To : All Counsel/Senior Law Clerks/Prosecutions
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致：刑事檢控科各律師/高級律政書記
裁判法院各法庭檢控主任

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CRIMINAL APPEALS BULLETIN
刑事上訴案判例簡訊

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This Bulletin summarises recent judgments which the editors consider of significance.
本簡訊輯錄近期上訴案件中各編輯認爲重要判詞的摘要。

(* Denotes Government Counsel
(*代表政府律師

# Denotes Appellant's/Applicant's/Respondent's Counsel)
#代表上訴人/申請人/答辯人的律師)

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Appeal No. (Date of Judgment)	Case Title	Significance

A. APPLICATIONS FOR REVIEW OF SENTENCE
申請刑罰覆核

AR 7/2006 & CA 126/2007 Ma CJHC Stuart-Moore VP Stock JA (6.6.2008) *K Zervos SC & Winsome Chan #L J Poots (R) Cheung Kam-chuen (A)	SJ v HII Siew-cheng (R) HKSAR v WONG Yat-san (A)	**Dangerous drugs/Trafficking in ketamine and ecstasy/New sentencing guidelines/Ketamine and ecstasy both highly dangerous with potential for psychological dependence/No good reason to treat traffickers in either drug differently/Same sentencing guidelines for each drug/No retrospective effect** 危險藥物 – 販運氯胺酮及忘我 – 新判刑指引 – 氯胺酮和忘我兩者均高度危險，有可能造成心理上的依賴 – 沒有充分理由對氯胺酮及忘我的販運者給予不同對待 – 兩種危險藥物的判刑指引相同 – 不具追溯力

Hii Siew Cheng (‘*Hii*’), the Respondent in AR 7/2006, was convicted on 12 June 2006 of an offence of trafficking in ketamine. He pleaded guilty to unlawfully trafficking in 1.97 kilogrammes of a powder containing 1.64 kilogrammes of ketamine, and was sentenced to 7 years and 4 months’ imprisonment. In the absence of specific guidelines for sentencing ketamine traffickers, the judge followed the practice of using the sentencing guidelines in *HKSAR v Lee Tak-kwan* [1998] 2 HKC 371, for trafficking in MDMA, or ‘*ecstasy*’. Prior to this, the judge had heard evidence about ketamine and ecstasy from a number of experts in the course of which comparisons as to the adverse effects of each were drawn. In the absence of specific guidelines for ketamine and when justifying her decision to adopt the sentencing guidelines for ecstasy in Hii’s case, the judge relied on *Seabrook v HKSAR* (1999) 2 HKCFAR 184, 192.

On review, it was submitted that the time had now been reached, in the light of present medical knowledge about ketamine and its prevalence in Hong Kong, for sentencing guidelines to be provided which dealt with ketamine in its own right. It was further argued that the ecstasy guidelines in *Lee Tak-Kwan*, being applied in many ketamine trafficking cases, were themselves out of date as the Court of Appeal’s observations in that case had been overtaken by recent medical research into ecstasy. It was said that if the judge in Hii’s case had correctly found that ecstasy and ketamine were both addictive in the sense she had described, it was not appropriate for ketamine or ecstasy traffickers to be sentenced on the existing ecstasy guidelines when these guidelines related to

what was understood at that time to be a non-addictive drug. In these circumstances, it was said that just as sentencing guidelines were needed for ketamine, so also the guidelines for ecstasy needed to be updated so that they were kept in line with modern medical knowledge. For that reason, arrangements were made for the consolidation of a case concerned with ecstasy so that it could be used as a means of revisiting, if necessary, the ecstasy guidelines.

For that purpose, CA 126/2007 was consolidated with the review hearing. In that case, Wong Yat-san (‘*Wong*’) had been sentenced on 29 March 2007 to 5½ years’ imprisonment after trial for trafficking in 1,510 blue tablets containing a total of 5.35 grammes of ice mixed with 85.11 grammes of ecstasy, with a street level value of $125,300.

Held :

(1) Whichever of the two drugs was the more prevalent, the most important features of the evidence were that both drugs were prevalent and both drugs were targeted at the young, particularly those aged under 21. Each drug had serious side effects which impinged not just upon the consumers but also on the community at large. It was plain, also, that ecstasy and ketamine were frequently taken by the same users to fill a gap as, for example, when ketamine was snorted before an ecstasy tablet had time to take effect or when ketamine was taken after the effects of ecstasy had begun to wane. Sometimes, they were taken simply to produce a new and different experience;

(2) It mattered little which of these drugs was the more prevalent. They were both, potentially at least, highly dangerous and they were addictive in the sense that they had the potential for psychological dependence. No good reason had been shown for treating traffickers of ketamine differently from those who trafficked in ecstasy;

(3) The most significant changes since *Lee Tak-kwan*’s case was the element of addictiveness which had been established in regard to each drug. It was this which primarily distinguished the evidence available and the evidence available in *Lee Tak-kwan* which led the court to say that ecstasy was not addictive and that psychological dependence was rare. These two drugs, different in their own ways, pharmacologically and in the harm they could do, were not to be distinguished when it came to dealing with those who were caught trafficking in them;

(4) On the information presently before the court, ketamine and ecstasy had been rightly described as the most popular and the

second most popular psychotropic substances of abuse amongst young drug takers, respectively. It was apparent, also, that these two types of drug were often taken in combination to complement each other and that, with each, a tolerance to them developed giving rise to psychological dependence and the adverse effects of toxicity. While there was no '*solid evidence*' of long-term effects due to toxicity related to the abuse of heroin, it was '*highly likely*' to be a factor. Relevant criminal studies had shown this to be so and human studies of a similar kind were impossible for obvious ethical reasons;

