

Case Summary

Chow Hang Tung (鄒幸彤) v Secretary for Justice

HCAL 401/2022; [2022] HKCFI 2225; [2022] 4 HKLRD 183

(Court of First Instance)

(Full text of the Court’s judgment in English at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=146190&currpage=T)

Before: Hon Alex Lee J

Date of Hearing: 12 July 2022

Date of Judgment: 2 August 2022

Judicial review – power to lift reporting restrictions under s. 87A(2) of Magistrates Ordinance (Cap. 227) – main purpose of s. 87A for protection of accused – meaning of the first “shall” in s. 87A(2) – plain and ordinary meaning – purposive and contextual interpretation – mandatory duty on magistrate to lift reporting restriction upon application by accused – magistrate having no discretion – decision of magistrate refusing to lift reporting restriction ultra vires – fairness to co-accused – whether magistrate had failed to take into account relevant considerations – whether reporting restrictions “strictly necessary” in the interest of justice fact and case sensitive

Background

1. The Applicant and three Interested Parties (namely, the Hong Kong Alliance in Support of Patriotic Democratic Movements of China and two others) were prosecuted for one charge of incitement to subversion, contrary to NSL 22 and 23. The Prosecution intended to seek a committal of the defendants to the CFI for trial. On the first appointed return day, the Applicant made an application to the Principal Magistrate (“the Magistrate”) asking that the reporting restrictions under s. 87A(1)

of the Magistrates Ordinance (Cap. 227) be lifted. The Magistrate refused the application whereupon the Applicant sought to challenge the decision of the Magistrate (“the Decision”) by way of judicial review.

2. The Magistrate had made the following points in arriving at the Decision: (para. 9)

- (a) Section 87A of the MO, as an exception to the general principle which allowed reporting of court proceedings, was enacted to realise the spirit of fair trial.
- (b) The court had an implied discretionary power when considering an application made pursuant to s. 87A(2).
- (c) The criminal case attracted local and overseas attention and had been widely reported by the media.
- (d) If the reporting restrictions were lifted, it would lead to wide and sharp discussions, even attacks, before trial. Further, some of the people who attended court had shown reckless disregard for order. The above would bring mental pressure to witnesses who might even be daunted and deterred, leading to a fair trial being undermined.
- (e) There would be no prejudice to the defence if the reporting restrictions were not lifted.

Major provision(s) and issue(s) under consideration

- BL 27 and 87
- NSL 4 and 41(4)
- BOR 10
- Criminal Procedure Ordinance (Cap. 221) (“CPO”), ss.122 and 123
- Magistrates Ordinance (Cap. 227) (“MO”), ss. 80 and 87A

3. The Court focused on the following two issues:

- (a) whether the first “shall” in s. 87A(2) of the MO bore its plain and literal meaning so that it imposed a mandatory duty on the Magistrate to lift the reporting restrictions upon an application by an accused pursuant to that subsection, i.e. whether the Magistrate had made an error of law by relying on a discretion he

did not have under s. 87A (the *ultra vires* issue);

- (b) if the answer to (a) was in the negative so that the Magistrate had a discretion, whether he had taken into account irrelevant considerations or had failed to take into account relevant considerations in coming to his decision not to lift the reporting restrictions.

Summary of the Court's rulings

4. Before addressing the issues in question, the Court gave a brief outline of committal proceedings in general at paragraphs 11 to 29 of the judgment.

Section 87A of the MO

5. The relevant provisions of s. 87A (restrictions on reports of committal proceedings) of the MO read: (para. 30)

“(1) No person shall publish in Hong Kong a written report, or broadcast in Hong Kong a report, of any committal proceedings in Hong Kong containing any matter other than that permitted by subsection (7).

(2) Notwithstanding subsection (1), a magistrate shall, on an application for the purpose made with reference to any committal proceedings by the accused or one of the accused, as the case may be, order that subsection (1) shall not apply to reports of those proceedings, and any such order shall be entered in the Magistrate's Case Register.” (emphasis added by the Court)

6. The Court made some initial observations on s. 87A of the MO which was added in 1971 and modelled on s. 3 of the Criminal Justice Act 1967 of the UK (“the 1967 Act”): (paras. 32-33)

(a) The s. 87A(1) restrictions applied only to committal proceedings.

