Sentencing (Principles)

Dashed Hope

香港特別行政區 訴 林子康

高等法院原訟法庭
HCMA 496/2011
原訟法庭法官張慧玲

聆訊及裁決日期： 2011年11月16日
判案理由書日期： 2011年11月21日

答辯人代表律師： 高級助理刑事檢控專員盧慶祥
上訴人代表律師： 駱應淦資深大律師

刑事罪判刑—刑事恐嚇—香港法例第200章《刑事罪行條例》第24(a)(ii)條—申請人威脅受害人稱若她不與他免費「援交」，他會將她的裸照傳送給她的男友—18個月的量刑起點是否明顯過重—「希望粉碎」因素—無正面良好品格

上訴人在裁判法院承認一項「刑事恐嚇」罪，被判監禁10個月。上訴人就判刑提出上訴。

上訴人透過互聯網認識X小姐。後X小姐同意以港幣$4,000與上訴人「援交」。在上訴人要求下，X小姐透過視像脫光衣服以供上訴人觀看。其後X小姐拒絕到上訴人家裏「援交」。翌日，X小姐收到來自上訴人的短訊。上訴人聲稱有X小姐的裸照，並要求X小姐與他免費援交，否則他將該等照片發送給X小姐的男友，X小姐因而感到恐懼。其後，X小姐從電腦收到來自上訴人的電郵，該電郵隨附10多幅X小姐的裸照。X小姐感到害怕。隨後，X小姐收到上訴人的一個來電，上訴人問X小姐有否收到該電郵。X小姐與男友相討後報警求助。上訴人被捕後在警誡下承認有關罪行。並謂出自一時衝動，警方調查期間，在上訴人的電腦發現36幅X小姐的裸照。

裁決，上訴(判刑)得直：

(1) 以本案案情而言，18 個月量刑起點看來是較高，但並非明顯過重。況且，裁判官在給予上訴人三分之一刑期扣減後，再因上訴人初犯額外減刑 2 個月，裁判官此特別寬大的做法是無理據的(參看案例 *Secretary for Justice v Chau Wan Fun* [2007] 1 HKC 423)。認罪後三分之一刑期扣減通常是屬最高減幅。在本案，無資料顯示上訴人有正面良好品格(positive good character)而可得多於三分之一的刑期扣減[24]。

(2) 警方於起訴現上訴人前曾爲上訴人錄取口供以徵求上訴人的同意，作爲向法庭申請法庭具結令(即 Bind Over Order)之用。上訴人表示同意接受具結令，亦維持其認罪及懺悔的態度[6]。警方其後亦同樣爲X 小姐錄取口供，獲得其同意警方以該方式處理該案[7]。但上訴人最終仍被正式起訴。

(3) 當上訴人在沙田裁判法院認罪、求情及被判刑當天，代表上訴人的律師尚未獲悉此等資料，故未有向裁判官就這方面作求情陳詞[7]及[8]。

(4) 本案案情嚴重，以具結令取代檢控並非正確做法，若警方正式向法庭申請具結令，裁判官將不會接納。就本案而言，向被告人錄取口供，以獲其同意警方以法庭具結令的形式了結案件，就如讓一名被告人存有希望，然後令「希望粉碎」(參看案例*HKSAR v Lui Kin Hong, Jerry*, CACC 378/1998)[5]及[10]。

(5) 本案裁判官將12 個月的刑期減至10個月，變相量刑起點是15個月。以本案案情而言，15個月的量刑起點可說是恰當的(雖然18個月並非明顯過高)。上訴人遭受希望粉碎之苦，故酌情額外減刑2個月。上訴得直，10個月的監禁刑期撤銷，改判8個月監禁[25]及[26]。

[English Translation of HCMA 496/2011]

HKSAR v LAM PATRICK CHI-HONG

COURT OF FIRST INSTANCE
HCMA 496/2011
Barnes J

Date of Hearing and Judgment: 16 November 2011
Date of Reasons for Judgment: 21 November 2011

Counsel for the Respondent: Francis Lo SADPP
Counsel for the Appellant: Lawrence Lok SC

Criminal sentencing – Criminal intimidation – Section 24(a)(ii) of the Crimes Ordinance (Cap 200) – Appellant threatened victim by saying he would sent her nude photographs to her boyfriend if she refused to have "compensated dating" with him for free – Whether starting point of 18 months manifestly excessive – "Dashed hope" factor – Lack of positively good character

The Appellant pleaded guilty to a charge of "criminal intimidation" at the magistracy and was sentenced to 10 months' imprisonment. He appealed against sentence.

The Appellant came to know Miss X through the internet. Later, Miss X agreed to have "compensated dating" with the Appellant at HK$4,000. At the request of the Appellant, Miss X stripped off her clothes and let the Appellant look at her naked body via video. Subsequently, Miss X refused to go to the Appellant's home to have "compensated dating" with him. On the following day, Miss X received an SMS from the Appellant. The Appellant said that he had Miss X's nude photographs and would send those photographs to Miss X's boyfriend if she refused to have "compensated dating" with him for free. Thus, Miss X was alarmed. Later, she received an email from the Appellant in her computer. Attached to the email were ten-odd nude photographs of Miss X. She felt afraid. Afterwards, she received a telephone call from the Appellant. The Appellant asked whether Miss X had received the email. After discussions with her boyfriend, Miss X reported the matter to the police. The Appellant was arrested. Under caution, he admitted that he committed the offence on the spur of the moment. During investigation, the police found 36 nude photographs of Miss X in the Appellant's computer.

Held, appeal (against sentence) allowed:

(1) On the facts of the case, a starting point of 18 months seemed to be on the high side, but it was not manifestly excessive. Moreover, on top of the one-third discount, the magistrate gave a further reduction of two months to the Appellant for it was his first offence. The magistrate had no justification to be so lenient (see *Secretary for Justice v Chau Wan Fun* [2007] 1 HKC 423). The maximum discount for a guilty plea was one-third. There was nothing in this case to show that the Appellant had a positively good character which would enable him to deserve a further reduction in addition to the one-third discount [24].

(2) Before the police charged the Appellant with an offence, they took a statement from him to seek his consent for applying to court for a bind over order. The Appellant agreed to accept a bind over order, maintained his indication to plead guilty and showed remorse [6]. Later, the police also took a statement from Miss X who agreed with the disposal of this case by police in such a manner [7]. But the Appellant was in the end formally charged.

(3) On the sentencing day when the Appellant pleaded guilty and made mitigations at the Shatin Magistracy, his representing counsel who was unaware of the above information did not advance mitigation to the magistrate in this respect [7] & [8].

(4) The facts of this case were serious. It was inappropriate to impose a bind over order in lieu of prosecution. Should the police formally apply to the court for a bind over order, the magistrate would not have accepted it. In the present case, taking a statement from the defendant in order to seek his consent to the way the police proposed to settle this matter by applying to court for a bind over order, was tantamount to giving a hope

to the defendant but then "dashing the hope" (see *HKSAR v Lui Kin Hong, Jerry*, CACC 378/1998) [5] & [10].

(5) The magistrate reduced the term of sentence from 12 months to 10 months. In effect, it was equivalent to adopting a starting point of 15 months. In the circumstances of this case, a starting point of 15 months would be regarded as appropriate (though 18 months was not manifestly excessive). Considering that the Appellant was a victim of "dashed hope", the court exercised its discretion to grant a further deduction of 2 months. The appeal was thus allowed. The original sentence of 10 months' imprisonment was quashed and substituted with one of 8 months [25] & [26].