(5) In those circumstances, and subject only to the weight of the respective '*doses*' normally used for each drug so that priority of treatment was achieved, there should be sentencing guidelines for both ketamine and ecstasy and those should be the same. Moreover, having regard to the addictive and toxic elements of both drugs, the sentencing guidelines should be higher than those outlined in *Lee Tak-kwan*;

(6) Sentencing guidelines were called for in regard to ketamine, which had been shown not only to be a prevalent drug in Hong Kong but also, seemingly, the most popular of all amongst those under 21 who abused drugs. Ecstasy was closely associated with ketamine. Furthermore, both drugs had been shown to be addictive in the sense that they gave rise to psychological dependence. These were the prime factors taken into account in the formulation of the guidelines which should be the same for both types of drug;

(7) The following tariffs for sentence after trial for traffickers in ketamine and ecstasy would apply:

(1)	Up to 1 gramme	- within the sentencer's discretion
(2)	Over 1 gramme to 10 grammes	- 2 to 4 years' imprisonment
(3)	10 to 50 grammes	- 4 to 6 years' imprisonment
(4)	50 to 300 grammes	- 6 to 9 years' imprisonment
(5)	300 to 600 grammes	- 9 to 12 years' imprisonment
(6)	600 to 1,000 grammes	- 12 to 14 years' imprisonment
(7)	Over 1,000 grammes	- 14 years upwards

(8) It was not envisaged that a trafficker in ketamine or ecstasy who visited a discotheque or similar premises would be given a non-custodial sentence under any circumstances save where these were exceptional in the extreme. The guidelines were intended to deter traffickers who frequented such premises where young people were likely to be. In very many instances, it was likely to be the small-time pushers of drugs, often with a mere handful of tablets to supply to others, who shouldered the responsibility for

taking young people off the rails and started them on a path of self-destruction through drugs;

(9) As regards '*social trafficking'*, the Court of Appeal, in *HKSAR v Wong Suet-hau and Another* [2002] 1 HKLRD 69, said:

> *51. In our opinion, while some of the 'social' or 'non-commercial' trafficking cases involving small quantities of drugs can properly be regarded, when all the circumstances are examined, as falling into the lower end of the sentencing scale applicable to the dangerous drug in question, we are firmly of the view that this factor should not, in itself, provide a general basis for imposing a lighter sentence, than would have been imposed for commercial trafficking. The 'friend' who starts off or perpetuates another's abuse of drugs, is as dangerous to the community as the commercial supplier of small quantities, who will generally traffic in drugs with those already addicted.*

In the unlikely event that an habitual abuser of ketamine or ecstasy or both, with no previous convictions for trafficking in dangerous drugs, was caught in the act of supplying a close acquaintance such as a boyfriend or girlfriend who was also a regular consumer of drugs, this might well give rise to circumstances where a non-custodial sentence would be justified. However, care must be taken in regard to mitigation of this kind that regular traffickers, in order to avoid what in practice would be an inevitable sentence of imprisonment, did not succeed in availing themselves of mitigation along such lines;

(10) The new guidelines did not have retrospective affect so that the tariff bands for trafficking in ketamine and ecstasy would only apply to offences committed after this judgment was given. It followed that Hii and Wong were not affected by them.

Result - (1) Application for review of sentence allowed, but no alteration made to Hii's sentence;

(2) Wong's application for leave to appeal allowed, and sentence of 5 years' imprisonment substituted.

B. CRIMINAL APPEALS/ AGAINST CONVICTION 刑事上訴案件/針對定罪

CA 519/2006 NG Wai-yip

Yeung JA
McMahon &
Barnes JJ

(28.5.2008)

*Jonathan Man

#K B Egan

District Court/Adequacy of reasons for verdict/Reasons must be directed at the issues/Real issues thoroughly dealt with by trial judge

區域法院 – 裁決理由須充分 – 理由須針對爭論點 – 主審法官已徹底處理真正的爭論點

The Applicant was convicted after trial of an offence of fraud, contrary to s 16A(1) of the Theft Ordinance, Cap 210.

On appeal, it was submitted that the judge had failed to give adequate reasons for his verdict and to demonstrate that he had properly evaluated the evidence of the witnesses. The conviction was said to be against the weight of the evidence and to be unsafe and unsatisfactory.

Held :

(1) There was no doubt that a judge, in deciding a criminal case, was obliged to give reasons for his verdict. Those reasons had to be adequate in the circumstances of the particular case. The principle was stated by O'Connor J in *R v Lam King-ming* Cr App 601/1979:

> *The reasons for verdict should, in a manner appropriate to the circumstances of the case, illustrate the salient points in the case and demonstrate that the evidence has been evaluated. Significant inconsistencies and conflicts should be dealt with in such manner as to indicate how those matters were resolved. There is no simple formula for what ought to be in a judgment as it must be related to the circumstances of the particular case. The magistrate should state his reasons to such an extent as will inform the parties as to how and why the particular verdict was arrived at and furthermore will enable an appellate court to perform its duty.*

(2) In *Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority* [1998] 4 HKC 505, 515, Li CJ said:

> *Where there is a duty to give reasons, it must be discharged by giving adequate reasons. What would amount to adequate reasons for a decision would*

> *depend on the context in which the decision maker is operating and the circumstances of the case in question.*

(3) The reasons required of a judge must be directed at the issues. What was common ground and plainly flowed from the resolution of those issues would normally require little or no analysis, if only for the simple reason that those matters were well understood by all parties and there was no great purpose to be served by a judge analysing the obvious;

(4) The only real issues were the credibility of PW1 and of the Applicant, and these were thoroughly dealt with in a more than adequately reasoned manner. There was no other major issue before the judge. Following his rejection of the Applicant's evidence and the acceptance of the evidence of PW1, the conviction inevitably followed. There was ample evidence to support the conviction.

