



### Summary of Judicial Decision

**HKSAR v Tsang Yam Kuen, Donald (“the Applicant”)**

**CACC 55/2017; [2018] HKCA 425**

**Decisions** : **Appeal against conviction dismissed;  
Appeals against sentence and costs order allowed  
(under application to the Court of Final Appeal for  
leave to appeal)**

**Dates of Hearing** : **25 and 26 April 2018**

**Date of Judgment/Decision** : **20 July 2018**

### Background

1. The Applicant was the Chief Executive of the Hong Kong Special Administrative Region (“CE”) between 21 June 2005 and 30 June 2012. As CE, he was *ex officio* President of the Executive Council (“ExCo”).
2. Between January 2010 and June 2012, the Applicant, acting as the President of ExCo, was involved in decision making in relation to several broadcasting licensing related applications submitted by a Wave Media Limited (“WML”), a company of which a Mr Wong Cho-bau (“Wong”) was the director and major shareholder. (WML was subsequently renamed as Digital Broadcasting Corporation (“DBC”).)
3. The applications of WML and DBC were ultimately approved by the Applicant in his capacity as the CE and the President of ExCo. Unknown to ExCo or the public, the Applicant was at the relevant times making arrangements to live in an apartment in Shenzhen (“the Property”) owned and refurbished by a company which Wong was the Chairman and General Manager. According to the interior designer of the Property Mr Barrie Ho, the estimated refurbishment and redecoration costs of the Property amounted to some HK\$3.5 million, while the interior design fee was HK\$350,000.
4. During his tenure as CE, the Applicant had made a total of 69 *ad hoc* declarations of interest at 46 meetings of ExCo, 23 of which meetings took place during the period of the offence (the first being 2 March 2010, the last being 5 June 2012). In those 23 meetings, whilst declaring various other interests, the Applicant had not declared or disclosed his relationship or dealings with Wong.
5. The Applicant only disclosed for the first time that he had rented the Property in a press release issued on 22 February 2012 in response to the media reports about the conduct and integrity of the Applicant in respect of his association and activities with various wealthy friends and businessmen that had been surfaced on 20, 21 and 22 February 2012.
6. The Applicant was subsequently tried on an indictment alleging one count of Accepting an advantage as Chief Executive (in respect of the refurbishment and



re-decoration of the Property of which he was ultimately to become the tenant) (“Count 1”) and two counts of Misconduct in Public Office, one in relation to the Applicant’s failure to declare or disclose or conceal from ExCo his dealings and negotiations with Wong when involved in decision making in relation to WML’s application (“Count 2”) and the other in relation to his proposal for the interior designer Mr Barrie Ho to be nominated for an honour or award under the Hong Kong Special Administrative Region (HKSAR) honours and award system (“Count 3”).

7. On 17 February 2017, the Applicant was convicted on Count 2 and acquitted on Count 3. The jury was unable to reach a verdict on Count 1 and a re-trial on Count 1 was ordered. On 22 February 2017, the Applicant was sentenced to 20 months’ imprisonment in respect of Count 2.
8. The retrial on Count 1 took place in September 2017. The new jury was similarly unable to reach a verdict on Count 1, which was then ordered to be left on the Court file marked not to be proceeded with without the leave of the Court.
9. On 6 March 2018, the trial judge ordered the Applicant to pay one-third of the total prosecution costs in respect of the original trial (“the Costs Order”). In so doing, the judge considered the conduct of the defence at the original trial and made comments concerning the Applicant’s conduct at the retrial.
10. The Applicant applied to the Court of Appeal for leave to appeal against conviction on Count 2 and sentence, and also against the Costs Order. By a judgment dated 20 July 2018, the Court of Appeal refused his application for leave to appeal against conviction but allowed his appeal against sentence and Costs Order.
11. On 27 July 2018, the Applicant applied to the Court of Appeal for a certificate that the decision involves points of law of great and general importance. By a judgment dated 31 August 2018, the Court of Appeal declined to certify any of the points of law raised by the Applicant.
12. On 17 August 2018, the Applicant filed to the Court of Final Appeal a Notice of Application for leave to appeal.

