

Criminal Litigation

When would using a computer be a crime? CFI decision narrowed the scope of application of the offence of accessing a computer with dishonest intent

Introduction

The offence of “access to a computer with dishonest or criminal intent” under section 161 of Crimes Ordinance (Cap. 200) (the “**Offence**”) has been widely used by the prosecution for cases including taking upskirt photos, hacking, cyber frauds and leaving provocative comments on the internet. In a recent ruling of the Court of First Instance (the “**CFI**”) *Secretary of Justice v Cheng Ka-Yee and others* [2018] HKCFI 1809, the judge ruled that the actions of four teachers who leaked the questions of a school entrance examination did not amount to the crime of “obtaining access to a computer with a view to dishonest gain for another”. This ruling clarified and narrowed the scope of application of this controversial provision.

Background and the Magistrate’s ruling

Three teachers in a primary school (the “**Primary School**”) and a teacher in another primary school (the “**Four**”) had used mobile smartphones and a school’s computer to leak pictures and copies of the questions of the admission interview of the Primary School. The Four were charged with violating s.161 of the Crimes Ordinance. In 2016, The Four were acquitted by Kowloon City Magistrates’ Court. The magistrate ruled that she was not sure if the three who worked in the Primary School were warned of the confidentiality obligations with respect to the questions of the admission interview and that the prosecution failed to prove the objective limb of the *Ghosh* test on “honesty” against the Four. On the review application by the prosecution, the Magistrate confirmed her decision to acquit.

The CFI’s decision

The prosecution then appealed to the CFI. In his decision, among other things, Deputy High Court Judge Pang Chung-ping ruled that the legal position advanced by the Prosecution that whether or not a person should be punished depends on the type of devices that the person used to communicate cannot be reasonably explained. The use of communication device was only peripheral to the criminal or dishonest plan, which could be achieved with or without the communication device. He also ruled that using a person’s own mobile smartphones, or use of computer which is not unauthorized, to leak questions did not amount to “obtaining access to computer”, and refused to convict the Four.

Justice Pang drew a difference between “obtaining access to a computer” and “using a computer”. He does not support the contention that “obtaining access to computer” includes using a person’s own smartphone to communicate, to take photographs or to send messages. To prove *actus reus* (the criminal act), the prosecution must prove “the unauthorized extraction and use of information” from a computer.

The Department of Justice has applied for leave to appeal and Justice Pang has allowed the leave. If the Court of Final Appeal (the “CFA”) also allows the leave to appeal, this case will be finally determined by the CFA.

Impact of the case on freedom of speech

Human right groups welcome the CFI’s ruling. The Offence has been criticised for its excessive usage, which exceeded the original purpose of the law. The prosecution has been using the Offence for charging netizens who leave provocative comments on the internet. After the CFI’s ruling which narrows the scope of the Offence, it is unlikely that leaving provocative comments on the internet will be regarded as “access to computer”, as it is unlikely to be “unauthorized extraction and use of information” from a computer.

Impact of the case on upskirt photo cases

This ruling clarified the purview of the Offence and the Department of Justice has to suspend the prosecutions of crimes related to smartphones, including taking of upskirt photos. Unless the CFI’s ruling is overruled by the Court of Final Appeal, the Department of Justice has to consider other charges including outraging public decency under common law, loitering under section 160(3) of the Crimes Ordinances (Cap. 200), or disorder in public places under section 17B(2) of the Public Order Ordinance (Cap. 245).

However, the elements of the alternative charges are different from those of the Offence.

1. For the charge of acts outraging public decency, it must be proved, among other things, that at least two people witnessed what happened and the offence must have been committed in a place where there was a real possibility that members of the general public might witness it.
2. For the charge of loitering causing concern, it must be proved, among other things, that offender has been idling, hanging about or remaining in or about the vicinity of the common parts of a building, which includes entrance hall, lobby, toilet, compound, car park, etc. It must also be proved that such loitering causes any person reasonably to be concerned for his/her safety or well-being.

3. For the charge of disorder in public places, it must be proved, among other things, that the act was done in public place, the victim is put in fear of being so harmed through the disturbance, and an average Hong Kong citizen is likely to be outraged by such conduct.

As it may be difficult for the prosecution to prove the elements of one of the above three charges, the prosecution has long been using the Offence, which has been relatively easier to prove, for the upskirt photo cases. After the CFI's decision, it may be more difficult for the prosecution to prove the offence in some of the upskirt photo cases.

In May this year, the Law Reform Commission's Review of Sexual Offences Subcommittee proposed the creation of a new offence of voyeurism to criminalise acts of non-consensual observation or visual recording of another person done for a sexual purpose. According to the report, the forms of visual recording would include photography, video recording and the taking of digital images. If this becomes law, then it will cover upskirt photo cases beyond the use of smartphones and computers and no need to use s.161 of the Crimes Ordinance for such offences.

For enquiries, please contact our Litigation & Dispute Resolution Department:

E: criminal@onc.hk

T: (852) 2810 1212

W: www.onc.hk

F: (852) 2804 6311

19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong

Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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