Result - Application dismissed.

C. CRIMINAL APPEALS/ AGAINST SENTENCE
刑事上訴案件/針對刑罰

CA 510/2006

Stuart-Moore VP
Hartmann &
McMahon JJ

(30.5.2008)

*J Reading SC
& Anthea Pang

#AA Bruce SC

LAM Hon-man, Albert

Murder/Defendant aged 17 years at time of offence/Absence of remorse/Generally applicable sentence between 27 and 30 years/Sentence of 29 years' imprisonment not manifestly excessive

謀殺 – 被告人犯案時17歲 – 沒有悔意 – 一般適用的刑期介乎27至30年 – 判處29年監禁並非明顯過重

On 9 December 2006, the Applicant was convicted of the murder of Choi Wai-lok ('*the deceased*'), a boy of 15 who was at the same school as the Applicant. The murder took place on 7 December 2005 when the Applicant was aged 17 years and 4 months.

In view of the Applicant's age, the judge was able to exercise her discretion under s 2 of the Offences against the Person Ordinance, Cap 212, to impose a determinate sentence. The judge took into account, when deciding the length of the sentence, seven previous decisions of the Court of Appeal providing ample authority from which to assess the appropriate range of sentence for an offence of this type. The judge exercised her discretion in the Applicant's favour when deciding not to impose a life sentence. In doing so, she had taken into account all the surrounding factors, not least that this was, as she described it:

> *…a brutal murder. I note that there was no gang or triad involvement, torture, perverse conduct or interference with the body… However, there were a large number of wounds some of which were extremely forceful and from at least two of which the deceased would have died.*

Although there was no motive for the killing, the judge found there was good reason to infer that the Applicant had carried the knife with him to the murder scene. The murder did not appear to have been committed on the spur of the moment. The *post mortem* established that the cause of death was '*bleeding from multiple stab and cut wounds*'.

On 15 December 2006, the Applicant was sentenced to 29 years' imprisonment.

On appeal

Held :

(1) There was plainly some foresight on the Applicant's part. He had shown no remorse and still found himself unable to own up to the enormity of what he had done despite strong and extremely compelling evidence of guilt;

(2) The Applicant's sentence was not manifestly excessive. It was a cause of real concern that on the evidence this was a motiveless killing. No doubt he had reasons to kill the deceased but he had never revealed them. His attempts to cover his tracks showed him to be someone with a devious and scheming nature. In some respects, the discretionary course adopted by the judge, when she chose not to impose a life sentence, might be viewed as a merciful one;

(3) The authorities indicated that for young offenders convicted in circumstances such as these the generally applicable sentence appeared to be between 27 and 30 years.

Result - Application dismissed.

香港特別行政區訴范石洪
HKSAR v FAN Shek-hung

高等法院上訴法庭－高院刑事上訴2006年第393號
高等法院上訴法庭法官張澤祐
高等法院上訴法庭法官楊振權
宣判日期：二零零八年五月二十六日

*陳淑慧
Winsome Chan

#吳建五
Paul Wu

COURT OF APPEAL OF THE HIGH COURT
CRIMINAL APPEAL NO. 393 OF 2006
Cheung &
Yeung JJA
Date of Judgment: 26 May 2008

洗黑錢 － 量刑的參考因素 － 被告人對有關公訴罪行知情並參予是加刑因素 － 法官不應只就他個人對社會事情的看法而將刑期調高至偏離一般適用的刑期，應先取案件普遍性資料爲理據 － 法庭不應

<u>過分着重有關的公訴罪行而作出判刑</u>

申請人經審訊後被裁定一項違反香港法例第455章《有組織及嚴重罪行條例》第25(1)條，即處理公訴罪行得益的財產(‘*洗黑錢*’)的罪名，罪名成立，被判監禁6年半。

案情顯示一間屬於莊士機構國際有限公司名下的買家在1996年2月以港幣105,000,000元購入一所物業，買家和賣家分別由不同的律師行代表處理該宗樓宇買賣交易。

買家和兩名聲稱是該物業的業主其後簽署了一份臨時買賣合約，同日，買家將一張面值港幣15,825,000元的本票交到業主的律師行，作爲購買物業所需支付的第一次訂金，業主指示律師行開出一張和訂金相同銀碼的支票給一名叫「蘇志賢」的人，蘇志賢其後到銀行兌現該張支票，並提取走現金。

其後，買賣雙方再簽署一份正式買賣合約，買家發出一張面值港幣15,825,000元的本票給業主的律師行作爲第二次訂金，業主指示律師行把這筆訂金以現金支票形式發給申請人，同日，申請人與另一名男子到銀行兌現該張現金支票。

是次物業交易其實是一個騙局，該物業的真正業主並沒有同意出售該物業，他們也沒有簽署過任何買賣文件。買家在這次交易中被騙去港幣31,650,000元，即兩次訂金的總額。