(b) The s. 87A(1) restrictions were in addition to, and not in derogation from, other similar statutory restrictions such as s. 9P

of the CPO which restricted the reporting of bail proceedings.

(c) Putting the dispute about the meaning of the first “shall” in s. 87A(2) aside, there could be little doubt that on every other occasion when “shall” was used in s. 87A in contrast to “may”, it was used in a mandatory rather than permissive sense. This usage of “shall” and “may” was consistent with their usage in other sections in the MO about committal proceedings.

(d) Since committal proceedings included a preliminary inquiry, if the accused elected for one, then both s. 87A and s. 80 (place where examination taken not an open court) of the MO would be relevant.

(e) The object of the s. 87A restrictions was to prevent potential jurors from reading details of the prosecution case as they came out in the committal proceedings, and from forming a prejudice against the accused. Thus, the main purpose of s. 87A was to protect an accused from pre-trial adverse publicity which might affect the future jury. For this reason, the accused, not the prosecution, was given the right to waive this protection.

7. Counsel for the Applicant relied on the principles of open justice (requiring that subject to well recognized exceptions, the contents of a public hearing could be fully reported) and English case authorities on the 1967 Act in arguing that the lifting of reporting restrictions was mandatory at the instance of the accused. The Court observed that as the mandatory nature of s. 3(2) of the 1967 Act (and hence s. 87A(2) of the MO) formed an integral and essential part of the reasoning of the English courts in those cases, and the English judges had spoken in one voice on the interpretation of the 1967 Act, the unanimous view of the judges merited serious consideration.

Effect of local context and legal framework on the interpretation of s. 87A of the MO

8. Although the Court accepted that local context and legal framework were important in construing a piece of legislation and that open justice

was a means to a fair trial, it was unable to agree with Counsel for the Respondent that the local context and legal framework in Hong Kong (comprising the Basic Law, the NSL and the BOR) called for an interpretation of s. 87A which was different from its plain meaning as supported by the English case authorities even though they were all from the pre-Human Rights Act 1998 (UK) era. (paras. 47-49)

9. The Court was unable to see how reporting restrictions *on its own* could serve as an effective means to protect prosecution witnesses from interference or undue pressure. It considered that the Respondent's contention that the lifting of reporting restrictions would lead to the frustration of the ultimate aim of doing justice was exaggerated and untenable: (para. 54)

(a) The prosecution had a legitimate interest in maintaining the fairness of the trial whether before or after reunification in 1997. (para. 50)

(b) The common law principles of open justice and press freedom were eminently featured in BL 27, BL 87, BOR 10, NSL 4 and NSL 41(4). The right to a fair trial was entrenched rather than altered by the Basic Law; the common law principles of open justice (subject to well-defined exceptions) remained the norm after reunification, and the NSL did not change that. Further, the prosecution had not asked for a closed court order under NSL 41(4). (para. 51)

(c) The major object of s. 87A(1) of the MO was to prevent prejudice against the accused. This was no different from its English equivalent, i.e. s. 3(2) of the 1967 Act; hence the English case law was directly relevant. (para. 52)

(d) It must be taken that the Legislative Council was aware of the English case authorities on s. 3(2) of the 1967 Act when it enacted s. 87A. Both "shall" and "may" were used in s. 87A, so that there could be no doubt that the Legislative Council appreciated at the time that the two words bore different meanings. (para. 52)

- (e) The consistent usage of “shall” in all other provisions in the MO relating to committal proceedings strongly suggested that the first “shall” in s. 87A(2) should bear the same meaning as it appeared elsewhere in the other places of the MO dealing with committals. (para. 53)

- (f) The Respondent’s concern that prosecution witnesses might be deterred from giving evidence in the absence of reporting restrictions was speculative: (para. 54)
 - (i) Except when there was a preliminary inquiry, return days were largely administrative in nature and did not involve examination of evidence in support of the charge.
 - (ii) The hearing of a preliminary inquiry would not be in open court and the public could be lawfully excluded if the ends of justice would be best answered by so doing: s. 80 of the MO.
 - (iii) There were other measures at the court’s disposal for protecting witnesses.