### **Issues in dispute**

13. In respect of the appeal against conviction, the Applicant contended that:
  - The jury needed to be specifically directed as to how they could convict the Applicant of Count 2 if they found nothing corrupt about his dealings with Wong. In particular, the jury should have been directed that they could not convict the Applicant of Count 2, absent a verdict of corruption on Count 1, unless they were sure that the Applicant’s interest in the Property was sufficient to influence him in his consideration of the licensing applications; and the jury should have been directed that the prosecution needed to



- prove deliberate concealment rather than mere non-disclosure. (Ground 1)
- The judge failed to direct the jury properly as to the *mens rea* of the offence. It was not enough for the Judge to define “wilfully” as something done deliberately and not by accident, inadvertence or oversight. The jury should have been told that deliberate meant “in the sense that the official knew that his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful”. (Ground 2)
  - The judge did not provide the jury with sufficient guidance as to how to approach the element of “seriousness” in the offence. (Ground 3)
14. In respect of the appeal against sentence, it was argued that the judge had misinterpreted the starting point adopted by the trial judge in the case of the first appellant in *R v Hui Rafael Junior*, which was said to be 27 months’ imprisonment, and thereby came to a mistaken starting point in the present case, which was no more serious on the facts. The starting point for sentence, in all the circumstances, should not have been more than 18 months’ imprisonment.
15. On the Costs Order, the Applicant’s main argument was that “the making of a Costs Order against a defendant is highly exceptional and should only be made ‘where the way in which the defendant approached the investigation and/or the prosecution of the cases constitutes an abuse’” and there was no special circumstance to justify the costs order in this case as the Applicant could not have rendered any “assistance” to the prosecution or the ICAC.

### **Department of Justice’s Summary of the Court’s rulings**

(full text of CA’s judgment at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=116406&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=116406&QS=%2B&TP=JU))

#### *Appeal against conviction*

##### **Ground 1: Duty to disclose**

16. It was clear at trial that the prosecution case did not depend on a finding that the arrangement was corrupt. The jury’s verdict shows that they were under no misapprehension about the difference between Counts 1 and 2. (paragraph 91)
17. The obvious importance of making his own declaration of interest in relation to WML could not have been lost on the Applicant given (i) the constant reminders about the importance of making appropriate declarations of interest at meetings of ExCo; (ii) the repeated recommendations that another shareholder of WML and also a member of ExCo at the material time be excluded from the discussions at those meetings concerning WML and DBC, which the Applicant approved; and (iii) that ExCo Member’s ensuing withdrawals from those



discussions. (paragraph 105)

18. It is also noted that the Applicant had made a declaration of interest in respect of an unrelated matter on the agenda at the meeting of 2 November 2010 at which WML's application was being discussed. The Applicant also made another declaration in relation to a different matter at the meeting of 20 January 2012, when DBC's application was under discussion. (paragraph 110)
19. The evidence was as formidable as it was compelling that the Applicant, as the CE, could not have overlooked the need to disclose his dealings with Wong when he approved the various applications from WML (and DBC), and that he must have deliberately decided not to make such disclosure, knowing that he had a conflict of interest. This was no mere non-disclosure but deliberate concealment. (paragraph 111)

#### Ground 2: Mens rea

20. The trial judge directed the jury in terms that they had to be sure that the Applicant's conduct in not making a declaration in respect of his dealings with Wong was deliberate and not by accident, inadvertence or oversight. He reminded the jury that it was the prosecution case that the Applicant "cannot possibly overlook the obligation to declare his interest by reason of the fact that so many events had taken place at the relevant times", events which he had invited them to examine closely. (paragraph 119)
21. Given the focus of this trial and the directions of the judge, which were rightly and necessarily aimed at the issues presented by the parties before the jury, it is fanciful to suggest that the jury could have convicted the Applicant unless they were sure that he had deliberately intended to conceal his dealings with Wong from ExCo, when he must have realized he had a conflict of interest between his private interests and his public duty which he should have disclosed. (paragraphs 120, 121 & 123)