裁決：

(1) 由於有關洗黑錢的案件涉及不同的案情，故此法庭沒有給予量刑指引的，但以下各點是可以列爲量刑的參考因素：*R v Karen Monfries* [2004] 2 Cr App R (S) 3, 9：

(a) 雖然洗黑錢控罪與有關的公訴罪行不一定有直接關係，但若果有關的公訴罪行是可以確認的，那麼法庭是可以在量刑時考慮有關公訴罪行本身的刑期；
(b) 洗黑錢的罪責是協助、支持及鼓勵有關的公訴罪行；
(c) 洗黑錢的被告人對公訴罪行的知情度；
(d) 涉及洗黑錢控罪的款額。

(2) 雖然法庭可以考慮公訴案件本身的刑期，法庭在作出洗黑錢控罪量刑時是必須以該項控罪本身，而不應該以有關的公訴罪行作爲量刑基礎：*HKSAR v Chen Shu-ming* Cr App 270/2005；當然若果被告人對有關的公訴罪行是知情，這是一個會令他被加重刑責的因素；

(3) 申請人聲稱他牽涉本案純粹是因爲他幫助一位朋友，他辯稱他對整件事件是一宗欺詐案件完全不知情，他從銀行提取出來的現金是涉案的另外一名男子拿走的，他之後一直聯絡不上他的朋友，他其後離開香港的原因是在案發前他已經答應了另一班朋友到內地替他們打理生意。在審訊時，原審法官不接納申請人的答辯理由，法庭同意申請人不但對案件知情，他更參與其中一個環節，所以他須負上較重的刑責，法庭需判處他一個較嚴峻的刑期；

(4) 法庭不認同原審法官所說因社會上出現頗多的欺詐案，因而要對申請人施以重刑以起阻嚇作用的做法，法庭考慮是否對某類案件採取阻嚇性刑罰之前必須先取得有關類別案件的普遍性的資料作爲理據，並須同時考慮同類案件一般被判處的刑期。法庭認爲法官在量刑時需要落實一些已經訂立的量刑原則及採用一個適用於該類案件的刑期，法官不應該只就他個人對社會事情的看法而將刑期調高至偏離一般同類案件所適用的刑期，這樣做不單止是對被告人不公道，更甚的是忽視了量刑原則；

(5) 原審法官雖然說他只會就申請人所處理的金額作出量刑，但從判刑理由書看來，有關的刑期其實是根據欺詐案件本身的案情而作出。雖然申請人對有關的欺詐行爲是知情的，並且參與其中一環節，但他並不是被控欺詐罪，從法官採用高達6年半監禁的刑期看來，法庭唯一的結論是法官在量刑時的確是過份着重整個公訴罪行。

結果：上訴得直，刑期由6年半監禁改爲5年8個月監禁。

[English digest of CA 393 of 2006, above]

FAN Shek-hung

Cheung & Yeung JJA

(26.5.2008)

*Winsome Chan

#Paul Wu

Money laundering/Sentencing considerations/Defendant's knowledge of and participation in underlying indictable offence an aggravating feature/Judge should not depart from the norm by making an upward adjustment simply for his own personal views on social matters and information about prevalence of offence should be obtained as sentencing basis/ Court should not place too much emphasis on underlying indictable offence when sentencing

The Applicant was convicted after trial of an offence of dealing with property representing proceeds of an indictable offence (‘*money laundering*’), contrary to s 25(1) of the Organized and Serious Crimes Ordinance, Cap 455, and sentenced to imprisonment for 6½ years.

The facts of the case were that in February 1996, a purchaser from the subsidiary of Chuang's Consortium International Limited bought a property for HK$105,000,000. The vendor and the purchaser were separately represented by different solicitors firms.

The purchaser signed a provisional sale and purchase agreement with two men who claimed to be owners of the property. On the same day, the purchaser sent a bank draft in the amount of HK$15,825,000 to the vendor’s solicitors as initial deposit. The vendor instructed the firm to issue a cheque in the same amount payable to a person called ‘SO Chi-yin’, who subsequently cashed the cheque at the bank.

A formal sale and purchase agreement was signed subsequently. On the same day, the purchaser gave a bank draft in the amount of HK$15,825,000 to the vendor’s solicitors as further

deposit. The vendor instructed the firm to pay that sum to the Applicant in the form of a cash cheque. On the same day, the Applicant and another man cashed the cheque at the bank.

The property transaction was in fact a scam. The real owner of the property had neither consented to the sale nor signed any conveyance documents. The purchaser lost HK$31,650,000, being the total sum of the two deposits, in the fraudulent transaction.

Held **:**

(1) There were no sentencing guidelines for money laundering offence as facts varied from case to case. Nevertheless, the following points could be taken as sentencing considerations: *R v Karen Monfries* [2004] 2 Cr App R (S) 3, 9 :

(a) While no direct relationship necessarily existed between the money laundering offence and the underlying indictable offence, when the underlying indictable offence could be identified, some regard could be paid to the appropriate sentence for it;

(b) The criminality of money laundering lay in the assistance, support and encouragement it provided to criminal conduct;

(c) The extent of the launderer's knowledge of the indictable offence;

(d) The amount of money involved in the money laundering.

