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**Summary of Judicial Decision**

**HKSAR v Rahman Md Sheikh Mojibur (“the Respondent”)**

**CACC 333/2018; [2020] HKCA 53**

**Decision : Prosecution’s appeal against costs order allowed**  
**Date of Hearing : 26 November 2019**  
**Date of Judgment : 13 January 2020**

**Background**

1. The Respondent, represented by counsel assigned by the Director of Legal Aid, faced a single charge of dealing with property known or believed to represent proceeds of an indictable offence (“money laundering”), was acquitted after trial. His counsel applied for the costs of the trial. The trial judge ordered that costs should be awarded in the Respondent’s favour, to be taxed if not agreed; and that his own costs should be taxed in accordance with the Legal Aid Regulations (“the costs order”).
2. The Appellant appealed against the costs order pursuant to section 19 of the Costs in Criminal Cases Ordinance, Cap. 492.
3. Facts of the case revealed that some \$1.35 million went through the Respondent’s bank account in over a year’s time. In the video-recorded interview, the Respondent told the police misleading half-truth as he only answered questions relating to his job and income but otherwise remained silent. The answers he gave could not explain the fund flow. Although the video-recorded interview was not produced at trial, the answers regarding his job and income were incorporated into the admitted facts. The Respondent’s other sources of income, which had not been reported for tax purposes, only became known when he and his witnesses gave evidence after the trial judge had ruled a case to answer. The trial judge found the defence evidence “hard to reject” and acquitted the Respondent.
4. Grounds of appeal:
  - (1) The Respondent had, by his conduct which formed the subject matter of the charge, brought suspicion on himself;
  - (2) The Respondent, having chosen to answer some of the questions in the video-recorded interview but refused to answer questions relevant to the subject matter of the charge when given the occasion to do so at the investigative stage, and only proffered an explanation after a case to answer had been found by the trial judge, thereby (i) misleading the prosecution into thinking that the prosecution case was stronger than it was and/or (ii) neglecting to bring forward a good and valid explanation to the charge at an early and appropriate stage; and



- (3) further or in the alternative, the judge wrongly exercised his discretion in awarding costs.

### **Issue in dispute**

5. Whether a defendant charged with money laundering who had a good defence at the investigative stage but chose not to disclose it until the defence case at trial should nonetheless be granted costs upon his acquittal.

### **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=126599&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=126599&QS=%2B&TP=JU))

6. The Respondent chose to present part of the story when he was interviewed which would have plainly led (or misled) the prosecution into thinking that there was no other source of income to explain the fund flow (paragraph 22).
7. A defendant, as of his right, is perfectly entitled not to answer questions or disclose his defence to the investigating authorities. But if he chooses to exercise such right, it does not mean that he cannot be deprived of costs if he had a perfectly good defence but chose not to give the slightest hint as to its existence. "After all, it is possible that had the respondent disclosed his business dealings and the documentary evidence in support of them, the prosecution might have considered that they did not have enough evidence to proceed; in which case, the costs which were occasioned to the public and his own purse would have been saved." (paragraph 25).
8. Even if the defendant believed that he had a good reason not to disclose his explanation (such as he would risk admitting to another offence), the fact that he chose to remain silent does not mean that he is entitled to recover costs if, as a result of his silence, he brings suspicion on himself and/or misleads the prosecution into thinking the case against him is stronger than it is. Whether or not the defendant brings suspicion on himself and/or results in the prosecution being misled does not logically depend on the defendant's state of mind (paragraph 26).
9. The exercise of the judge's discretion miscarried. The Respondent had chosen to answer certain questions, the answers of which would have led the police to believe, erroneously, there was no conceivable explanation for the fund flow (paragraph 27).
10. Although the video-recorded interview was not produced at trial, nor relied upon by the prosecution to resist costs, the appellate court is not prevented from looking at it. Any material which realistically explains why the prosecution took the view it did about the viability and strength of its case against a defendant may be relevant to the exercise of the judge's discretion,



whether or not it is put before the judge at trial by way of evidence; and whether or not it is strictly admissible as such (paragraph 28).

**Prosecutions Division  
Department of Justice**

**July 2020**