Deterrence

HKSAR v LI OI YEE (李靄儀**)**

COURT OF APPEAL
CACC 362/2010
Stock VP, Wright & M Poon JJ

Date of Hearing: 2 November 2011
Date of Judgment: 2 November 2011

Counsel for the Respondent: Wayne Walsh DLO
Counsel for the Applicant: Andy H S Hung

Criminal law & procedure – Sentencing – Attempting to traffic in a dangerous drug – Trafficked in substance thought to be 39.5g ICE – Harm created by advancement of the culture and of the business of trafficking in dangerous drugs – Substantial degree of criminality by reason of the *mens rea* – Significant part of sentencing aim is deterrence - Sentence of 4 years' imprisonment appropriate

刑事法及訴訟程序－判刑－企圖販運危險藥物－販運誤以爲是39.5克冰的物質－助長販毒歪風及活動所造成的害處－因犯罪意圖而刑責程度嚴重－判刑目的之主要部分是阻嚇作用－判處4年監禁屬恰當

The Appellant was convicted after trial of a count of attempting to traffic in a dangerous drug and was sentenced to 4 years' imprisonment. She was stopped by the police on the street and was found to be carrying a handbag containing 39.5g of a substance which she believed to be methamphetamine hydrochloride but which, upon analysis by the Government Chemist, turned out not to be drug at all. The Appellant claimed to have purchased that substance for $13,600 believing it to be ICE and intended it for her own consumption, which assertion was disbelieved by the judge.

In sentencing the Appellant, the judge took the view that had the substance in fact been methamphetamine hydrochloride, the appropriate sentence would have been one in the region of 8 to 8½ years' imprisonment. The judge opined that the gravamen of the offence was that the Appellant had intended to traffic in a significant quantity of ICE and that a deterrent sentence was necessary. The Appellant was sentenced to a term of 4 years' imprisonment in the end.

The Appellant appealed against sentence contending that the judge had failed to (i) have sufficient regard to the facts that it was impossible for the Appellant to commit the actual trafficking offence so that the punishment should be more related to the *mens rea* instead of the act or preparatory work of trafficking and that since no dangerous drug was found in the substance, the room for potential harm caused to others was far less than that of other actual trafficking cases; (ii) take into account that had the Appellant been arrested whilst she was actually selling the substance, she could have been prosecuted for the lesser offence under s.4A of the

Dangerous Drugs Ordinance; and (iii) recognise that had the substance contained but a small quantity of dangerous drugs, the Appellant would have received a shorter sentence on the basis of that small quantity.

Held, dismissing the appeal:

(1) The harm at which the attempt offence is directed, where the offender believes, albeit mistakenly, the substance to be or to contain a dangerous drug, is the harm created by the advancement of the culture and of the business of trafficking in dangerous drugs. The *mens rea* in this case is precisely the same as the *mens rea* had the substance turned out to be a dangerous drug, and there is, by reason of this *mens rea* a substantial degree of criminality: *Patel and Varshney* (1995) 16 Cr App R (S) 267, 272. Whilst part of the sentence in any dangerous drugs case is directed at the actual harm caused by the ultimate consumption of the drug, a significant part of the sentencing aim in dangerous drugs cases is that of deterrence. It is the aim of the courts firmly to dissuade erstwhile traffickers from engaging in this trade and it sits ill in the mouth of the offender who believes erroneously that he is trafficking in dangerous drugs to suggest that he should by reason of happenstance be immune from that deterrent policy [8]. These principles are reflected in a number of English cases: *R v Afzal and Arshad* (1992) 13 Cr App R (S) 145, *R v Tomasz Szmyt* [2010] 1 Cr App R (S) 69 considered [10]-[11].

(2) In a case such as the present, the court should look at the sentence which otherwise would be imposed, in accordance with the relevant guideline tariffs, for trafficking in the drugs which the offender believed she possessed, for her moral culpability remains the same, but the court should at the same time accord a reduction in recognition of the fact that the *actus reus* brings with it no harm to an ultimate consumer [12].

(3) The Appellant's contention in respect of s 4A ignores s 4(1)(c) of the same ordinance which provides that it is an offence to 'do or offer to do an act preparatory to or for the purpose of trafficking in a substance believed to be a dangerous drug' and which carries the same penalties as that provided for trafficking in the actual drug. *R v Lee Wing Chun* [1982] HKC 653. The conduct of the Appellant clearly fell within the ambit of s 4(1)(c): *R v Ye Wing Leung* CACC 159 of 1997 [16]-[18].

Disparity of Sentence

HKSAR v LAI YAT BING

COURT OF FIRST INSTANCE
HCMA 514/2011
Stuart-Moore DJ

Date of Hearing and Judgment: 25 August 2011

Counsel for the Respondent: Rosa Lo PP
Counsel for the Appellant: In person

Criminal sentencing – Disparity of sentence – Possession of obscene articles for the purpose of publication – s 21(1)(b) of Control of Obscene and Indecent Articles Ordinance

刑事罪判刑 – 判刑上的差異 – 管有淫褻物品以供發布 –《淫褻及不雅物品管制條例》第21(1)(b)條

The Appellant was convicted of possession of obscene articles for the purpose of publication, namely 3,177 obscene DVDs. He was sentenced to 8 months' imprisonment and was fined $10,000. The Appellant appealed against the fine only.

The facts were that a decoy police officer visited the shop and was served by the Appellant. 5 obscene DVDs were purchased from the Appellant who took the $100 marked money. Upon search, a total of 3,177 obscene DVDs were found and seized from the shop. The Appellant was arrested and admitted the offence under caution.

Held, appeal dismissed:

(1) Citing *HKSAR v TANG Wei-hung* HCMA 988/2005, the court noted that the imposition of a fine, coupled with immediate custodial sentence, is a valuable and effective deterrent to offences such as the present [4].

(2) However, in some cases which have been brought before the court on appeal, fines were imposed whereas in others no fine was imposed, and this apparently extends also to cases heard in Chinese. The court commented that parity of sentencing in commonly encountered offences is essential and it is extremely unfair if some defendants are being treated more harshly than others merely depending upon which magistrate they appear before. A consistent approach needs to be maintained or it will give rise to an understandable and genuine grievance [10].

International Element

HKSAR v LEE SHINWON & ORS

COURT OF APPEAL
CACC 27/2011
Cheung CJHC, Macrae & McWalters JJ

Date of Hearing: 28 October 2011
Date of Judgment (re: conviction): 28 October 2011
Date of handing down Reasons for Judgment (re: conviction): 14 November 2011
Date of Judgment (re: sentence) : 14 November 2011

Counsel for the Respondent: Ira Lui SPP
Counsel for A1: Suzanne Sim
Counsel for A2: Edwin Choy
Counsel for A3: Jackson Poon & Derek Hui

Criminal sentencing – Immigration offence - Conspiracy to obtain services by deception

刑事罪判刑－入境罪行－串謀以欺騙手段取得服務

The three Applicants and two accomplices were jointly charged with conspiracy to obtain services by deception and the criminal conduct involved was human trafficking. They participated in a scheme to traffic two Mainlanders to Australia on a flight leaving Hong Kong for Sydney. The scheme was for the Applicants to fly from Korea to Sydney via Hong Kong. In Hong Kong a substitution was to take place and A2 and A3 were to be replaced by the two Mainlanders being trafficked. The Mainlanders were able to pose as A2 and A3, who had flown from Korea, as they had been given false Korean passports in the names of A2 and A3. The boarding passes for the Hong Kong/Sydney sector had been issued in Korea and were given to the Mainlanders. It was their plan that A2 and A3 would wait until the flight for Sydney had departed Hong Kong and then approach airline staff to claim that they had lost their boarding passes for that flight. In this way they were able to obtain entry into Hong Kong [1]-[2].

A1 was the person in charge of the group. He accompanied A2 and A3 from Korea to Hong Kong and travelled to Australia with the Mainlanders. A1 pleaded guilty to the charge whereas A2 and A3 were convicted

after trial [3] & [5]-[7].

For the Mainlanders, the judge adopted the same starting point of 3 years' imprisonment. For A1, the judge adopted a starting point of 4½ years and discounted it for the plea of guilty to 3 years' imprisonment. The judge adopted a higher starting point because he viewed A1 as the most culpable of the defendants and as being not far behind the mastermind [9].

For both A2 and A3, the trial judge adopted the same starting point of 4 years' imprisonment. For A3 the judge allowed a discount of 4 months for his psychiatric condition and sentenced him to imprisonment for 3 years 8 months [10]-[11].

In the course of mitigation, the trial judge was referred to two cases: *HKSAR v He Wen You* [2009] 3 HKLRD 445 and *HKSAR v Cheng Kwong Chung & Ors* CACC 536/2001. On appeal, it was argued by the Applicants that these cases support their contention that the judge had adopted too high a starting point in respect of each of them [43].