#### Ground 3: Seriousness

22. It was complained that the trial judge had not spelt out the importance of the consequences of the misconduct in determining whether it was serious enough to warrant conviction for the offence, particularly where there was no accompanying conviction for corruption. (paragraph 134)
23. The Court of Appeal considered that the consequences would be obvious in the context of the present case. The point that the failure by the Applicant to disclose a personal relationship with the beneficiary of his decision undermined public confidence in the decision-making process, the integrity of the office holder and the purity of the decision itself are obvious consequences which the Applicant, of all people at the very top of the Government administration, after decades in public service, would have readily and instinctively understood, and so would a Hong Kong jury. (paragraphs 134 & 136)



24. The consequences of the Applicant's misconduct in this case were inevitably and inextricably bound up with the importance of the responsibility reposed in him as CE to make a declaration of interest where a possible conflict of interest presented itself. The judge's directions in respect of the seriousness of the offence and the evidence relevant to that issue were correct, sufficient and in accordance with authority. (paragraphs 138 & 139)
25. Looking at the present case in its factual context, the Court of Appeal did not see the sort of tension between competing public interests which might be relevant to the question of seriousness. The Court of Appeal cannot conceive of any public interest that might have been enhanced by the concealment of the Applicant's relationship with Wong and none was put forward in evidence by him. (paragraph 143)
26. The law relating to Misconduct in public office is well settled in Hong Kong. If, in this case, one simply asks oneself whether it is Misconduct in public office for a CE to deliberately conceal from ExCo, without reasonable excuse or justification, that he has a private arrangement and dealings with the person who will benefit from his decision, the answer is a resounding one. It will be the same answer as that given by the jury in respect of Count 2. (paragraphs 145 & 146)

*Appeal against sentence*

27. The Court of Appeal was not persuaded that the judge had misunderstood the sentencing approach to the first appellant in *HKSAR v Hui Rafael Junior*. (paragraph 156)
28. The Applicant's persistent concealment of the fact of his dealings with Wong, at a time when he was making sensitive decisions in WML and DBC's favour, was a very serious matter for the head of the Government and administration of the HKSAR. Moreover, to this day, there has never been a proper explanation as to why the Applicant did what he did. (paragraphs 156 & 157)
29. The Applicant's misconduct was particularly serious, given his pre-eminent position in the community and the harm his actions will have engendered among the people of Hong Kong in their confidence in the way the Government does its business, in the officials who are trusted to oversee the integrity of the system and, ultimately, in the decisions themselves. For the Applicant's persistent misconduct over a sustained period of time, a term of immediate imprisonment was inevitable. (paragraph 158)
30. While the Court of Appeal agreed with the judge's reasoning, the appropriate starting point, in all the circumstances, should have been 18 months' imprisonment. From that starting point, 6 months' reduction would be given for his good character and past contribution to Hong Kong. The sentence was therefore reduced from 20 months to 12 months. (paragraph 159)



*Appeal against costs order*

31. The judge's observation concerning the defence conduct resulting in the discharge of a juror had no part to play in the costs order. (paragraph 176)
32. What the Applicant did was much more than a proper exercise of his right to silence. The judge was entitled to conclude that there were special circumstances, in the sense that the Applicant's conduct in the course of the ICAC investigation and at trial was unreasonable and improper, thus putting the ICAC and the prosecution to avoidable expense. (paragraph 199)
33. The judge was entitled to order the Applicant to bear part of the prosecution costs. However, in the entire circumstances of the case, including the facts that the Applicant was not a wealthy businessman but a retired civil servant, the Applicant's legal costs must have significantly reduced the cash still available to him, the costs order may have a crippling effect on him and the Applicant's conduct in the course of the investigation and trial was not outrageously unreasonable, the Costs Order against the Applicant was excessive and a fixed sum of HK\$1 million was more just and reasonable. (paragraphs 203 & 204)

**Prosecutions Division  
Department of Justice**

**July 2018  
(updated on 31 August 2018)**