(2) The court should only sentence on the basis of the money laundering offence itself rather than the underlying indictable offence, though regard could be paid to the sentence for the indictable offence: *HKSAR v Chen Shu-ming* Cr App 270/2005. Of course, it would be an aggravating factor if the defendant had knowledge of the underlying indictable offence;

(3) The Applicant claimed that he was involved in the present case purely because he rendered assistance to a friend. It was his defence that he had no knowledge about the incident being a fraud. The money he drew from the bank was taken away by another man involved in the present case. He had lost contact with that man ever since then. He subsequently left Hong Kong because prior to the incident he had promised some friends to look after their business in the Mainland. At trial, the judge rejected the Applicant's defence. The court accepted that the Applicant not only had knowledge of the case but also participated in part of the scheme. His level of culpability was therefore higher and a

harsher sentence should be imposed;

(4) The court disapproved the approach adopted by the trial judge, that in light of the prevalence of fraud cases in the society, a severe punishment should be imposed on the Applicant in order to achieve a deterrent effect. In determining whether a deterrent sentence was required, the court must first obtain information about the prevalence of the particular type of offence as a basis for sentencing, and, at the same time, consider the usual sentences imposed on for similar offences. A sentencing judge should follow the established sentencing principles and adopt a sentence appropriate to that type of offence. A judge should not depart from the norm by making an upward adjustment simply because of his own personal views on certain social issues. By doing so, it would be unfair to the defendant and amount to a disregard of sentencing principles;

(5) Although the trial judge said he would only sentence the Applicant with reference to the amount of money he had dealt with, his written reasons for sentence showed that he had sentenced on the basis of the facts of the fraud case. Although the Applicant had knowledge of the fraudulent conduct and participated in part of the scheme, he was not charged with any fraud offence. The only conclusion that could be drawn from the high term of 6½ years was that the trial judge had placed too much emphasis on the underlying indictable offence at the time of sentencing.

Result - Appeal allowed. Sentence of 6½ years' imprisonment substituted for one of 5 years and 8 months.

香港特別行政區訴黃炳基
HKSAR v WONG Ping-kay

高等法院上訴法庭 – 高院刑事上訴2007年第274號
高等法院上訴法庭法官張澤祐
高等法院上訴法庭法官楊振權
宣判日期：二零零八年五月二十九日

*陳淑慧
Winsome
Chan

#潘展平
Jackson
Poon

COURT OF APPEAL OF THE HIGH COURT
CRIMINAL APPEAL NO. 274 OF 2007
Cheung &
Yeung JJA

Date of Judgment: 29 May 2008

<u>販運可卡因 – 被告人的高齡不是減刑因素 –‘*極大份量*’的可卡因的量刑基準 - 被告人過往刑事紀錄對量刑基準影響不大</u>

申請人承認一項販運毒品罪，被判入獄16年8個月，涉案毒品爲1455.19克混合劑內含810.77克可卡因。

申請人年齡超過60歲，有多次犯罪紀錄，其中11次和毒品有關，最近一次在2001年，申請人因製毒而被判入獄。

原審法官以25年爲量刑基準，並因申請人認罪而將刑期扣減三分一至16年8個月，但原審法官不同意就申請人的年齡而要將量刑基準下調。。

裁決：

(1) 法庭不同意由於申請人已有60歲，故16年8個月的判刑等同‘*終身監禁*’，屬‘*摧毀性判刑*’，而必須扣減。法庭強調，販運毒品罪行嚴重，必須施行重刑以收阻嚇之用，無論罪犯年長、年少或有其他殘障都不是強烈或充分的減刑理由，目的是避免鼓勵從事販運毒品罪行人士利用該些年長、年少或有其他殘障的人參與邪惡罪行： *R v Chen Chun-yeh* Cr App 513/1996。假若申請人因年紀老邁而有可能老死獄中，他可以在有需要時向行政長官提出申請，要求特赦，但被告人年紀老邁並非法庭在判刑時遠離有關量刑指引及作出特殊安排的理由。當然法庭是可以根據個別案件，以被告人年紀大而在判刑時酌量作出輕微的調整；

(2) 販運可卡因罪行之量刑基準和販運海洛英罪行相同： *AG v Pedro Nel Rojas* [1994] 2 HKCLR 69； *R v Lau Tak-ming & Ors* [1990] 2 HKLR 370。 *Lau Tak-ming* 一案並沒有就販運超過600克海洛英罪行作出明確量刑指引，但有案例裁定上

調之幅度不應和毒品分量之增加成正比。本案涉及約800克可卡因，較可導致20年量刑基準的600克多200克，屬'*極大份量*'類別，原審法官採納的25年量刑基準並非完全不合乎比例，但亦屬過高，22年的量刑基準已足夠： ***HKSAR v Li Lap-fo*** Cr App 639/1999 ； ***HKSAR v Chiu Ho-chung*** [2001] 1 HKLRD 697 ； ***HKSAR v Lam Kam-kwong*** [2002] 1 HKC 541 ；

(3) 原審法官強調申請人有多次犯案紀錄，最後一次更被判入獄12年，但他忽略了判刑在上訴後，減至6年8個月。雖然被告人的纍纍案底可以是加刑因素： ***HKSAR v Chan Pui-chi*** [1999] 3 HKC 848，但就販毒案件而言，該加刑因素所佔的比重不大，故不論申請人製毒罪行最終被判刑期多少，對本案適用的量刑基準影響不大。

結果： 上訴得直。判刑由16年8個月減至14年8個月。

[English digest of CA 274 of 2007, above]

FAN Shek-hung

Cheung & Yeung JJA

(29.5.2008)

*Winsome Chan

#Jackson Poon

Trafficking in cocaine/Old age of defendant not a mitigating factor/Sentencing tariff for *'very substantial quantities'* of cocaine/Criminal record of defendant not having much effect on starting point

The Applicant pleaded guilty to a count of trafficking in a dangerous drug and was sentenced to imprisonment for 16 years and 8 months. The quantity involved was 1,455.19 grammes of a mixture containing 810.77 grammes of cocaine.

