



Summary of Judicial Decision

HKSAR v CHAN Siu-tan (A5)

HKSAR v Wong Cho-shing & 3 others (A1-A3 and A6)

FAMC 48 and 49 of 2019; [2020] HKCFA 14

Decision : **Application for leave to appeal to the Court of Final Appeal refused**
Date of Hearing : **7 April 2020**
Date of Reasons for Determination : **17 April 2020**

Background

1. In the evening of 14 October 2014, a large crowd of protestors were present in the vicinity of the Central Government Complex and Tamar Park and caused blockage on Lung Wo Road. In the small hours on 15 October 2014, the police carried out a clearance operation to disperse the protestors. During the clearance operation, a protestor (“Tsang”) was arrested. Tsang was later handed over to the plainclothes police officers including the Applicants and a co-defendant, D4. They carried Tsang to outside Lung Wui Road Government Building Pump Station East Substation (“the Substation”). Another plainclothes police officer, D7, joined the parties at the Substation. At the Substation, Tsang was assaulted for approximately four minutes by some or all of the Applicants, D4 and D7. After the assault, A5 and A6 accompanied Tsang to the Central Police Station. At the police station, A5, in the presence of A6, slapped Tsang.
2. The 7 police officers (the Applicants and two co-defendants (D4 and D7)) were charged with a joint charge of causing grievous bodily harm with intent, and A5 was alone charged with one charge of common assault. After trial, the 7 police officers were found not guilty of causing grievous bodily harm with intent, but guilty of assault occasioning actual bodily harm. A5 was also convicted of one count of common assault. The 7 police officers were sentenced to 2 years’ imprisonment.
3. Upon the Applicants and their co-defendants’ appeals to the Court of Appeal (“CA”) against both conviction and sentence, the Applicants’ appeals against conviction were dismissed, while two co-defendants’ appeals against conviction were allowed by CA on 26 July 2019. Their appeals against sentence were allowed by CA. (full text of the CA’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=123313&QS=%2B&TP=JU)



4. The Applicants subsequently sought to apply for a certificate to the Court of Final Appeal on the basis of four points of law of great and general importance.

The Court of Appeal declined to certify any of the questions posed on 25 October 2019. (full text of the CA's judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=125078&QS=%2B&TP=JU)

5. The Applicants renewed their application before the Appeal Committee of the Court of Final Appeal ("CFA"), seeking certification and leave to appeal in respect of four points of law and leave to appeal on two grounds on the substantial and grave injustice basis.

Issue in dispute

Points of Law

6. Question 1 concerns the test of admissibility of video recorded material, in particular as to the 'legal standard' required to be satisfied. The question states: *"When the authenticity (and thus relevance) of video recorded material is in issue, does the test for admissibility require the party seeking to admit it to establish, to any legal standard, that the material is in fact authentic or is it sufficient merely to ask whether the disputed evidence, if believed by the tribunal of fact, would be sufficient to prove authenticity beyond a reasonable doubt?"*
7. Question 2 concerns the use of impugned video as a control sample to authenticate other impugned footages. The question asks: *"When the authenticity/relevance (and thus admissibility) of various video footages is in issue and where the original footage is in existence and obtainable by the prosecution:- (1) is it permissible in law to use the impugned footages to authenticate one another? (2) is it permissible in law first to assess and find one of the footages to be 'prima facie' authentic and then use that footage as a control sample to authenticate other impugned footages? (3) or does the law require the authenticity of the comparator footage to be proved beyond doubt?"*
8. Question 3 concerns whether the Defence's right to fair trial will be compromised if the Prosecutions uses an open source video as evidence while the original video footage is in existence; and to permit a witness who has access to the original video footage to give evidence of his comparison between the original video footage and the downloaded video footage. The question is as follows: *"Where original video footage is in existence, readily obtainable by the prosecution and where any examination of it would*



instantly demonstrate how relevant and important it is to the issue of authenticity/relevance (so that its production should and could be made by Court order) is it compatible with the requirements of a fair trial:- (1) to permit the Prosecution to use internet-downloaded, edited video footages which purport to be the same as the original video footage notwithstanding the former's authenticity is challenged? (2) to permit a prosecution witness (who alone had had access to the original video footage) to give hearsay evidence of his own comparison between the original video footage and the edited, downloaded footages in support of the authenticity of the internet-footages, in circumstances where neither the Judge nor the defence had access to the original video footage or were privy to such comparison exercise so that the witness's evidence was incapable of effective challenge?"

