Summary of Judicial Decision

HKSAR v YIU Chi-ming ("the Appellant")
CACC 142/2018; [2021] HKCA 99

Decision	**:**	**Appeal against conviction was dismissed**
Date of Hearing	**:**	**13 November 2020**
Date of Judgment	**:**	**26 January 2021**

Background

1. The appellant was convicted of one count of trafficking in a dangerous drug of about 160 grammes of cocaine, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap. 134. He was sentenced to 10 years and 9 months imprisonment. He appealed against his conviction.

2. At the time of offence, the appellant was intercepted by the police when he was opening the driver's door of a private car parked outside his home. A substantial amount of cocaine was found inside the private car. The appellant was said to have made a verbal admission at the scene confessing that he had trafficked in the dangerous drugs in order to earn money for his sick father. His verbal admission was contemporaneously recorded in the notebook of the arresting officer. The appellant also made a subsequent video recorded interview acknowledging and supplementing his earlier admission made under arrest. He reiterated that he had delivered the cocaine for money.

Issues in dispute

3. The issue on appeal is that the trial judge did not give the jury a specific direction, known as the *Mushtaq* direction, in accordance with Direction 39.1 of the Specimen Directions in Jury Trials. The appellant argued that the *Mushtaq* direction should be given to the jury in a step-by-step structured approach and with all elements of the direction conveyed to the jury.

Department of Justice's Summary of the Court's rulings

(full text of Court of Appeal 's judgment at *https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=133176&QS=%2B&TP=JU*)

4. The Court of Appeal, at §§44-56 of the judgment, set out the English legislative context in which the House of Lords delivered the judgment in *R v Mushtaq*, its application in Hong Kong as approved by the Court of Final Appeal in *HKSAR v Pang Hiu San* and the two key principles of the *Mushtaq* direction, namely (i) the jury be told that if they found that any confession made by an accused was or may have been obtained in circumstances of involuntariness, oppression or in consequence of anything said or done which was likely to render any confession unreliable, then they must disregard it; and (ii) the jury must clearly understand that they must disregard such a confession even if they were sure it was true.

5. The Court of Appeal noted that any departure from the progressive step-by-step approach set out in the Specimen Direction was not said to be necessarily fatal in its past judgment in *HKSAR v Yeung Chun Hin* (§57).

6. The key issue is whether the direction of the trial judge effectively removed from the range of options available to the jury that they could act on the statements if they considered that they had been signed (or might have been signed) as a result of improper conduct on the part of the police, even if they believed the statements to be true (§58).

7. The Court of Appeal highlighted the potential problem of the 2013 Specimen Direction 39 in force at the time of the trial in that:

   (a) It linked the voluntariness of the confession to the issues of its truth and created the risk that the jury might conclude that the confession was true, and thereafter acted upon it, even though they were persuaded that the allegations of the defence that the confession was oppressively obtained were or might be correct (§63); and

   (b) It did not clearly separate out the issue of the voluntariness of the admissions from the issue of their truth, as opposed to the way the 2020 update of the Specimen Directions was drafted (§66).

8. The proper three-step approach of the direction to the jury on the issue should be: -

1) did the defendant make the admissions;
2) were the admissions made in circumstances of oppression; and
3) are the admissions true.

Under this three step formula the jury will only arrive at the third step if they are sure that the defendant made the admissions and that the admissions were not made in circumstances of oppression (§§64-65).

9. In the present case, the trial judge reminded the jury of the requirement that before they could act on the admissions, they had to find that the appellant actually made it and that they were sure that he had given those admissions "of his own free will" (§69).

10. The trial judge did not tell the jury (i) to disregard the admission allegedly made at the scene if they found it was made and if they further found it was made under inducements and threats; and (ii) they could not act on any admission, even if they believed the admission was true, once they concluded that the admission was or may have been obtained as a result of police impropriety. However, it is apparent that the trial judge had presented to the jury in stark, black and white terms that if they believed the police then they should convict; and if they concluded that the allegations of the defence of police impropriety were or might be true, then they should acquit (§§70-73).

11. The Court of Appeal was confident that given the judge's direction in the particular circumstances of this trial, there was no risk that the jury might be lured into the impermissible reasoning of acting upon any of the admissions they believed to be true but in respect of which they concluded had or might have been obtained oppressively. For these reasons, the Court of Appeal upheld the conviction and dismissed the appeal (§§74-75).

Prosecutions Division
Department of Justice

March 2021