The Applicant was over 60 years old and had numerous previous convictions, 11 of which related to dangerous drugs. The most recent case was in 2001 when he was sentenced to jail for manufacturing a dangerous drug.

The trial judge adopted a starting point of 25 years' imprisonment and reduced this by one-third for sentence for the Applicant's guilty plea, to 16 years and 8 months. However, the trial judge refused to reduce the starting point for the Applicant's old age.

Held :

(1) The court did not agree that the term of 16 years and 8 months, considering that the Applicant was 60 years of age, was equivalent to *'life imprisonment'* and that it, being a *'destructive sentence'*, must be reduced. The court emphasised the gravity of the trafficking offence and the necessity to impose deterrent sentences. No matter the offenders were old or young in age, or had any disability, none of these would be a strong or a sufficient mitigating factor. The purpose was to discourage drug syndicates from recruiting aged, young or disabled people to participate in evil crimes: *R v Chen Chun-yeh* Cr App 513/1996. If the Applicant was too old and might possibly die in prison, he could seek pardon from the Chief Executive when necessary. However, his old age was not a reason for the court to depart from the sentencing norm and make special arrangements. No doubt, the court, depending upon the circumstances of each individual case, could still exercise discretion in making minor adjustments in sentence on the basis of a defendant's old age;

(2) The sentencing guidelines for trafficking cocaine and heroin were the same: *AG v Pedro Nel Rojas* [1994] 2 HKCLR 69; *R v Lau Tak-ming & Ors* [1990] 2 HKLR 370. In *Lau Tak-ming*, no clear sentencing guidelines were laid down for trafficking heroin of over 600 grammes. However, it was held in some cases that any upward adjustment should not be directly proportional to the quantity of drugs involved. The present case involved 800 grammes of cocaine, with 200 grammes in excess of 600 grammes which, according to the guidelines, attracted a starting point of 20 years' imprisonment. It fell into the *'very substantial quantities'* category. Although the starting point of 25 years adopted by the trial judge was not completely non-proportional, it was still excessive. A starting point of 22 years would have been sufficient. *HKSAR v Li Lap-fo* Cr App 639/1999； *HKSAR v Chiu Ho-chung* [2001] 1 HKLRD 697；*HKSAR v Lam Kam-kwong* [2002] 1 HKC 541；

(3) The trial judge emphasized that the Applicant had numerous previous convictions, 11 of which related to dangerous drugs and in the last case he was even sentenced to 12 years' imprisonment. The trial judge overlooked the subsequent reduction of sentence to 6 years and 8 months as a result of the Applicant's appeal. While the Applicant's lengthy criminal record could be an aggravating factor (*HKSAR v Chan Pui-chi* [1999] 3 HKC 848), as far as drug trafficking cases were concerned, such an aggravating factor would not be given much weight. Accordingly, in any event, the previous sentence imposed on the Applicant for the manufacturing offence would not have much effect on the starting point applicable to the

present case.

Result - Appeal allowed. Sentence reduced from 16 years and 8 months to 14 years and 8 months.

D. MAGISTRACY APPEALS/
AGAINST CONVICTION
裁判法院上訴案件/針對定罪

MA 1225/2007 WONG Shuk-fong

Longley DJ

(30.5.2008)

*Grace Chan

#M K Wong SC

Employment of a person not lawfully employable/Exercise of right of silence/Adverse inferences not to be drawn/Infringement of right of silence
僱用不可合法受僱的人 – 行使緘默權 – 不得作出不利推論 – 侵犯緘默權

The Appellant was convicted of an offence of employing a person not lawfully employable, contrary to s 17I(1) of the Immigration Ordinance, Cap 115.

The charge alleged that '*on the 27th day of March 2007 in Tsang Fai Restaurant, Block B, Ground Floor, 31-33 Shek Kip Mei Street, Kowloon, in Hong Kong'*, the Appellant was '*the employer of Tam Lai Fong, an employee who was not lawfully employable'*.

On that day, there were two premises being run under the name Tsang Fai Restaurant in Shek Kip Mei Street, the premises that were the subject of the charge ('*No. 31-33'*) and premises on the other side of the road at 38 Shek Kip Mei Street ('*No. 38'*). There were separate business registration certificates in respect of each premises. Whereas the restaurant at No. 38 had a liquor licence, the restaurant at No. 31-33 was still awaiting the grant of such a licence.

On the day in question, police officers posing as customers entered the restaurant at No. 31-33 where they were served by Tam Lai Fong ('*Tam'*), an illegal immigrant and therefore not '*lawfully employable'* for the purpose of s 17I(1) of the Immigration Ordinance, Cap 115. When Tam served them, the Appellant was not in the premises at No. 31-33. It was only after the police had revealed their identities and asked to speak to the person in charge that a worker at the premises at No. 31-33 went across to the road to No. 38 and returned with the Appellant.