9. Question 4 concerns whether the totality of evidence before the Judge is sufficient to prove the authenticity of the disputed video footage beyond reasonable doubt. The question reads as follows: "*Absent production of the (readily available) original video footages, was the totality of evidence before the trial Judge capable in law of proving the authenticity of the disputed, edited video footages beyond a reasonable doubt?"*

Substantial and Grave Injustice

10. The Applicants contended that the approach to determining admissibility adopted by the Judge and upheld by the Court of Appeal was erroneous.
11. In addition, A5 sought to argue that, having rejected Tsang's evidence regarding an alleged assault by police officers at the time of his arrest, it was unsafe for the Judge to have relied on his evidence in support of the authenticity and admissibility of the video recordings in question.

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

(full text of the Appeal Committee's judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127462&QS=%2B&TP=JU)

12. The applications for leave to appeal were dismissed by the Appeal Committee.

Points of Law

13. Question 1 seeks to suggest that the Judge applied the wrong test because he erroneously thought 'it sufficient merely to ask whether the disputed evidence, if believed by the tribunal of fact' as the basis for proving "authenticity beyond a reasonable doubt". This is misdirected and based on a misapprehension of the trial Judge's ruling. The Judge was not suggesting that "merely to ask whether the disputed evidence, if believed by the tribunal of fact, would be sufficient to prove authenticity beyond a



reasonable doubt” and thus to establish admissibility at the *voire dire* stage. He was assessing whether the evidence established *prima facie* authenticity such that it merited further assessment for the purposes – if believed – of proving guilt beyond reasonable doubt on the general issue. Since the Judge went on to find that the evidence not only established *prima facie* authenticity but established authenticity beyond reasonable doubt, the application for leave to debate on further appeal whether he had or had not correctly adopted a “*prima facie* evidence” standard rather than a “balance of probabilities” (or some other) standard to determine admissibility at the *voire dire* stage is academic for all practical purposes. (paragraphs 16-17)

14. In Hong Kong, the “*prima facie* evidence” standard is clearly established as applicable where a challenge is made to the admissibility of video recordings on the basis of lack of authenticity. (paragraph 18)
15. The Appeal Committee refused to certify Question 2. It is well-established that authenticity of a video recording can be proved circumstantially. Whether any particular comparison is legitimate is a fact-specific question. It is not reasonably arguable that in deciding on admissibility, only a comparator proven to be authentic beyond reasonable doubt can be used. Such rigidity in approaching circumstantial evidence cannot be justified. (paragraphs 25-26)
16. In relation to Question 3, at no stage of trial proceedings did any of the defendants’ counsel mount any application for the originals to be produced at trial. There was no suggestion of flagrant incompetence on the part of trial counsel. It was a tactical decision by trial counsel to take advantage of the absence of the originals. (paragraph 29)
17. The evidence of Mr David Wong (PW8), the news production manager, who testified that he had compared the footage uploaded to the TVB website with the relevant Blu-ray disc was not hearsay as he was testifying about comparisons he had made between different video recordings. He was not purporting to give second hand evidence about any past events such as those depicted in the challenged footage. The Appeal Committee held that Question 3 does not raise any point of law of great and general importance and its answer is necessarily fact-specific. (paragraphs 30-31)
18. Question 4 concerns whether the totality of evidence before the Judge was capable of proving authenticity of the disputed video footages beyond reasonable doubt. This is not a question of law but an invitation to re-assess the weight of evidence. The certification was refused. (paragraph 32)



Substantial and Grave Injustice

19. The 'substantial and grave injustice' limb which seeks to content the approach to determining admissibility adopted by the court below was erroneous. It premised on the propositions which underlie the Questions discussed above. The Appeal Committee was satisfied that the approach of the Courts below involved no departure from established norms capable of founding leave on the substantial and grave injustice basis. (paragraph 34)

20. For the 'substantial and grave injustice' limb contended by A5, A5 accepts that the leave sought on this issue is "wholly contingent" on leave being granted on the first issue under 'substantial and grave injustice'. In view of the refusal of leave on the first issue under the substantial and grave injustice ground, it must follow that leave must be refused on this second issue as well. In any event, it is trite law that a judge or jury may accept some part of a witness's evidence and reject other parts. The trial Judge was best placed to access Tsang's credibility and reliability. (paragraph 35)

**Prosecutions Division
Department of Justice**

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