



## **Summary of Judgment**

**Sham Wing Kan (岑永根) v Commissioner of Police**

**Yeung Ching Yin (楊政賢), Chan Sin Ying (陳倩瑩), Hung Hiu Han (洪曉嫻) &  
Chan Siu Ping (陳小萍) (Interested Parties)**

**CACV 270/2017; [2020] HKCA 186**

**Decision : Respondent’s appeal allowed**  
**Date of Hearing : 25-27 June 2019**  
**Date of Judgment : 2 April 2020**

### **Background**

1. This is an appeal lodged by the Commissioner of Police (“Respondent”) from the Judgment of Au J (as he then was) (“Judge”) in which the Judge held that section 50(6) of the Police Force Ordinance (“PFO”) authorises police officers to search the digital contents of a mobile phone or similar device seized from an arrestee without warrant only in exigent circumstances and that, in so authorising the warrantless search, PFO s.50(6) is constitutional and compliant with Article 14 of the Hong Kong Bill of Rights (“BOR 14”) and Article 30 of the Basic Law (“BL 30”).
2. Following the Police’s arrest of the Applicant (as well as the Interested Parties), the subject mobile phones were seized and retained by the Police, but they were returned to their owners without inspection due to their claims for legal professional privilege. Notwithstanding so, the Applicant by way of judicial review sought a declaration that (1) PFO s.50(6) does not authorise police officers to search without warrant the digital contents of mobile phones seized on arrest or, alternatively, (2) PFO s.50(6) is unconstitutional under BOR 14 and BL 30. With a view to striking a balance between the protection of privacy rights and interests of effective law enforcement, the Judge held that under PFO s.50(6) the Police is only authorised to search without warrant the digital contents of mobile devices in exigent circumstances; such exigent circumstances are where, when a person is lawfully arrested under PFO s.50, there is a reasonable suspicion that an urgent search may (a) prevent an imminent threat to safety of the



public or police officers, (b) prevent imminent loss or destruction of evidence, or (c) lead to the discovery of evidence in an extremely urgent and vulnerable situation.

3. The Respondent appealed against the Judge's decision.

### **Issues in dispute**

4. At the Court of Appeal ("CA"), the central issue identified was this: How is a search of the digital contents of mobile phones or similar devices found on or seized from an arrested person incidental to arrest to be conducted in a manner that is compatible with BOR 14 and BL 30? Specifically, the central issue is whether a judicial warrant shall be required before such search can be carried out and, if not so, how such search without warrant is to be conducted in order to make it compatible with BOR 14 and BL 30.

### **Department of Justice's Summary of the Court's Rulings**

(Full text of the judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=127304&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127304&QS=%2B&TP=JU))

5. The CA started by setting out how the central issue should be approached. It was first stated that a search of the digital contents of mobile devices without warrant as a specie of the power of search by law enforcement officers incidental to arrest is based on the common law rather than PFO s.50(6). There is no need to have the doctrine of exigent circumstances under the common law in Hong Kong as the common law power is directed at wider objectives in respect of all law enforcement officers, and the concept of reasonable practicality shall be a guide for warrantless search of digital contents when such power is exercised. (paragraphs 103-104, 152 & 160)
6. The CA went on to state that the correct approach for developing the common law in Hong Kong is to adopt a set of criteria which shall satisfy the proportionality approach as discussed in *Keen Lloyd Holdings Ltd & Ors v Commissioner of Customs & Anor* [2016] 2 HKLRD 1372; in other words, warrantless search of digital contents shall be subject to scrutiny under the proportionality test, i.e. the set of criteria permitting warrantless search of digital contents shall serve legitimate interests, be rationally connected with and be no more than necessary to accomplish such interests. (paragraph



106)

7. Given the engagement of the rights protected under BOR 14 and BL 30 and the potentially high privacy interest of the digital contents stored in mobile devices, even in the context of search of materials incidental to an arrest, the primary position held by the CA is that a warrant shall be obtained before a search is conducted unless it is not reasonably practicable to do so:
- (a) In terms of privacy interest, three important characteristics arising from the use of a mobile phone distinguish it from other objects that might be kept on an arrestee's person: (1) the vast amount and unique nature of the personal information stored in it; (2) storage of such information on "cloud" accessible by the mobile phone; (3) the portability and accessibility of such information. (paragraphs 114-119)
  - (b) On the other hand, mobile phones are equipped with security features to safeguard the digital contents stored in them from unauthorised access; the security features as well as other difficulties might impede the Police's timely access to the digital contents stored on or accessible by the device for law enforcement purposes. Legitimate law enforcement objectives may be seriously undermined. The law shall recognise the new challenges presented by the use of mobile phones as instruments of crime and the legitimate need for law enforcement officers to search such phones in appropriate circumstances with appropriate safeguards. (paragraphs 120-133)
  - (c) At this juncture, the CA clarified that a magistrate can issue a warrant under PFO s.50(7) to authorise a search of the digital contents of a mobile device by adopting a purposeful construction in respect of a search of such mobile device as a "place", and the electronic data or files contained in it as "documents" or a portion thereof or an extract therefrom, provided that the other requirements under PFO s.50(7) are satisfied. (paragraphs 163, 165 & 166)
8. In holding that there is a power to search the digital contents of mobile devices without warrant under the common law, the CA acknowledged that the purpose of procuring or gathering evidence, which is an equally important facet of the common law power, but not one justified by circumstances of exigency, may necessarily require a police officer to act prudently and promptly in circumstances which may not strictly be



characterised as an emergency. The disagreements are on the precise limits of those circumstances in which a warrantless search may be justified and the safeguards that should be in place, and the common law in Hong Kong shall be developed with due regard paid to the proportionality requirement in terms of intrusion into privacy interest for law enforcement purposes. (paragraphs 154 & 182-183)

9. With a view to striking a balance between intrusion into privacy interest in a warrantless search of digital contents and legitimate law enforcement objectives incidental to an arrest, the CA set down the following conditions for the Police's exercise of power to conduct a warrantless search of digital contents upon arrest:

(a) When it is not reasonably practicable to obtain a warrant before a search is conducted, the police officer shall have a reasonable basis for having to conduct the search immediately as being necessary (i) for the investigation of the offence(s) for which the person was suspected to be involved, including the procurement and preservation of information or evidence connected with such offences; or (ii) for the protection of the safety of persons (including the victim(s) of the crime, members of the public in the vicinity, the arrested person and the police officers at the scene);

(b) other than a cursory examination for filtering purpose, the scope of the detailed examination of the digital contents of mobile devices shall be limited to items relevant to the objectives set out in the above; and

(c) as an additional safeguard, a police officer shall make an adequate written record of the purpose and scope of the warrantless search as soon as reasonably practicable after the performance of the search and a copy of the written record shall be supplied forthwith to the arrested person unless doing so would jeopardise the ongoing process of criminal investigation.

(paragraph 218)

10. Lastly, the CA stressed:

(a) The proportionality analysis shall not be geared towards the seriousness of the offence(s) alone; and (paragraph 214)



(b) After the power of warrantless search of digital contents is exercised, it is a matter for the Court to consider if the proportionality test, including the fourth step relating to the deleterious effects of a measure on the individual concerned, has been satisfied if there is a legal challenge to the specific exercise of power. (paragraphs 207 & 216)

11. In light of the above, the CA allowed the Respondent's appeal and granted a declaration that a police officer can conduct a search of the digital contents of a mobile phone found on an arrested person in accordance with the conditions set out in paragraph 9 above, and the power is compatible with BL 30 and BOR 14.

**Civil Division**

**Department of Justice**

**April 2020**