Held, applications for leave to appeal against sentence dismissed:

(1) An analysis of the case law reveals the sentencing policy behind this type of offence and the sentencing goal, namely deterrence, that must be reflected in the sentence imposed [47].

(2) Policy considerations that underlie a court's approach to sentencing for these cases were enunciated in the cases of *Cheng Kwong Chung* and *He Wen You*. In *Cheng Kwong Chung*, the Court of Appeal said at paragraph 51 of its judgment: "*We take the view that offences such as these are very serious. They involve the exploitation of persons on the Mainland, for substantial sums, exploitation which is no doubt financially crippling to the emigrant and his or her family and which puts the emigrant at continuing risk. Beyond that, and importantly, the offences deliberately seek not only to undermine Hong Kong's laws but also the immigrations laws of other jurisdictions, and to enable persons to travel on aircraft when they are not authorised to do so. It hardly needs to be emphasised that conduct of this kind is to be treated by our courts with a firm hand, not least when air security and international immigration controls carry an importance greater than ever before.*" [48].

(3) In *He Wen You*, the Court said at paragraph 9 of its judgment, "*We must point out that a higher starting point is applicable to this kind of cases, which clearly involve sophisticated planning and arrangement. Making use of Hong Kong's position as a hub of communications, offenders assist illegal immigrants in entering a third country. By means of a fraudulent scheme, offenders help illegal immigrants enter the restricted area of the Hong Kong International Airport, where they then use false boarding passes to board flights bound for a third country. Upon arrival in that country, they will use false identity documents for gaining entry into that country. These activities will obviously tarnish Hong Kong's international reputation. Furthermore, as a result of those activities, immigration authorities of foreign countries will become wary of visitors from Hong Kong even when they are holding lawful travel documents, which means that visitors from Hong Kong will have to suffer a certain degree of inconvenience when they enter those countries. Severe, deterrent sentences must therefore be imposed for those offences.*" [48].

(4) There is also the comity of nations consideration which was adverted in *HKSAR v Yim Kim Ping & Ors* CACC 67/2009 as "*a mutual responsibility shared by all nations to punish and deter those who tried to cross international borders with forged travel documents.*" [49].

(5) There were two other Court of Appeal authorities where a starting point of 4½ years' imprisonment had been endorsed: *Yim Kim Ping* and *HKSAR v Teo Zi Yang & Anor* CACC 52/2010 [52].

(6) The ground of appeal for A1 was that the sentence imposed by the trial judge was manifestly excessive and/or wrong in principle. In considering this argument, the starting point must be an examination of the charge to which A1 pleaded guilty. Although it was a conspiracy to obtain travel services by deception, the deception was not, as counsel for A1 contended, limited to simply misusing boarding passes [55]-[56].

(7) The charge clearly pleaded that part of the deception was the use of forged travel documents. The conspiracy was not, therefore, a limited one and was no narrower, in terms of the conduct it encompassed, than the charges employed in the other Court of Appeal decisions. All these cases, whatever charge might be employed by the prosecutor, were concerned with punishing the conduct of human trafficking taking place in

Hong Kong – conduct which undermines the integrity of Hong Kong's air travel security and immigration procedures. The actual details of the human trafficking scheme in the present case were not so significantly different from the schemes in the other Court of Appeal authorities so as to create a meaningful distinction between them. For persons who played a substantial role in carrying out such schemes, the Court of Appeal had endorsed a starting point of 4½ years' imprisonment. Given the role that A1 played in the scheme, the starting point was wholly appropriate [57] & [59].

(8) The only ground of appeal against sentence of A2 and A3 was that, given their respective culpability the judge's starting point of 4 years' imprisonment was too high and resulted in a sentence that was manifestly excessive. In support of this ground, counsel argued that the Court of Appeal authorities lay down a benchmark of 3 to 3½ years for defendants whose participation in a human trafficking scheme was limited to the kind of roles played by A2 and A3. But an analysis of those cases did not reveal any such benchmark [61] & [64]-[65].

(9) The trial judge accepted that A2 and A3's culpability was less than that of A1, hence the lower starting point. Nevertheless, the judge correctly recognized that without willing cooperation of A2 and A3, the conspiracy would collapse. They were essential to the conspiracy's successful implementation. Thus, whilst not the masterminds of the scheme or the leading henchmen of the mastermind, they provided substantial assistance in carrying out the scheme [62].

(10) For A2 and A3, a starting point of 4 years imprisonment could not be said to be manifestly excessive [65]-[66].

HKSAR v PADILLA GERARDO GONZAGA & ORS

COURT OF APPEAL
CACC 275/2011
Stock &Yeung VPs, Cheung JA

Date of Hearing and Judgment: 30 November 2011

Counsel for the Respondent: Robert K Y Lee SADPP

Counsel for A1-A4: James Tze (re: sentence only)
Counsel for A2: In person (re: conviction)
Counsel for A5: In person

Criminal sentencing – Theft – Coming to Hong Kong as a group to steal a diamond at an international jewellery show - Appropriateness to enhance the sentence by 50% under OSCO due to planning and international element involved

Criminal sentencing – Theft – Giving effect to aggravating features of the offence without recourse to OSCO – International element, planning and offence committed by several persons

刑事罪判刑－盜竊罪－集體來港在國際珠寶展偷竊一枚鑽石－因有計劃部署並涉及國際犯罪元素而根據《有組織及嚴重罪行條例》加刑百分之五十是否恰當

刑事罪判刑－盜竊罪－沒有訴諸《有組織及嚴重罪行條例》但使罪行的加重刑罰因素有效－國際犯罪元素、有計劃部署及多人犯案

A1 to A5 came to Hong Kong from the Philippines at about the same time. 2 days later, all the Applicants attended an international jewellery show at the Hong Kong Convention and Exhibition Centre. A1 was captured by CCTV to have stolen from a show case a diamond which was worth HK$251,682. CCTV footage also showed all Applicants lining up together to wait for registration. When A1 stole the diamond, A3 and A4 acted as distracters by making enquiries with the sales assistants at the booth. A2 was in the same booth opposite to A1. A5 admitted that he was part of the group that had gone to steal the diamond. The stolen diamond had not been recovered.

A1, A3, A4 and A5 pleaded guilty to theft. A2 pleaded not guilty and was convicted of theft after trial.

The judge adopted a starting point of 3 years' imprisonment and granted one-third discount for the guilty pleas of A1, A3, A4 and A5. He then enhanced the sentence by 50% under the Organized and Serious Crimes Ordinance ("OSCO"). The resulting sentence was 3 years' imprisonment for the Applicants who pleaded guilty. A2 who was convicted after trial was sentenced to 4 1/2 years' imprisonment.

A1, A3 and A4 appealed against their sentences. A2 appealed against both conviction and sentence. A2's application for leave to appeal against conviction and sentence was adjourned. A5 abandoned his appeal against sentence but applied from the Court of Appeal to treat the abandonment as a nullity. The Court's decision as to A5's application was reserved.

Held, appeal against sentence allowed (A1, A3 and A4 only):

(1) The present case could not have been described as an organized crime as defined by section 2 of OSCO. Only the second category embraced by the definition was relied upon by the prosecution, namely, a Schedule 1 offence (theft is such an offence) that "is related to the activities of two or more persons associated together solely or partly for the purpose of committing *two or more acts*, each of which is a Schedule 1 offence and involves substantial planning and organisation." (Emphasis added) It was impossible to discern from the evidence more than one act which was a Schedule 1 offence which the Applicants had committed jointly. The court below was not empowered to enhance the sentence pursuant to the provisions of OSCO [13]-[15] & [21].

(2) The Court was however, duty bound, to give effect to features in aggravation of the offence of theft, though without recourse to OSCO. The aggravating features of this case were the international element and that the offence was planned and committed by several persons. Such aggravating features in the context of a public exhibition of expensive jewellery, warranted in each case a sentence, prior to discount for mitigation features, of 4 years' imprisonment [22]-[23].

(3) Accordingly, the sentences of A1, A3 and A4 in relation to the offence of theft were substituted with a term of 2 years and eight months' imprisonment [24].