Whether the first “shall” in s. 87A(2) was capable of bearing a facultative meaning and conferred a discretionary power

10. In relation to the Respondent’s submission that depending on the context and purpose, the word “shall” was capable of bearing a facultative meaning and conferred a power or discretion, the Court held: (paras. 55-57)

- (a) The application of this common law principle was context-specific.
- (b) The natural and ordinary meaning of the first “shall” in s. 87A(2) did not lead to any absurdity. On the contrary, a mandatory “shall” matched the legislative intent and was also consistent with the usage of that word in the other parts of the MO relating to committal proceedings.
- (c) There was no evidence that the policy behind s. 87A was for the protection of prosecution witnesses. Rather, every evidence pointed to the protection of the accused, so that it would be up

to the accused to decide whether he would waive that protection.

Conclusion on the ultra vires issue

11. The Court held that there was no cogent or convincing reasons for the Respondent's proposition that the provisions in s. 87A of the MO should bear a meaning other than their plain and ordinary meaning. On the contrary, a purposive and contextual interpretation and a consideration of the case law pointed in unison to the conclusion that s. 87A(2) meant what it said in that a magistrate was, at the instance of the accused, under a mandatory duty to lift the s. 87A(1) restrictions. It followed that the Decision was *ultra vires* in that the Magistrate purported to exercise a discretion which did not exist. (para. 58)

12. The Court acknowledged that the operation of s. 87A(2) might result in unfairness in a multi-defendant situation where not all of them agreed to the lifting of reporting restrictions. The magistrate would have no discretion even when that happened. The Court remarked that this might be an area of reform which the Legislative Council would like to consider. (para. 59)

13. Although an issue might arise as to whether s. 87A(2) was so wide that would violate the fair trial right of the co-accused, the Court refrained from giving any conclusive views on this issue for the following reasons:

(a) All the Interested Parties had taken a neutral stand and had not objected to the Applicant's application. (para. 60)

(b) Although the discretion which the Respondent sought to read into s. 87A(2) could not be supported by common law rules of statutory interpretation, whether a "remedial interpretation" could and should be adopted (as in *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574) had not been argued by the parties and should be left for future consideration in a suitable case. (para. 61)

Whether the Magistrate had failed to take into account relevant

considerations in coming to his Decision

14. As the Court had ruled that the Magistrate did not have a discretion under s. 87A(2), it would not be necessary to consider whether he had taken into account irrelevant considerations or had failed to take into account relevant considerations in exercising his discretion. Even assuming that the Magistrate did have a discretion so that the protection and interests of prosecution witnesses could be a legitimate consideration, the Court was inclined to hold the view that a magistrate presiding over committal proceedings should not refuse to accede to an application under s. 87A(2) unless such refusal was “strictly necessary” in the interests of justice, citing BOR 10. Whether the reporting restrictions were “strictly necessary” would be fact and case sensitive. However, the Magistrate did not seem to have considered the following matters which were relevant: (paras. 62-65)

- (a) whether, and if so to what extent, the s. 87A(1) reporting restrictions were effective in achieving the aim of protecting prosecution witnesses;
- (b) if the concern was about unruly behaviour of some members of the public present in court, whether it could be alleviated by excluding them pursuant to s. 122 of the CPO, s. 80 of the MO (for preliminary inquiry) and/or by ordering a hearing in camera pursuant to s. 123 of the CPO;
- (c) if the concern was about the revelation of identities of prosecution witnesses, whether an anonymity order could help;
- (d) if the concern was about the risk to the impartiality of potential jurors, consideration could be given to trying the case by a panel of three judges under NSL 46 instead of having a jury trial;
- (e) whether there were civilian witnesses and, if so, the nature of their evidence; if the prosecution witnesses were all police officers, whether it could be expected that they were less likely to yield to improper pressure or be deterred from giving evidence;
- (f) whether counsel could so tailor their speeches in court as to avoid revealing the identity of the prosecution witnesses and the contents of their evidence.

15. Hence, even if there were such a discretion as contended by the

Respondent, the Decision would still be flawed in that the Magistrate had failed to take into account relevant considerations as a result of which it had not been shown that the reporting restrictions were “strictly necessary” in the circumstances. (para. 65)

16. In conclusion, the Court ordered that the Decision be quashed and that the Magistrate should make an order to lift the reporting restrictions in accordance with s. 87A(2) of the MO when the Applicant next appeared before him. For the avoidance of doubt, the above orders of the Court did not affect the restrictions on reporting bail proceedings imposed by provisions other than s. 87A of the MO (para. 66)

#583695v3D