The defence of the Appellant was that Tam had approached her while she was working at No. 38 and asked whether they were hiring staff. She had replied that they were hiring workers at the restaurant across the street and had pointed to her husband's restaurant. She had told Tam the pay and the working hours and had looked at a photocopy of her identity card. She had then told her to go to No. 31-33 and look for '*Manager Chan'*. She had told her this because the Manager, Chan Shun Hing, was the next most

senior person in the restaurant at No. 31-33 after her husband and was responsible for interviewing people. It would be Manager Chan's decision whether to employ her. She had not hired her.

On appeal, complaint was made that the magistrate infringed the Appellant's right of silence by certain questions he asked of her relating to Manager Chan during her evidence, and by taking into account in assessing her credibility her silence relating to Manager Chan while the police were at No. 31-33.

Held :

(1) As it was the Appellant's evidence that she knew the police were looking for the person in charge of the restaurant at No. 31-33 and that she knew that her husband who was normally in charge of the restaurant was absent but that the next most senior person was present, it might be thought logical for someone in her position to draw that to the attention of the police when she arrived. The question was whether the magistrate's conclusion that her failure to do so cast doubt on her evidence that it was Manager Chan, rather than she, who was in charge of the restaurant in the absence of her husband was one he was entitled to reach. By reason of the Appellant's right to silence, he was not;

(2) It was well-established that any distinction previously drawn between using silence to infer guilt and using it to attack the weight of an account given at trial but not earlier could not be sustained. It was inappropriate to use a person's silence against him in any way: *Lee Fuk-hing v HKSAR* (2004) 7 HKCFAR 600;

(3) If a defendant chose to exercise his right of silence on an earlier occasion in the knowledge that no adverse inferences could be drawn therefrom and on a subsequent occasion was alleged to have made an admission, there was no reason why in fairness his earlier exercise of the right of silence should count against him;

(4) The magistrate erred in asking the Appellant why she had not told the police to ask Manager Chan about the case;

(5) When considering the credibility of the Appellant, the magistrate said that he rejected as '*inherently improbable the evidence that the defendant did not ask Chan to explain the matter to the police if Chan was indeed the person in charge of Shop No. 31-33'*. There was no evidence that the Appellant did not ask Chan to explain the matters to the police, but it was clear from the context that what the magistrate was referring to was evidence that the Appellant had not told the police to ask Manager Chan about the case. In drawing such an adverse inference, he infringed the Appellant's right of silence.

Result - Appeal allowed. Retrial ordered.

E. JUDICIAL REVIEW
司法覆核

CACV 138, 139 & 140/2008

Stuart-Moore ACJHC & Stock JA

(27.5.2008)

*Alex Lee

#D Chang SC, Newman Lam & Amanda Lee (1)
M Lee SC, H Pun & William Lam (2)
Cheng Huan SC, William Lam & Bernard Chung (3)

(1) KO Kit
(2) LU Dayong
(3) CHAN Kai-san

Trial/Breach of legal professional privilege by ICAC during investigation/Judge finding ICAC acted in good faith/ Collateral challenge to judge's careful analysis not warranted/ Satellite litigation rarely permitted in criminal justice system
審訊 – 廉政公署在調查期間違反法律專業保密權 – 法官裁定廉政公署真誠行事 – 不應對法官的審慎分析提出附帶質疑 – 刑事司法體系甚少容許附屬訴訟

On 16 May 2008, Hartmann J refused three applications for leave to apply for judicial review.

The Appellants were three defendants in a criminal trial in the District Court where they were charged with conspiracy to defraud and conspiracy to accept advantages.

At trial, the defence applied for a permanent stay of proceedings. The ground of that application was the recording of a conversation between A2 and her solicitor at that Applicant's offices by the ICAC. It was argued that that conduct was such an affront to the public conscience that it would be an abuse of process to permit the prosecution to continue.

On 19 November 2007, the judge refused the stay application, but reserved the right to review that decision until the conclusion of a *voire dire* in relation to the admissibility of other evidence. The decision was affirmed in a ruling dated 3 April 2008 and it was in respect of that ruling, which dismissed the application for a permanent stay, that the application for leave to apply for judicial review was launched.

The Applicants said that if the correct principles had been applied by the judge, a stay of proceedings was inevitable and it would be unacceptable in the circumstances to expect the Applicants to go through a lengthy trial prior to an acquittal on the merits or, if convicted, to an appeal that was destined to succeed because of the point taken in the proposed review.

The Applicants emphasised the importance of legal professional privilege. They attacked the finding of the judge that the ICAC had acted in good faith. They said the evidence disclosed deliberate breaches of legal professional privilege, and that the judge failed to acknowledge that the affront to the public conscience and to the rule of law was not less an affront because of

inadequate safeguards or ignorance on the part of a junior officer. They said it was artificial and oppressive to require the Applicants to wait to raise the matter upon an appeal in the event they were convicted, and that the proceedings should now be stayed.

Although the privilege of A1 and A3 had not been breached, they said that the proceedings ought to be stayed as against them as well because it could not be known what use had been made, in furtherance of the prosecution, of material that emerged from the privileged conversation.

In the Court of First Instance, the judge emphasised, by reference to *R v Latif* [1996] 1 WLR 104, the fact that the proposed application was from the exercise of a judicial discretion which required the trial judge to decide whether the abuse had been such as to amount to an affront to the public conscience and required the criminal proceedings to be stayed; and that it was apparent, in his view, that the District Court judge had taken all relevant factors into account and did so '*by having regard to the evidence of all witnesses before him in what it is apparent were fairly exhaustive proceedings*'. He took the view that the issue was not simply whether there was or was not a deliberate breach of privilege or whether there was or was not bad faith, but that the decision of the trial judge was one that required a '*nuanced exercise of judicial discretion*'. He expressed the view as well that if the exercise of that discretion was to be challenged, the challenge should be raised '*within the confines of the criminal justice process by way of appeal'* .

