



Summary of Judgment

Lee Chu Ming, Martin & Ors v A Permanent Magistrate, Eastern Magistracy and The Commissioner of Police

HCAL 1396/2020; [2020] HKCFI 2028

Decision : **Application for judicial review dismissed**
Date of Hearing : **13 August 2020**
Date of Judgment : **20 August 2020**

Background

1. This is an application for judicial review against the search warrants in respect of examination of digital content in mobile devices (“the Search Warrants”).
2. The Applicants were arrested by the Police and charged with the offences of incitement to knowingly take part in an unauthorised assembly and/or organising and/or knowingly taking part in an unauthorised assembly. Following the Police’s arrest of the Applicants, the subject mobile phones were seized and retained by the Police. The Search Warrants were subsequently obtained by the Police.
3. Prior to the substantive hearing of this application, an interim injunction restraining the Commissioner of Police (“the Commissioner”) from executing the Search Warrants was granted by Coleman J.

Grounds of Review

4. The 4 grounds of challenge are that the Search Warrants are (i) *ultra vires* for lack of specificity and being oppressive; (ii) the retention of the mobile phones for more than 2 months before applying for the Search Warrants constituted unreasonable delay; (iii) the Commissioner had failed to inform the Applicants of the applications for the Search Warrants; and (iv) the Magistrate was wrong to decline jurisdiction to review the issue of the Search Warrants.

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=130295
&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130295&QS=%2B&TP=JU))



5. The Court started by analysing and pointing out the significance of the judicial gatekeeping process in issuing a search warrant – to protect individuals from unjustified State intrusions upon their privacy, the overriding need to preserve both the integrity and the effectiveness of criminal investigations, and also the reasonable opportunity afforded to the affected party to challenge, by way of an *inter partes* hearing, the warrants which were obtained *ex parte* as laid down in the leading authority of *Keen Lloyd Holdings v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372 (“*Keen Lloyd*”). (paragraphs 68-76)
6. The Court went on to analyse the leading case in the specific context of a warrantless search in the case of *Sham Wing Kan v Commissioner of Police* [2020] 2 HKLRD 529 (“*Sham Wing Kan*”) which established, *inter alia*, that a magistrate could issue a search warrant under section 50(7) of the Police Force Ordinance (Cap. 232) to authorise a search of the digital contents of a mobile phone, by treating the mobile phone as a separate “place” for which a specific search warrant should be obtained. The Court identified certain safeguards under a warrantless search as ruled by the Court of Appeal – (i) when it was not reasonably practicable to obtain a search warrant; (ii) the scope and purpose of the search must be truly incidental to the arrest and necessary for investigation or protection of the safety of persons; and (iii) there must be documentation of the purpose and scope of the warrantless search; and (iv) there would be supervision by way of after-the-event judicial review. The Court then emphasised that in the present case, there was the additional safeguard of the judicial gatekeeping process before the search warrants were issued (paragraphs 77-91)
7. In dismissing Ground 1, the Court held that what should be stated in the search warrant was a matter of construction of the empowering provision so it would depend on what the statutory provision required, either expressly or by necessary implication. In construing the empowering provision, the Court should not rewrite it. The Court noted that the Court of Appeal in *Philip KH Wong, Kennedy YH Wong & Co v Commissioner of ICAC (No 2)* [2009] 5 HKLRD 379 did not find it correct or justified in principle to impose restrictions or conditions to protect even the undeniable and absolute right of legal professional privilege. The Court rejected the Applicants’ submission that there was a licence to fish under the Search Warrant and the statutory purpose was set out on the face of the Search Warrant, which specifically requires and limits the authorisation to the search of the portions or extracts of the digital contents which are likely to be of value to the investigation of the specific named offences. (paragraphs 93-124)
8. The Court also held that the absence of identifying a clear “limit” or the exact



scope of relevant informational materials for search and seizure was not a valid objection because it was often impossible for the Police to determine the exact scope at the stage of investigation, and without conducting at least a cursory look at the digital contents of the mobile phone. Adopting the decision of the Supreme Court of Canada in *R v Vu* [2013] 3 RCS 657 as well as the common views by the Courts in Canada, the United States and the United Kingdom, the Court accepted that *ex post*, or after-the-event, review was the preferred mode of control, when the reasonableness of the Police's actual conduct in search of the device came under scrutiny, as opposed to the imposition of any *ex ante* search protocol, which was generally considered to be impractical, and unsuited to the task of the authority issuing the warrant. (paragraphs 126-137)

9. The Court also agreed with the ruling of Chow J in the recent case of *Cheung Ka Ho Cyril v Securities and Futures Commission* [2020] 1 HKLRD 859 that what was required to be included or set out in a search warrant depends, ultimately, on the terms of the enabling statute. There is no overriding or overarching requirement for specificity outside what is mandated by the relevant statute authorising the issue of the search warrant. (paragraph 138)

10. Despite the above, the Court did not foreclose the possibility that in future in some cases it might be appropriate to impose search protocols as a result of decisions made on thorough after-the-event review. However, it remains that whilst it may be within a magistrate's powers to approve or require some search parameters in any given case, the exercise of the discretion not to do so would not render the search warrant outside the magistrate's powers. Further, the absence of *ex ante* search protocol or restriction is not inconsistent with the constitutional protection for privacy because (i) the authority to search a mobile phone is subject to the implied condition that the manner of search must be reasonable; and (ii) the manner of search may be subject to judicial review after the fact. (paragraphs 142-147)

11. As regards the alleged delay for applying the search warrants (Ground 2), the Commissioner explained that time had been taken for seeking legal advice in light of the Applicants' claims for legal professional privilege, addressing the need to adopt a standardised approach and format and making schedule adjustments for simultaneous applications. (paragraph 37)

12. The Court did not accept that there has been unreasonable delay. The Court further questioned the legal basis of such challenge, as there was no complaint of irrationality or *Wednesbury* unreasonableness in this regard, nor any allegation that the alleged delay was somehow *ultra vires*. (paragraphs 154-155)



13. As for Ground 3 which was also rejected, the Court accepted that it was implicit in the judicial nature of the warrant issuing process that the search warrant was issued on an *ex parte* application, but the magistrate had the right to entertain an *inter partes* application for setting aside an *ex parte* warrant on the limited grounds as defined in the Court of Final Appeal Case in *P v Commissioner of ICAC* (2007) 10 HKCFAR 293. (paragraph 163)
14. The Court also emphasised the potential concerns that advance notice would tip off persons under investigation and/or accomplices to the need to conceal and/or destroy evidence. (paragraph 168)
15. By reference to the case of *Sham Wing Kan*, the Court further highlighted that the risk of remote access to the volatile digital content stored on cloud platforms by other users via other digital devices, pending the obtaining of a search warrant, should not be negated. (paragraph 169)
16. On the question of the jurisdiction of the Magistrate (Ground 4), in view of the authority of *Keen Lloyd*, the Court found that the Magistrate's view that she had no jurisdiction to hear an application to set aside the search was wrong. However, having found that there is no merit on Grounds 1 to 3, no relief is granted as it would serve no purpose for the Magistrate to hear again the same arguments. (paragraphs 178-179)
17. In light of the above, the application for judicial review is dismissed. (paragraph 181)

Civil Division

Department of Justice

August 2020