Mitigating Factors

HKSAR v NGAI YIU CHING (倪耀偵)

COURT OF APPEAL
CACC 107/2011
Stock VP, Fok JA, McWalters J

Dates of Hearing: 2 September 2011
Date of Judgment: 3 October 2011

Counsel for the Respondent: Samantha Chiu Ag SPP
Counsel for the Applicant: Manyi Tsang

Criminal sentencing – False imprisonment – Indecent assault – Multiple offences - One transaction rule only a practical working rule, not a rule of law – Importance of totality principle – Emphasis on reflecting offender's overall culpability – Old age on its own not a mitigating factor – Effect of sexual assaults on victim - Victim impact statement not required

刑事罪判刑－非法禁錮－猥褻侵犯－多項罪行－「同一事件」的原則只是實際做法而不是法律規則－整體量刑原則的重要性－重點在於反映罪犯的整體罪責－高齡本身不是減刑因素－性侵犯對受害人的影響－無須受害人所受影響的評估報告

The Applicant (D), a 69-year-old caretaker, pretended to be an owner of two steel companies and befriended the victim who agreed to be his sworn daughter. On the day in question, D lured the victim to his workplace at a warehouse in a secluded area by offering her a job and promising to give her $1 million. Inside the premises, the victim was tied and gagged and falsely imprisoned for 6 to 7 hours. In the course of the false imprisonment, D indecently assaulted the victim thrice by kissing and fondling her breasts and kissing on her thighs for about 5 to 6 minutes each time. When the victim escaped eventually, she encountered a taxi on the way and was noticed by the taxi driver to be frightened and crying and her hands were red and swollen.

D was convicted after trial of one count of false imprisonment and three counts of indecent assault. He was sentenced to 3 years' imprisonment for each count and the sentences for the indecent assault counts were ordered to be served concurrently with each other but consecutively to the sentence for the false imprisonment count, making a total term of 6 years. The judge explained that he ordered the indecent assault sentences to run concurrently with each other because "they were all committed very soon after one another and to that extent can be considered as part of the same incident". He provided no reason why he ordered these sentences to be served consecutively to the false imprisonment sentence. Nor was there any indication by him that he had regard to the totality principle.

On D's application for leave to appeal against sentence, it was argued on his behalf that since the four offences were all part of one transaction, the judge had erred in principle in not ordering all of the sentences to run concurrently.

Held, granting the application for leave, treating the hearing of the application as the appeal but dismissing the appeal:

(1) When a judge is faced with the task of sentencing a defendant for multiple offences, he is required as an initial step to identify the appropriate sentence for each offence and as the final step to achieve a total sentence appropriate to the culpability of the offender. In the case of several offences committed in the course of a single episode, the prosecuting authority might choose to proffer only one charge, where one charge embraces all the criminal conduct reflected by the evidence, or separate charges for each criminal act. If it chooses the former course, the instances of proved conduct embraced by the single charge but which could have been the subject of separate charges are taken into account in deciding what penalty reflects the true overall criminality. If it elects the latter course, namely, to charge two or more offences arising from an episode of criminal activity, the objective is still the same; that is to say, the ultimate overall sentence must still reflect the overall and true culpability, although the sentencing judge must take care, first, to pass a sentence for each individual offence that

is appropriate to that offence and the circumstances of its commission and, second, not to punish the offender twice for the same conduct [13]-[17].

(2) The "one transaction" rule that concurrent sentences should be imposed for offences arising from one transaction or course of criminal conduct was not developed as an inflexible rule of law. It was never intended as anything more than a practical rule of thumb to guide judges in the exercise of the power to impose consecutive sentences so that the final sentence is not one that is unfair to an offender. Departure from such practical working rule does not inevitably mean that the sentence imposed on the offender is excessive. The real point is not whether two or more offences are committed at about the same time, but whether the second or other further offences add to the culpability or criminality of the first. Whatever sentence is arrived at after application of the rule is still subject to the totality principle. *HKSAR v Leung Ping Wa* HCMA 1038/2005 and *Secretary for Justice v Tseung Man Ka* [2000] 4 HKC 611 considered [18]-[21].

(3) The totality principle is there to ensure not only fairness to the offender, in the sense that he is not punished twice for the same offence and that the sentence is not an unduly crushing punishment but it is also a tool by which to ensure that "the overall effect of the sentences is sufficient having regard to the usual principles of deterrence, rehabilitation and denunciation": *R v K M* [2004] NSWCCA 65 at para 55. The emphasis therefore should be on a reflection in the sentence of the true culpability disclosed by the offences of which the accused has been convicted. It is likely to be a more effective approach in reflecting an offender's overall culpability than one which becomes overly concerned with the one transaction rule, although in the case of more than one offence, the court must guard carefully against punishing twice for the same act. If the second offence which takes place in the course of the suggested single episode adds to the culpability of the first offence, it will normally follow that the sentence for the second offence will run wholly or partially consecutive to that for the first; to what extent, if at all, will depend upon an assessment of the totality appropriate for the conduct as a whole. *HKSAR v Kwok Shiu To* [2006] 2 HKLRD 272 and *HKSAR v Iu Wai Shun* [2008] 1 HKC 79 considered. This approach is reflected in other jurisdictions: *R v Greaves & Ors* [2011] 1 Cr. App. R.(S) 8 and *Cahyadi v The Queen* 168 A Crim R 41 considered [22]-[26].

(4) In the present case, D abused the trust that he had gained from the victim and lured her to a secluded location where he could restrain her more readily. Once he had her under his control, he bound and gagged her. These acts added not only to the terror of her ordeal but also the danger of it. Taking also into account the duration of the detention, the sentence of 3 years' imprisonment imposed for the false imprisonment was fully justified [28].

(5) Each of the indecent assaults was humiliating and all were serious examples of this offence. The assaults were committed against a vulnerable, frightened woman who was under the control of D. Each offence lasted for some time and involved a high level of indecency. The sentences for these offences, especially given that there were three separate incidents of indecent assault, are not excessive [29].

(6) To simply make the indecent assault sentences all concurrent with each other is to run the risk that D is not properly punished for his overall culpability and the fact that whilst he had the victim under his control, he repetitively indecently assaulted her. Multiple offences of the same kind committed in effect on the same occasion can be sentenced by either of two ways. The first is that adopted by the trial judge but when employing this method, the sentence must reflect the fact that multiple offences have been committed. The second course is to impose partially consecutive sentences. Whichever course is adopted is a matter of discretion for the sentencing judge. The course adopted by the trial judge was appropriate for the circumstances of this case and that the starting point of 3 years sufficiently reflected the fact that there were multiple indecent assaults inflicted upon the victim over the course of her imprisonment [32].

(7) In the circumstances of this case, the judge was wholly justified in ordering the sentences for the indecent assaults to run consecutively to the sentence imposed for the false imprisonment as the former offences added substantially to D's culpability for the latter; or vice versa [35].

(8) Old age, except perhaps advanced old age, has never on its own been accepted as a mitigating factor. For sentencing purposes, D should be regarded as a person of mature years, not as an old man. Nevertheless, that the convicted person has for a lengthy period of time hitherto led a blameless life may suggest strongly that the offence or offences of which he has been convicted are out of character. That they are out of character is an inference more readily drawn if D shows remorse for his conduct. *HKSAR v Lan Yuk Huen* CACC 37/2008; *Secretary for Justice v Wong Hong Leung* [2010] 1 HKLRD 226 considered [38].

(9) The failure to present a victim impact assessment report does not necessarily mean that the court is unable to draw commonsense conclusions as to the effect of a sexual offence upon a victim. In the circumstances of this case, one does not need a victim impact assessment report before one can assume profound effect on the victim. There was ample evidence from which to conclude that the victim was traumatised by her ordeal. *HKSAR v Chung Chi Wing* [2010] 5 HKC 75 disapproved. *HKSAR v Chow Yuen Fai* [2010] HKC 226 and *HKSAR v Tam Kam Fai* CACC 329/2001 considered [40]-[47].

