was untenable because it would render section 47(2) redundant. Under this argument, a secondary offender who deals with the benefits of another person’s crime within the meaning of section 47(2) would almost invariably be liable to be convicted of the section 411 PC offence, and thus under section 47(1) as well. However, this would render section 47(2) redundant, and such a result was diametrically opposed to the principle that the courts should endeavour to give meaning to every word in a law.

The CA also pointed out that section 47(2) referred to the accused “having reasonable grounds to believe” that the relevant property represented another person’s benefits from criminal conduct, whereas section 47(1) did not refer to any such requirement of knowledge. The apparent lack of such a requirement in section 47(1) would make eminent sense if that provision applied *only* to primary offenders. If so, it would be unnecessary to stipulate any knowledge requirement, simply because a primary offender who benefits from his own criminal conduct must necessarily know that he is dealing with such benefits. As such, the CA concluded that section 47(1) could not be interpreted to cover a secondary offender, such as Osborn, who had been convicted of the section 411 PC offence. The only possible interpretation of section 47(1) was that it covered *only* primary offenders.

The CA also addressed the Prosecution’s argument that its interpretation would aid the authorities to achieve the aims of the CDSA more effectively, in that it would facilitate convictions where an offender sought to deal with the proceeds of crime committed in a foreign jurisdiction. Specifically, instead of having to first prove that a foreign offence had been committed, the Prosecution could simply use the section 411 PC offence to anchor the section 47(1) conviction.

In this regard, the CA observed that Parliament had specifically amended the CDSA in 2014. Prior to 2014, a “foreign serious offence” was defined as an offence “against the law of... a foreign country *stated in a certificate* purporting to be issued by ... the government of that country”, where the “act or omission constituting the offence ... would, if it had occurred in Singapore, have constituted a serious offence”. However, Parliament recognised that were serious difficulties in obtaining foreign certificates, as it was not an internationally established practice to issue such certificates. It therefore amended the CDSA in 2014, to permit a wider range of evidence which could be used to prove the foreign law giving rise to the underlying offence. Parliament’s action in this regard undermined the Prosecution’s interpretation – if the Prosecution was correct that secondary offenders who laundered proceeds of foreign crimes

could be charged under s 47(1), there would not have been a need to amend the law in the first place.

Therefore, Question 1 was answered in *the negative*. On the facts, a secondary offender such as Osborn, 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 section 47(1).

(ii) Whether Osborn could be convicted under section 47(2) instead

The CA then considered whether Osborn could be convicted under section 47(2) instead. Since the offences took place prior to the 2014 CDSA amendments (as discussed above), the Prosecution would have to comply with the pre-2014 version of the CDSA. That prior version required the Prosecution to either provide evidence to show that a "serious offence" had been committed overseas, or provide a foreign certificate to prove that a "foreign serious offence" had taken place. The Prosecution did not rely on the first option; neither did it tender a foreign certificate.

Nonetheless, the Prosecution argued that Osborn could still be convicted under section 47(2), under the definition of "criminal conduct". Section 47(2) requires the offender to know or have reasonable grounds to believe that the property in question is or represents "*another person's* benefits from *criminal conduct*", where "criminal conduct" means "doing or being *concerned in*" any act constituting a "serious offence" or "foreign serious offence." The Prosecution claimed that the phrase "another person" in section 47(2) relates to the primary offender who engaged in criminal conduct overseas, and the foreign criminal was "concerned in" Osborn's section 411 PC offence, which was a "serious offence".

The CA rejected this argument. First, this interpretation would, again, render the definition of "foreign serious offence" prior to the 2014 amendments largely redundant. If an offender could simply be charged with a "serious offence" (e.g. under section 411 PC) to form the basis of a section 47(2) offence, there would almost never be a need for the Prosecution to obtain a foreign certificate. As explained earlier, when amending the CDSA in 2014, the Parliament recognised that there were serious difficulties in obtaining foreign certificates. Accordingly, this amendment to the CDSA was an implicit recognition that the authorities would generally need to obtain a foreign certificate to secure a conviction under section 47(2).

Second, the Prosecution's approach was circular. It was essentially arguing that Osborn should be convicted of an offence of dealing with property which represented the benefits of the foreign criminal's conduct. The foreign criminal's conduct was then defined with reference to Osborn's criminal offence, i.e. being "concerned in" the latter offence.

Third, section 47(2) required the "another person" (the foreign criminal) to benefit from Osborn's criminal conduct. The CA found it difficult to see how the foreign criminal had benefited from Osborn's receipt of stolen property (under the section 411 PC offence). Instead, it was Osborn's *laundering* of the stolen property, not his mere *receipt* of the property, which could benefit the foreign criminal.

As such, the CA rejected the Prosecution's interpretation of section 47(2), and held that a section 47(2) offence was not made out because the Prosecution failed to tender a foreign certificate showing that the bank fraud in Bermuda amounted to a foreign serious offence.

B. Question 2: If Osborn could be convicted under section 47(1), could “his benefits from criminal conduct”, under section s 47(1), refer to the entire proceeds from his criminal conduct or the actual reward or advantage gained by him?

The CA stated since it had decided that a *secondary* offender such as Osborn could not be charged under section 47(1), this second question did not arise. This was because the “his” in section 47(1) could only refer to the primary offender, thus the phrase “his benefits from criminal conduct” must refer to the benefits accruing to the primary offender.

IV. Conclusion

The CA therefore acquitted Osborn of the five CDSA charges. However, Osborn still had to serve the 24-month sentence imposed by the DJ for the section 411 PC offence.

V. Lessons learnt

Practitioners should take note of the ambit of section 47(2) for secondary offenders. First, while actual knowledge of the underlying crime is not necessary, the Prosecution could still charge a secondary offender for having “reasonable grounds to believe” that the proceeds he/she received were derived from another person’s benefits from criminal conduct. Second, in this case Osborn was charged under the previous version of the CDSA, which required a foreign certificate (and the Prosecution failed to provide such a certificate). However, the Prosecution no longer needs to tender foreign certificates to prove that such “foreign serious offences” had taken place; instead, the CDSA now permits a wide range of evidence to prove the foreign law giving rise to the underlying offence.

The public should also be wary of online “love scams” and remain vigilant for red flags in the behaviour of their online dates. Some red flags would include an online date’s request to transfer large amounts of money, not having a proper bank account while doing business overseas, and inconsistent changes to reasons given for such suspicious requests.

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