



**Summary of Judicial Decision**

**HKSAR v Tsang Yam Kuen, Donald (“the Appellant”)  
FACC 29/2018; [2019] HKCFA 24**

**Decision** : **Appeal against conviction allowed**  
**Date of Hearing** : **14 May 2019**  
**Date of Judgment** : **26 June 2019**

**Background**

1. In late 2009, the Government of the Hong Kong Special Administrative Region (“HKSAR”) invited applications for sound broadcasting licences. In April 2010, four such applications were made, one of them by Wave Media Limited (“WML”), a company in which a mainland businessman Mr Wong Cho-bau (“Wong”) held shares. In late 2010, WML also applied to surrender an earlier licence it held. In 2011, a further application was made to allow one of WML’s shareholders, Mr Arthur Li, to be a director and Chairman notwithstanding that he was disqualified by a provision of the relevant regulations.
2. The three licence applications made by WML were ultimately approved by the Executive Council (“ExCo”), with the first of the above applications approved in principle on 2 November 2010, the first and second applications finally approved on 24 March 2011 and the third application approved on 20 January 2012. Mr Arculli, a member of the ExCo and a shareholder in WML, made a declaration of interest to the ExCo and took no part in the deliberations of WML’s licence applications.
3. The Appellant, who at the time was Chief Executive of HKSAR, participated in the deliberations of the ExCo in respect of those applications as President of the ExCo. He made no declaration of interests to the ExCo about his dealings and negotiations with Wong in respect of a residential property in Shenzhen owned by a company controlled by Wong (“the Property”). It was not disclosed that the Appellant had entered into discussions with Wong in early 2010 about his proposal to occupy the Property following his retirement, there was an agreement to have the Property refurbished in accordance with the Appellant and his wife’s requirements at the expense of the owner (a company controlled by Wong); and a payment of RMB 800,000 was made by Mrs Tsang to a company related to the company that owned the Property in November 2010. The cost of the refurbishment was around HK\$3.5 million and the designer’s fee was HK\$350,000.
4. As the Appellant had made declarations of interest on many other occasions during his term of office, he was obviously aware of the importance of declaring interests where necessary.
5. The Appellant was tried on an indictment alleging:
  - (a) one count of Chief Executive accepting an advantage, namely, the



refurbishment and redecoration of the Property as an inducement or reward for the Appellant's handling of WML's licence applications ("Count 1");

(b) one count of Misconduct in Public Office in respect of the Appellant's failure to declare or disclose or conceal from the ExCo his dealings and negotiations with Wong concerning the Property when the ExCo was considering WML's licence applications ("Count 2"); and

(c) one count of Misconduct in Public Office in relation to his recommendation of an interior designer Mr Barrie Ho (who had been engaged by the company controlled by Wong for the refurbishment of the Property) for an award in the Hong Kong system of honours ("Count 3").

6. The Appellant did not give evidence at trial but relied on the explanations provided in the transcripts of his media interviews. Part of the defence case was that the Appellant regarded a requirement for disclosure of his dealings with Wong as far-fetched and, further, that even if the jury disagreed with that, what was involved was an error of judgment.
7. A lease of the Property dated 21 February 2012 produced by the solicitors for the Appellant to the ICAC was tendered as an exhibit but the Prosecution did not accept the genuineness of the document. The Prosecution case was that the purported lease was part of an attempt by the Appellant to put an innocent complexion on dealings, including payments and transfers of money, that were corrupt, although the true nature of the arrangements concerning the Property remained obscure.
8. On 17 February 2017, the Appellant was convicted on Count 2 and acquitted on Count 3. The jury could not agree on Count 1. On 20 July 2018, the Court of Appeal dismissed his appeal against conviction in respect of Count 2 but reduced the sentence from 20 months to 12 months' imprisonment. The Appellant applied for leave to appeal to the Court of Final Appeal. The Appeal Committee granted leave to appeal on the basis of two points of law and a possible substantial and grave injustice.

### **Issue in dispute**

9. The offence of Misconduct in public offence is committed where (1) a public official; (2) in the course of or in relation to his public office; (3) willfully misconducts himself by act or omission, for example, by willfully neglecting or failing to perform his duty; (4) without reasonable excuse or justification; and (5) where such misconduct was serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.



10. At trial, the primary prosecution case was that the dealings between the Appellant and Wong in respect of the renovations to the Property were corrupt, and that they were deliberately concealed in order to hide that corruption. If that case had been accepted, there would have been a conviction on Count 1, and the elements of wilfulness and seriousness in respect of Count 2 would have presented little difficulty. As that case was not accepted by some members of the jury, the central question in the appeal was whether the jurors who were not prepared to convict on Count 1, but who convicted on Count 2, had been given appropriate guidance on how they were to approach the issues of wilfulness and seriousness of the non-disclosure.