Totality

HKSAR v NGAI YIU CHING (倪耀偵)

COURT OF APPEAL
CACC 107/2011
Stock VP, Fok JA, McWalters J

Dates of Hearing: 2 September 2011
Date of Judgment: 3 October 2011

Counsel for the Respondent: Samantha Chiu Ag SPP
Counsel for the Applicant: Manyi Tsang

Criminal sentencing – False imprisonment – Indecent assault – Multiple offences - One transaction rule only a practical working rule, not a rule of law – Importance of totality principle – Emphasis on reflecting offender's overall culpability – Old age on its own not a mitigating factor – Effect of sexual assaults on victim - Victim impact statement not required

刑事罪判刑－非法禁錮－猥褻侵犯－多項罪行－「同一事件」的原則只是實際做法而不是法律規則－整體量刑原則的重要性－重點在於反映罪犯的整體罪責－高齡本身不是減刑因素－性侵犯對受害人的影響－無須受害人所受影響的評估報告

The Applicant (D), a 69-year-old caretaker, pretended to be an owner of two steel companies and befriended the victim who agreed to be his sworn daughter. On the day in question, D lured the victim to his workplace at a warehouse in a secluded area by offering her a job and promising to give her $1 million. Inside the premises, the victim was tied and gagged and falsely imprisoned for 6 to 7 hours. In the course of the false imprisonment, D indecently assaulted the victim thrice by kissing and fondling her breasts and kissing on her thighs for about 5 to 6 minutes each time. When the victim escaped eventually, she encountered a taxi on the way and was noticed by the taxi driver to be frightened and crying and her hands were red and swollen.

D was convicted after trial of one count of false imprisonment and three counts of indecent assault. He was sentenced to 3 years' imprisonment for each count and the sentences for the indecent assault counts were ordered to be served concurrently with each other but consecutively to the sentence for the false imprisonment count, making a total term of 6 years. The judge explained that he ordered the indecent assault sentences to run concurrently with each other because "they were all committed very soon after one another and to that extent can be considered as part of the same incident". He provided no reason why he ordered these sentences to be served consecutively to the false imprisonment sentence. Nor was there any indication by him that he had regard to the totality principle.

On D's application for leave to appeal against sentence, it was argued on his behalf that since the four offences were all part of one transaction, the judge had erred in principle in not ordering all of the sentences to run concurrently.

Held, granting the application for leave, treating the hearing of the application as the appeal but dismissing the appeal:

(1) When a judge is faced with the task of sentencing a defendant for multiple offences, he is required as an initial step to identify the appropriate sentence for each offence and as the final step to achieve a total sentence appropriate to the culpability of the offender. In the case of several offences committed in the course of a single episode, the prosecuting authority might choose to proffer only one charge, where one charge embraces all the criminal conduct reflected by the evidence, or separate charges for each criminal act. If it chooses the former course, the instances of proved conduct embraced by the single charge but which could have been the subject of separate charges are taken into account in deciding what penalty reflects the true overall criminality. If it elects the latter course, namely, to charge two or more offences arising from an episode of criminal activity, the objective is still the same; that is to say, the ultimate overall sentence must still reflect the overall and true culpability, although the sentencing judge must take care, first, to pass a sentence for each individual offence that is appropriate to that offence and the circumstances of its commission and, second, not to punish the offender twice for the same conduct [13]-[17].

(2) The "one transaction" rule that concurrent sentences should be imposed for offences arising from one transaction or course of criminal conduct was not developed as an inflexible rule of law. It was never intended as anything more than a practical rule of thumb to guide judges in the exercise of the power to impose consecutive sentences so that the final sentence is not one that is unfair to an offender. Departure from such practical working rule does not inevitably mean that the sentence imposed on the offender is excessive. The real point is not whether two or more offences are committed at about the same time, but whether the second or other further offences add to the culpability or criminality of the first. Whatever sentence is arrived at after application of the rule is still subject to the totality principle. *HKSAR v Leung Ping Wa* HCMA 1038/2005 and *Secretary for Justice v Tseung Man Ka* [2000] 4 HKC 611 considered [18]-[21].

(3) The totality principle is there to ensure not only fairness to the offender, in the sense that he is not punished twice for the same offence and that the sentence is not an unduly crushing punishment but it is also a tool by which to ensure that "the overall effect of the sentences is sufficient having regard to the usual principles of deterrence, rehabilitation and denunciation": *R v K M* [2004] NSWCCA 65 at para 55. The emphasis therefore should be on a reflection in the sentence of the true culpability disclosed by the offences of which the accused has been convicted. It is likely to be a more effective approach in reflecting an offender's overall culpability than one which becomes overly concerned with the one transaction rule, although in the case of more than one offence, the court must guard carefully against punishing twice for the same act. If the second offence which takes place in the course of the suggested single episode adds to the culpability of the first offence, it will normally follow that the sentence for the second offence will run wholly or partially consecutive to that for the first; to what extent, if at all, will depend upon an assessment of the totality appropriate for the conduct as a whole. *HKSAR v Kwok Shiu To* [2006] 2 HKLRD 272 and *HKSAR v Iu Wai Shun* [2008] 1 HKC 79 considered. This approach is reflected in other jurisdictions: *R v Greaves & Ors* [2011] 1 Cr. App. R.(S) 8 and *Cahyadi v The Queen* 168 A Crim R 41 considered [22]-[26].

(4) In the present case, D abused the trust that he had gained from the victim and lured her to a secluded location where he could restrain her more readily. Once he had her under his control, he bound and gagged her. These acts added not only to the terror of her ordeal but also the danger of it. Taking also into account the duration of the detention, the sentence of 3 years' imprisonment imposed for the false imprisonment was fully justified [28].

(5) Each of the indecent assaults was humiliating and all were serious examples of this offence. The assaults were committed against a vulnerable, frightened woman who was under the control of D. Each offence lasted for some time and involved a high level of indecency. The sentences for these offences, especially given that there were three separate incidents of indecent assault, are not excessive [29].

(6) To simply make the indecent assault sentences all concurrent with each other is to run the risk that D is not properly punished for his overall culpability and the fact that whilst he had the victim under his control, he repetitively indecently assaulted her. Multiple offences of the same kind committed in effect on the same occasion can be sentenced by either of two ways. The first is that adopted by the trial judge but when employing this method, the sentence must reflect the fact that multiple offences have been committed. The second course is to impose partially consecutive sentences. Whichever course is adopted is a matter of discretion for the sentencing judge. The course adopted by the trial judge was appropriate for the circumstances of this case and

that the starting point of 3 years sufficiently reflected the fact that there were multiple indecent assaults inflicted upon the victim over the course of her imprisonment [32].

(7) In the circumstances of this case, the judge was wholly justified in ordering the sentences for the indecent assaults to run consecutively to the sentence imposed for the false imprisonment as the former offences added substantially to D's culpability for the latter; or vice versa [35].

(8) Old age, except perhaps advanced old age, has never on its own been accepted as a mitigating factor. For sentencing purposes, D should be regarded as a person of mature years, not as an old man. Nevertheless, that the convicted person has for a lengthy period of time hitherto led a blameless life may suggest strongly that the offence or offences of which he has been convicted are out of character. That they are out of character is an inference more readily drawn if D shows remorse for his conduct. *HKSAR v Lan Yuk Huen* CACC 37/2008; *Secretary for Justice v Wong Hong Leung* [2010] 1 HKLRD 226 considered [38].

(9) The failure to present a victim impact assessment report does not necessarily mean that the court is unable to draw commonsense conclusions as to the effect of a sexual offence upon a victim. In the circumstances of this case, one does not need a victim impact assessment report before one can assume profound effect on the victim. There was ample evidence from which to conclude that the victim was traumatised by her ordeal. *HKSAR v Chung Chi Wing* [2010] 5 HKC 75 disapproved. *HKSAR v Chow Yuen Fai* [2010] HKC 226 and *HKSAR v Tam Kam Fai* CACC 329/2001 considered [40]-[47].

