



Summary of Judicial Decision

HKSAR v Chow Ho Yin (“the Appellant”) FACC 4/2019; [2019] HKCFA 52

Decision : Appeal against conviction dismissed
Date of Hearing : 28 November 2019
Date of Judgment : 10 January 2020

Background

1. The Appellant was stopped and searched by police officers. He was caught hiding drugs in his underpants. He admitted to possession of the drugs in question (“the Confession”) and was charged with trafficking in a dangerous drug, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap. 134.
2. At his trial, the Appellant challenged the Confession as involuntary and inadmissible, claiming that he was induced by certain promises made by one of the arresting officers. When the impugned officer was about to testify in the *voir dire*, the Appellant fell ill. The Judge refused to adjourn the hearing to the following morning while the Appellant sought medical assistance. The Judge concluded that the Appellant had a choice to stay or leave and would not be prejudiced by being absent because his counsel had full instructions. The Appellant was absent for the whole of the officer’s evidence at the *voir dire*. The Confession was ruled admissible and the Appellant was convicted by the jury.

Issue in dispute

3. Whether a substantial and grave injustice has been done because of the Judge’s refusal to adjourn the hearing and decision to continue in the Appellant’s absence deprived him of a fair trial.

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=126543&QS=%2B&TP=JU)

4. There is a well-established right for the accused to see and hear the case against him, confront his accusers, and give prompt and continuous instructions to his legal representatives. The right to be present provided for under Article 11(2)(d), section 8 of the Hong Kong Bill of



Rights Ordinance, Cap. 383, is part of the broader right to a fair trial. The right is however not absolute. (Paragraphs 14 to 16)

5. A trial judge has the discretion to allow a trial (including a *voir dire*) to proceed in the absence of an accused in appropriate circumstances. In exercising the discretion, the judge must carefully consider all the relevant circumstances arising in the case with the *"overriding concern ... to ensure that the trial, if conducted in the absence of the [accused], will be as fair as circumstances permit and lead to a just outcome"*. The judge should proceed with *"utmost care and caution"*. The decision to proceed should only be made in *"rare and exceptional cases"*, and if an accused is absent because of illness, *"it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin"*. The discretion *"should be sparingly exercised and never if the accused's defence will be prejudiced by his absence"*. (Paragraph 18)
6. The authorities establish a number of non exhaustive or conclusive factors that should be taken into consideration:
 - Was the accused's absence voluntary or involuntary? Where an accused is absent because of illness, the absence is generally treated as involuntary.
 - Has the accused waived the right to be present at his trial? This is a question of fact to be determined in all the circumstances.
 - Would an adjournment resolve the problem of the accused's absence? If so, would the adjournment required be short or long? Would an adjournment impact negatively on the conduct of the trial, for example, the effect of delay on the memory of witnesses?
 - Is the accused legally represented? If so, to what extent are his legal representatives able to receive and act upon instructions in his absence?
 - Would the accused be prejudiced by his absence, having regard to the nature of his defence and the evidence against him?
 - Would there be a risk of the jury reaching an improper conclusion about the accused's absence? (Paragraph 17)
7. The trial judge should have granted a brief adjournment of the trial for the afternoon while the appellant sought medical assistance. (Paragraph 30)



8. The trial must be viewed as a whole in determining whether the Appellant, in all the circumstances, had a fair trial. This is not a case that the improper exercise of discretion would bring the administration of justice into disrepute. Accordingly, no substantial and grave injustice had been done to the Appellant. The Court concluded that as a whole, the overall fairness of the trial was maintained. The appeal was unanimously dismissed. (Paragraphs 29 to 32)

Prosecutions Division
Department of Justice

April 2020