Held :

(1) The threshold for granting leave was that the court must be satisfied that an arguable case for relief had been shown: *Peter Po Fun Chan v Winnie C W Cheung & Another* [2008] 1 HKLRD 319. In most applications for judicial review arguability was the sole issue. It was, however, not the sole issue in this application for leave;

(2) It was trite that judicial review was a remedy of last resort and that where another adequate remedy was provided that alternative should, save in the most exceptional circumstances, be used: *Yeung Chun-pong and Others v SJ* [2008] 2 HKC 46. That case emphasised the public interest in ensuring that charges, once before a court, should be tried and that there was built into the system a prescribed appeal mechanism that did not envisage collateral challenges. There was a strong presumption against entertaining a judicial review application where the complaint could be raised within the criminal trial and appeal process, and such satellite litigation should rarely be permitted in the criminal

justice system: *R v DPP ex p Kebilene* [2000] 2 AC 326. In *R v Liverpool City Justices and The Crown Prosecution Services ex p Price* (1998) 162 JP 766, it was said that it was only in '*a very exceptional case that this court will exercise its supervisory jurisdiction to intervene and quash the decision by the justices in the exercise of their discretion not to stay proceedings for abuse of process*';

(3) This was not a case which warranted a collateral challenge. This did not detract from any of the principles stated in *SJ v Shum Chiu and Others* [2008] 1 HKLRD 155, but recognised that in cases of breach of legal professional privilege there was no automatic '*red card*'. Each case, each breach, had to be viewed in the light of its own facts;

(4) What had to be recognised in this case was that the trial judge pointed to specific findings of fact which mitigated or mollified such sense of outrage as was naturally evoked when a breach of privilege was occasioned, especially when it was found that those responsible for the breach clearly ought to have known better. Those factors included, but were not limited to, the swift withdrawal of all personnel and the halt to covert surveillance;

(5) It could neither be said that the judge's decision was necessarily correct, nor that it was necessarily incorrect. He had before him very extensive evidence, and he would have reviewed this in detail. In the light of the judge's careful analysis and in particular the specific reasons provided by him it could not be said, as things stood on their face, that the judge was clearly wrong. Whilst that was not the threshold test for the granting of leave, it was in this case a factor in deciding whether this was one of those wholly exceptional instances in which a collateral challenge was justified. In those circumstances, it would be inappropriate to permit this collateral challenge to proceed.

Result - Appeals dismissed.

Per cur - This was yet another instance in which the parties had sought to derive encouragement from *Dairy Farm Co. Ltd v Director of Food and Hygiene* [2005] 3 HKC 1. As indicated in *Yeung Chun-pong*, the *Dairy Farm* judgment was not to be taken as authority for the proposition that judicial review was appropriate for stopping a prosecution where a court in its reviewing capacity thought that the prosecution case was weak or that, as intimated in *Dairy Farm*, someone other than the defendant was more culpable if culpability there was. In *Dairy Farm* no reasons were given by the magistrate for his refusal to stay the proceedings, which was not the

position here. In any event, *Dairy Farm* did not assist the Appellants.

F. PRACTICE AND PROCEDURE
常規與程序

CA 472/2006

CHAN Yat-chuen

Stuart-Moore ACJHC
Hartmann & McMahon JJ

(16.6.2008)

*Alain Sham & Jonathan Man

#Dominic Yeung

Doing acts tending and intended to pervert the course of public justice/Defendant electing not to testify/Judge making reference to ancient case law on consequences of silence/Dangers of relying on pre-*Woolmington v DPP* authority/Not desirable to rely on cases decided when the understanding of burden and standard of proof differed from the present

作出傾向並意圖妨礙司法公正的作爲 – 被告人選擇不作供 – 法官就緘默的後果參考古舊案例 – 依賴***Woolmington v DPP***之前的案例的危險性 – 不宜依賴在裁決時對舉證責任和準則的理解與現時不同的案例

The Applicant was convicted after trial in the District Court of an offence of doing acts tending and intended to pervert the course of public justice, contrary to common law.

The charge was particularised as:

> *CHAN Yat-chuen, on or about the 25th day of February 2004, in Hong Kong, with intent to pervert the course of public justice, did a series of acts which had a tendency to pervert the course of public justice in that he incited, induced and instructed CHAN Ying-kin, Ken to make a false statement under caution to the Hong Kong Police Force concerning a case of wounding, namely Police case number TP/RN 04001715.*

On appeal

Held :

(1) On the evidence, the conviction was unsafe and unsatisfactory. There was a further matter that the judge, in dealing with the '*consequences'* of the election of the Applicant not to give evidence, relied upon *R v Burdett* 4B & Ald 95, which was decided in 1820. The portion of the case relied upon by the judge was (at 161):

> *No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but, when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the*

> *conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends?*

(2) There were dangers in relying on case law from the era before *Woolmington v DPP* [1935] AC 462, in areas of law relating to the burden of proof or of the import which might be given to a defendant electing not to give or call evidence. Reliance on cases decided in the distant past at a time when the understanding of the operation of the burden and standard of proof was far from that of the present, and acceptance of a changing evidential onus was common, was wholly undesirable.

Result - Appeal allowed.