Victim Impact

HKSAR v NGAI YIU CHING (倪耀偵)

COURT OF APPEAL
CACC 107/2011
Stock VP, Fok JA, McWalters J

Dates of Hearing: 2 September 2011
Date of Judgment: 3 October 2011

Counsel for the Respondent: Samantha Chiu Ag SPP
Counsel for the Applicant: Manyi Tsang

Criminal sentencing – False imprisonment – Indecent assault – Multiple offences - One transaction rule only a practical working rule, not a rule of law – Importance of totality principle – Emphasis on reflecting offender's overall culpability – Old age on its own not a mitigating factor – Effect of sexual assaults on victim - Victim impact statement not required

刑事罪判刑－非法禁錮－猥褻侵犯－多項罪行－「同一事件」的原則只是實際做法而不是法律規則－整體量刑原則的重要性－重點在於反映罪犯的整體罪責－高齡本身不是減刑因素－性侵犯對受害人的影響－無須受害人所受影響的評估報告

The Applicant (D), a 69-year-old caretaker, pretended to be an owner of two steel companies and befriended the victim who agreed to be his sworn daughter. On the day in question, D lured the victim to his workplace at a warehouse in a secluded area by offering her a job and promising to give her $1 million. Inside the premises, the victim was tied and gagged and falsely imprisoned for 6 to 7 hours. In the course of the false imprisonment, D indecently assaulted the victim thrice by kissing and fondling her breasts and kissing on her thighs for about 5 to 6 minutes each time. When the victim escaped eventually, she encountered a taxi on the way and was noticed by the taxi driver to be frightened and crying and her hands were red and swollen.

D was convicted after trial of one count of false imprisonment and three counts of indecent assault. He was sentenced to 3 years' imprisonment for each count and the sentences for the indecent assault counts were ordered to be served concurrently with each other but consecutively to the sentence for the false imprisonment count, making a total term of 6 years. The judge explained that he ordered the indecent assault sentences to run concurrently with each other because "they were all committed very soon after one another and to that extent can be considered as part of the same incident". He provided no reason why he ordered these sentences to be served consecutively to the false imprisonment sentence. Nor was there any indication by him that he had regard to the totality principle.

On D's application for leave to appeal against sentence, it was argued on his behalf that since the four offences were all part of one transaction, the judge had erred in principle in not ordering all of the sentences to run concurrently.

Held, granting the application for leave, treating the hearing of the application as the appeal but dismissing the appeal:

(1) When a judge is faced with the task of sentencing a defendant for multiple offences, he is required as an initial step to identify the appropriate sentence for each offence and as the final step to achieve a total sentence appropriate to the culpability of the offender. In the case of several offences committed in the course of a single episode, the prosecuting authority might choose to proffer only one charge, where one charge embraces all the criminal conduct reflected by the evidence, or separate charges for each criminal act. If it chooses the former course, the instances of proved conduct embraced by the single charge but which could have been the subject of separate charges are taken into account in deciding what penalty reflects the true overall criminality. If it elects the latter course, namely, to charge two or more offences arising from an episode of criminal activity, the objective is still the same; that is to say, the ultimate overall sentence must still reflect the overall and true culpability, although the sentencing judge must take care, first, to pass a sentence for each individual offence that is appropriate to that offence and the circumstances of its commission and, second, not to punish the offender twice for the same conduct [13]-[17].

(2) The "one transaction" rule that concurrent sentences should be imposed for offences arising from one transaction or course of criminal conduct was not developed as an inflexible rule of law. It was never intended as anything more than a practical rule of thumb to guide judges in the exercise of the power to impose consecutive sentences so that the final sentence is not one that is unfair to an offender. Departure from such practical working rule does not inevitably mean that the sentence imposed on the offender is excessive. The real point is not whether two or more offences are committed at about the same time, but whether the second or other further offences add to the culpability or criminality of the first. Whatever sentence is arrived at after application of the rule is still subject to the totality principle. *HKSAR v Leung Ping Wa* HCMA 1038/2005 and *Secretary for Justice v Tseung Man Ka* [2000] 4 HKC 611 considered [18]-[21].

(3) The totality principle is there to ensure not only fairness to the offender, in the sense that he is not punished twice for the same offence and that the sentence is not an unduly crushing punishment but it is also a tool by which to ensure that "the overall effect of the sentences is sufficient having regard to the usual principles of deterrence, rehabilitation and denunciation": *R v K M* [2004] NSWCCA 65 at para 55. The emphasis therefore should be on a reflection in the sentence of the true culpability disclosed by the offences of which the accused has been convicted. It is likely to be a more effective approach in reflecting an offender's overall culpability than one which becomes overly concerned with the one transaction rule, although in the case of more than one offence, the court must guard carefully against punishing twice for the same act. If the second offence which takes place in the course of the suggested single episode adds to the culpability of the first offence, it will normally follow that the sentence for the second offence will run wholly or partially consecutive to that for the first; to what extent, if at all, will depend upon an assessment of the totality appropriate for the conduct as a whole. *HKSAR v Kwok Shiu To* [2006] 2 HKLRD 272 and *HKSAR v Iu Wai Shun* [2008] 1 HKC 79 considered. This approach is reflected in other jurisdictions: *R v Greaves & Ors* [2011] 1 Cr. App. R.(S) 8 and *Cahyadi v The Queen* 168 A Crim R 41 considered [22]-[26].

(4) In the present case, D abused the trust that he had gained from the victim and lured her to a secluded location where he could restrain her more readily. Once he had her under his control, he bound and gagged her. These acts added not only to the terror of her ordeal but also the danger of it. Taking also into account the duration of the detention, the sentence of 3 years' imprisonment imposed for the false imprisonment was fully justified [28].

(5) Each of the indecent assaults was humiliating and all were serious examples of this offence. The assaults were committed against a vulnerable, frightened woman who was under the control of D. Each offence lasted for some time and involved a high level of indecency. The sentences for these offences, especially given that there were three separate incidents of indecent assault, are not excessive [29].

(6) To simply make the indecent assault sentences all concurrent with each other is to run the risk that D is not properly punished for his overall culpability and the fact that whilst he had the victim under his control, he repetitively indecently assaulted her. Multiple offences of the same kind committed in effect on the same occasion can be sentenced by either of two ways. The first is that adopted by the trial judge but when employing this method, the sentence must reflect the fact that multiple offences have been committed. The second course is to impose partially consecutive sentences. Whichever course is adopted is a matter of discretion for the sentencing judge. The course adopted by the trial judge was appropriate for the circumstances of this case and that the starting point of 3 years sufficiently reflected the fact that there were multiple indecent assaults inflicted upon the victim over the course of her imprisonment [32].

(7) In the circumstances of this case, the judge was wholly justified in ordering the sentences for the indecent assaults to run consecutively to the sentence imposed for the false imprisonment as the former offences added substantially to D's culpability for the latter; or vice versa [35].

(8) Old age, except perhaps advanced old age, has never on its own been accepted as a mitigating factor. For sentencing purposes, D should be regarded as a person of mature years, not as an old man. Nevertheless, that the convicted person has for a lengthy period of time hitherto led a blameless life may suggest strongly that the offence or offences of which he has been convicted are out of character. That they are out of character is an inference more readily drawn if D shows remorse for his conduct. *HKSAR v Lan Yuk Huen* CACC 37/2008; *Secretary for Justice v Wong Hong Leung* [2010] 1 HKLRD 226 considered [38].

(9) The failure to present a victim impact assessment report does not necessarily mean that the court is unable to draw commonsense conclusions as to the effect of a sexual offence upon a victim. In the circumstances of this case, one does not need a victim impact assessment report before one can assume profound effect on the victim. There was ample evidence from which to conclude that the victim was traumatised by her ordeal. *HKSAR v Chung Chi Wing* [2010] 5 HKC 75 disapproved. *HKSAR v Chow Yuen Fai* [2010] HKC 226 and *HKSAR v Tam Kam Fai* CACC 329/2001 considered [40]-[47].