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

(full text of CFA's judgment at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=122716&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=122716&QS=%2B&TP=JU); press summary issued by the Judiciary at [https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2018/FACC000029\\_2018\\_files/FACC000029\\_2018ES.htm](https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2018/FACC000029_2018_files/FACC000029_2018ES.htm))

11. The primary prosecution case on Count 2, as well as its case on Count 1, was that the reason why the Appellant was "hopelessly compromised", and the reason why his dealings with Wong were kept secret was that those dealings were corrupt, and that the Appellant had taken a bribe. That was the alleged "true nature of his relationship with Wong". (Paragraph 56)
12. If the jury were to be invited to convict on a basis not involving an allegation of corruption but a contention that there was a relationship suggestive of some unspecified and unknown impropriety giving rise to divided loyalties, such an approach required explanation. References in argument, and in the summing-up, to an obvious conflict of interest, and to the Appellant being hopelessly compromised, and to deliberate concealment, took their colour from what was alleged to be the "true nature of the relationship" that required disclosure. The only alleged relationship specified was that of the giver and taker of a bribe. No more anodyne version, based on "divided loyalties" surfaced. (Paragraph 57)
13. The trial judge referred briefly to the possibility that the jury might come to the conclusion that there existed no corrupt practice. He did not, however, elaborate on the possibility of some non-corrupt "impropriety". He told the jury to go back to the particulars of Count 2 and told them to consider whether the failure to declare or disclose, or the concealment, was deliberate, which he contrasted with "not by accident, not by inadvertence, not by oversight [and] without reasonable excuse of justification". (Paragraph 58)
14. Part of the defence case was that the appellant regarded a requirement for disclosure of his dealings with Mr. Wong as far-fetched and, further, that, even if the jury disagreed with that, what was involved was an error of judgment.



That was consistent with a deliberate decision not to disclose, but one that was not wilful. There was no reference to that in the directions on willfulness. (Paragraph 60)

15. In a note on directions handed up by the Prosecution prior to the summing-up, it was submitted: *“‘Wilfully’ in this context means deliberately, rather than by accident or inadvertence or oversight, in the sense that the Defendant either knew his conduct was unlawful or deliberately disregarded the risk that his conduct was unlawful.”* The defence invited the judge to direct on knowing unlawfulness. (paragraph 61)
16. In a case where the allegedly wilful misconduct consists of a failure to comply with an obligation to disclose information, and there is a viable issue as to whether disclosure was, and was regarded as, necessary, a direction which treats a conscious decision not to disclose as the equivalent of deliberate failure to disclose, or, even worse, concealment, is dangerously ambiguous. (Paragraph 70)
17. As the present case was argued, and left to the jury, references to the true nature of the relationship between the Appellant and Wong, and a serious conflict of interest, and to the Appellant’s being hopelessly compromised, were put in the context of the prosecution’s primary case, on Count 2 as well as Count 1, of corruption. In that context, there was no viable issue of the kind referred to above. However, on an approach to Count 2 without the element of corruption, there was a viable issue on the element of wilfulness, and it was not explained to the jury. (Paragraph 71)
18. It is in the nature of the offence of misconduct in public office that a jury is required to make an assessment of whether the alleged misconduct is so serious as to involve an element of culpability which is of such a degree that the misconduct is calculated to cause injury to the public interest so as to call for condemnation and punishment. Jurors are not required to give reasons for their decision, but they are expected to have them. This expectation is meant to be satisfied by a trial process that involves reasoned argument by counsel, and judicial directions appropriate to the case. (Paragraph 72)
19. On the prosecution’s primary case of corruption as the motive for concealment, the element of seriousness required little elaboration, and the directions of the trial judge were adequate. When corruption was taken out of the equation, then an evaluation of the nature and extent of the Appellant’s departure from his responsibilities, and the seriousness of the consequences which might follow from his omission required consideration of the motives behind his omission, what it was the Appellant was required to disclose, and the consequences of non-disclosure. Without proper analysis of the competing possibilities, there was a danger the jury would fall into the trap of assuming that there was something criminal about the Appellant’s dealings with Wong. (Paragraphs 69 and 74)



20. The trial judge's directions on wilfulness and seriousness were inadequate. That inadequacy would have been immaterial if the jury had convicted on both Count 1 and Count 2. The appeal should be allowed and the appellant's conviction and sentence should be quashed. (Paragraphs 75 and 76)
21. It had not been argued, and could not be argued, that it was not open to a jury, properly instructed, to convict the Appellant on Count 2 of the indictment. As the Appellant had suffered a just punishment for the offence in respect of which he would be re-tried, that weighed heavily in favour of a conclusion that the interests of justice do not require a new trial. There should not be such an order. (Paragraphs 77 and 80)

**Prosecutions Division  
Department of Justice**

**April 2020**