Young and Vulnerable Victims

HKSAR v CHAN HOI TAT (陳凱達)

COURT OF APPEAL
CACC 447/2010
Cheung & Hartmann JJA, Barnes J

Dates of Hearing: 27 September 2011
Date of Judgment: 27 September 2011
Date of handing down Reasons for Judgment: 18 October 2011

Counsel for the Respondent: Agnes Chan Ag ADPP
Counsel for the Applicant: James McGowan

Criminal sentencing – Aiding, abetting, counselling and procuring the making of child pornography – Criminal intimidation - Indecent assault – Misuse of the internet by older man to seek and groom victims who are vulnerable and immature – Need to protect the young and the vulnerable – Deterrent sentence required

刑事罪判刑－協助、教唆、慫使和促致製作兒童色情物品－刑事恐嚇－猥褻侵犯－年長男子利用互聯網作不當用途，藉此搜尋並結識易受傷害及未成熟的受害人以發展性關係－需要保護年輕人及易受傷害者－須判處阻嚇性刑罰

The Applicant (D) was convicted after trial of one count of aiding, abetting, counselling and procuring the making of child pornography (Charge 1), two counts of criminal intimidation (Charges 2 & 4) and two counts of indecent assault (Charges 3 & 5). He was sentenced to imprisonment for 1 year for each of Charges 1, 2 & 4 (all concurrent) and 2 years' imprisonment for each of Charges 3 & 5 (both consecutive to each other and the other charges); resulting in a total term of 5 years.

The charges arose from incidents that took place between 2003 and 2005. The complainant X (then aged 12) came to know D (then aged 24) via the internet in 2003. On a date unknown in 2003, at D's request, X sent two naked photographs of herself to D via the internet using the webcam (Charge 1). Later in 2004, D requested to meet X and when X refused, he threatened to publish her naked photographs in the media and over the internet and to send the same to X's father (Charge 2). As a result, X met D and was then taken to a place which she believed to be D's home. There D undressed X and forced her to masturbate him and perform oral sex on him. D then took further naked photographs of X, after which he kissed her body including her lower parts (Charge 3). In 2005, D again requested to meet X and, upon her refusal, made the same threats to her (Charge 4). As a result, X met D later and was taken to an hourly hotel where she was indecently assaulted again by D. On this occasion, apart from forcing X to masturbate him and perform oral sex on him, D also rubbed his penis against X's thighs from behind in a form of simulated sex. Naked photographs were then taken of X after which D again forced X to perform oral sex on him and kissed X's body including her lower parts (Charge 5).

D appealed against both conviction and sentence. In respect of his sentence appeal, it was contended on his behalf that the judge had failed to take into account sufficiently D's excellent background and positive good character, and hence the total sentence of 5 years was manifestly excessive.

Held, dismissing both applications for leave to appeal against conviction and sentence:

(1) This is a serious case. D was grooming a 12-year-old via the internet. He talked with her about daily matters before progressing to introducing matters of a sexual nature to this young girl. It is far too easy for an older man to prey on the innocence and/or naivety of a youngster and a deterrent sentence must be imposed to protect the young [45].

(2) One of the perils of the misuse of the internet by an older man is that he could groom an immature girl into believing that she is more mature than she is, and to give her the false confidence that she could behave and should be treated as if she were an adult. The internet is now widely available for all sorts of innocent, valuable and educational purposes. Its misuse by older men to seek and find and then groom girls who are vulnerable and immature, should be deterred. It is an area in which the Court needs to deliver a clear message of disapproval: *Attorney General's Reference No. 127 of 2004 (David Michael Briggs)* [2005] 2 Cr. App. Rep. (S.) 74; *Secretary for Justice v Chung Yui Hung* [2007] 2 HKLRD 771 adopted [46].

(3) For the offence of indecent assault, the act could range from a relatively minor touch to an act short of an attempted rape. It is necessary to look at all the circumstances to decide what is the appropriate sentence, bearing in mind the need to protect the young and the vulnerable from such transgressions, the need to deter others and the need to redress the grievances suffered by the victim and his/her family [48].

(4) In the present case, the acts involved in both indecent assault charges were very serious, particularly when there was an additional act of simulated sex involved in Charge 5. A starting point of 2 years was too low in all the circumstances. The overall sentence of 5 years was not manifestly excessive [49].

Sentencing Basis

SJ v CHAN CHUN FAI (陳俊輝**)**

COURT OF APPEAL
CAAR 11/2010
Cheung & Yeung JJA, Chu J

Date of Hearing and Judgment: 28 April 2011

Counsel for the Applicant: Wesley Wong Ag DDPP & Samantha Chiu PP
Counsel for the Respondent: Oliver Davies

Criminal sentencing – Trafficking in dangerous drugs – 12.85 gms of "Ice" – Defendant exported drugs from Hong Kong to Macau – Where defendant intended to use drugs for self-consumption, wrong to impose sentence on basis of possession for self-use and then enhance sentence by reason of defendant exporting drugs

刑事罪判刑－販運危險藥物－12.85克“冰”－被告人將毒品從香港出口往澳門－若毒品是被告人擬供自用，則以管有毒品供自用爲基礎定出刑罰後再以被告人出口毒品爲理由加刑是錯誤的

The defendant was about to travel from Hong Kong to Macau by ferry. After he passed through the Hong Kong Immigration counter, he was stopped by Customs officers and drugs were found in his shoulder bag. The defendant claimed to Customs officers that the drugs were for his own consumption. The prosecution accepted that claim.

The defendant pleaded guilty in the Court of First Instance to one count of trafficking in dangerous drugs contrary to s 4(1)(a) and (3) of the Dangerous Drugs Ordinance (Cap 134). The drugs were 12.85 grammes of methamphetamine hydrochloride (“Ice”). The Court sentenced him to a term of 18 months’ imprisonment. The Secretary for Justice applied for a review of the sentence on the ground that it was wrong in principle and manifestly inadequate.

Held, application for review allowed and the sentence was increased to 3 years and 6 months’ imprisonment.

(1) The sentencing judge approached the matter by first considering what the sentence would be for possession of the drugs, and then increasing that sentence for the aggravating element of exportation which created the offence of trafficking. This approach was incorrect as a matter principle. The defendant had committed and pleaded guilty to the offence of trafficking. It was not in any sense a technical offence. He was bringing the drugs from Hong Kong to Macau and this constituted exporting the drugs within the meaning of s 2 of Cap 134, namely, “to take or cause to be taken out of Hong Kong or any other country, as the case may be, by land, air or water” [4]-[5].

(2) The sentencing judge, in a situation such as this, must proceed on the basis that the defendant is charged with the more serious offence of trafficking and not simple possession. Self consumption of the drugs is only a matter that goes towards mitigation and does not by itself change the nature of the offence [7].

(3) Trafficking in 12.85 grammes of “Ice” attracts a sentence of at least 7 years’ imprisonment under the guideline set out in *Attorney General v Ching Kwok-hung* [1991] 2 HKLR 125, whereas a sentence of 18 months’ imprisonment is the customary sentence for possession of the drugs for self use. Since the defendant has committed the offence of trafficking, it is wrong to sentence him on the basis of possession for self use and then enhance the sentence by reason of the fact that he was exporting the drugs [9]-[10].

(4) In the present case, the correct and workable approach would be to adjust the starting point downwards by 25% for personal consumption. This being the case it is not necessary to address the issue of latent risk because, looking at the matter in the proper perspective, the defendant is sentenced on the basis of trafficking with the strong mitigating factor that the drugs were intended for his own consumption. Bearing in mind that the defendant pleaded guilty and that the drugs were wholly for his self consumption, the appropriate sentence should be 3 years and 6 months’ imprisonment [15]-[16].

SJ v YIU MAN CHUN (姚文俊**)**

COURT OF APPEAL
CAAR 14/2010
Stock VP, Fok JA, McMahon J

Date of Hearing and Judgment: 4 April 2011

Counsel for the Applicant: Martin Hui SPP
Counsel for the Respondent: Walter Lau

Criminal sentencing – False imprisonment – Wounding – Entrapping former girlfriend in apartment for 9 hours and wounding her neck and chin with a cutter – Aggravating features –Repeated offender – Adverse psychological impact on victim – Appropriate sentence before mitigation should be 4½ years

Sentencing – Artificiality in separating the two offences in this case – Agreed facts in respect of previous convictions for offences of wounding the same victim should have been placed before sentencing judge in this case

刑事罪判刑－非法禁錮－傷人－在寓所禁錮前女友9小時並以刜刀傷其頸部及下巴－加重刑罰因素－屢犯者－對受害人有不良心理影響－求情前的恰當刑罰應是4½年監禁

判刑－矯作地分開案中兩項罪行－應將與以往同一受害人的傷人案定罪有關的同意事實呈交本案判刑法官考慮

The Respondent (D) was convicted in the District Court upon his own pleas of false imprisonment and wounding. He was sentenced to 12 months' imprisonment in respect of each offence, and 6 months of the second sentence were ordered to be served consecutively, making a total of 18 months' imprisonment.

D and the victim were former lovers. On the night in question, D visited the victim's flat and, whilst being there, he had an argument over the phone with his sister. The victim became frightened and wanted to leave. D prevented her from doing so and, in shutting the gate, he injured her hand. The victim later made a report to the police by telephone. Upon the police's arrival, D refused to let them in and blocked the entrance to the flat with a wooden table. He took out a hammer to hit the table and his own hand. He then took a cutter, grabbed the victim's neck and pressed the cutter against her neck and chin, causing her superficial cut wounds on those areas. After the victim had promised not to inform the police about her injuries and upon negotiation, D surrendered the hammer and the cutter and allowed the police to enter the apartment. The victim had by then been detained against her will for some 9 hours. She suffered from tenderness and cut wounds on the neck with no likely permanent scarring and bruising on her right hand.

About 11 months prior to the present offences, D had treated the victim with violence on another occasion for which he was subsequently sentenced, on two charges of wounding, to a total of 12 months' imprisonment. He was released from prison 3 months before the present offences.

Before sentencing D, the judge called for a victim impact report which showed that the victim was suffering from post-traumatic stress disorder and fairly severe adverse psychological impact.

The judge also called for a psychological report on D which described him as someone who demonstrated "limited remorse and victim empathy" and tended to minimise his wrongdoings. D's risk of violent recidivism was estimated to be relatively high and there was a need for psychological intervention.

The Secretary for Justice applied for a review of sentence pursuant to s 81A of the Criminal Procedure Ordinance. It was contended that the judge had failed sufficiently to reflect a number of aggravating features in this case and the sentences imposed were, in the overall impact, manifestly inadequate.

Held, application for review granted, sentence imposed for the false imprisonment charge set aside and a sentence of 2 years and 9 months' imprisonment substituted, to run concurrently with the 12-month sentence for the wounding charge which remained undisturbed:

(1) There is some artificiality in this case in sentencing D for two offences trying, somehow, to divorce the false imprisonment from the wounding and treating them as distinct. Had there been a charge of false imprisonment alone, it would have been perfectly permissible for the sentencing judge to take into account all the facts embraced by the act of false imprisonment, including the act of holding a cutter to the victim's face and the fact that a wound was occasioned. In this case, it is artificial to split the two criminal acts as if one had nothing to do with the other. They were closely interwoven [31].

(2) The appropriate sentence for an act of keeping someone for several hours in his or her own flat as a result of a domestic dispute will vary enormously according to the history and all the surrounding circumstances. The wielding of weapons, namely the hammer and cutter, is a serious aggravating feature. To hold a cutter to someone's throat is particularly aggravating because it is both terrifying to the victim and a highly dangerous act in itself. The appropriate starting point for the offence of false imprisonment with all its surrounding circumstances, before the aggravating feature of the prior incident, is a sentence of 3½ years' imprisonment [33]-[34].

(3) The previous offences of wounding in 2009 and the fact that the current offences occurred within months of D's discharge from prison show an entire lack of remorse and constitute particularly serious aggravating features. The fact that this was a replay of the 2009 offences illustrates that the sentence imposed on the previous occasion failed to deter D and that a sentence needs to be imposed that would have a greater chance of deterrence and which, at the same time, is designed to protect potential victims from D's proclivity to violence [35]-[36].

(4) Furthermore, the fact that this was the second occasion upon which the victim had been subjected to serious violence at D's hands significantly aggravated the trauma visited upon her. Taking into account this serious aggravating feature, an appropriate sentence before mitigation would have been 4½ years' imprisonment. By virtue of the guilty plea, the appropriate sentence for the offence of false imprisonment would be one of 3 years' imprisonment [37]-[38]. As it was a review, the Court of Appeal substituted a sentence of 2 years and 9 months' imprisonment in relation to the false imprisonment offence.

(5) The facts agreed in 2009 in respect of the previous offences of wounding should have been placed before the sentencing judge by the prosecutor. It is extraordinary that it was not done [35].

香港特別行政區 訴 阮成坤

高等法院原訟法庭
HCMA 959/2010
原訟法庭法官潘敏琦

聆訊及判案日期： 2011年4月14日

答辯人代表律師： 署理高級檢控官吳穎軒
上訴人代表律師： 何子青

刑事罪判刑 － 刑期同期/分期執行 － 在非法入境後未得處長授權而留在香港罪(《入境條例》第 38(1)(b)條)及管有意圖爲入境條例的目的而使用的虛假的文件罪 (《入境條例》第 42(2)(c)(ii)及42(4) 條)

上訴人承認控罪(1)在非法入境後未得處長授權而留在香港罪，違反《入境條例》第 38(1)(b)條，及控罪(2)管有意圖爲入境條例的目的而使用的虛假的文件罪，違反《入境條例》第 42(2)(c)(ii)及42(4) 條，分別被判監禁18個月及10 個月，弟二項判刑當中8 個月分期執行，即總刑期爲26 個月監禁。上訴人就判刑提出上訴。

案情指上訴人被警員截查期間，向警員聲稱他是一名中國內地的船員及出示一本中華人民共和國海員護照給警員查閱，調查發現該海員護照內所附貼的抵港船隻船員名單是虛假的。上訴人承認偷渡來港，他聲稱來港的目的是爲找尋工作。

裁決，上訴得直，總刑期減爲21 個月：

(1) 上訴人向警員展示虛假的船員名單之作爲屬他在非法入境後所干犯的另一控罪。有關的虛假船員名單，縱使最終無助上訴人在港找尋工作，最低限度亦有助他在非法進入香港之後繼續留在香港 [11]。部份刑期分期執行的量刑原則乃*香港特別行政區訴李長利* 一案 HCMA 935/2004 後的大勢所趨，亦比較合理 [13]。

(2) 不過，上訴人向警員出示的是虛假的抵港船隻船員名單，他被控的控罪是管有此虛假文件，本案並沒有證供顯示，他出示給警員查閱的中華人民共和國海員護照是虛假或僞造的。雖然上訴人承認來港是找尋工作，事實上，他向警員出示的虛假名單，根本無助於他找尋工作，不能與虛假或僞造身份證相提並論 [14]。

(3) 法庭不會干預兩項控罪的個別刑期，但認爲控罪(2)刑期中的3 個月刑期分期執行較適合反映本案案情的嚴重性，因此如述改判。總刑期減爲21 個月[15]。

[English Translation of HCMA 959/2010]

HKSAR v RUAN CHENG KUN

COURT OF FIRST INSTANCE
HCMA 959/2010
M. POON J

Date of Hearing and Judgment: 14 April 2011

Counsel for the Respondent: Hermina Ng Ag SPP
Counsel for the Appellant: Jane Ho

Criminal Sentencing – Concurrent/consecutive sentences – Remaining in Hong Kong without the authority of the Director after having landed unlawfully (s 38(1)(b) of Immigration Ordinance) and possession of false document intended for use for the purposes of Immigration Ordinance (ss 42(2)(c)(ii) and 42(4) of Immigration Ordinance)

The Appellant pleaded guilty to charge (1) of remaining in Hong Kong without the authority of the Director after having landed unlawfully, contrary to s 38(1)(b) of the Immigration Ordinance and charge (2) of possession of a false document intended for use for the purposes of the Immigration Ordinance, contrary to ss 42(2)(c)(ii) and 42(4) of the same Ordinance. He was sentenced to 18 months' imprisonment and 10 months' imprisonment respectively and 8 months of the second sentence were ordered to run consecutively, making a total of 26 months' imprisonment. The Appellant appealed against sentence.

The facts were that when the Appellant was intercepted by a police officer, he claimed to be a sailor from the Mainland China and produced a PRC Seafarer's Passport for inspection. Investigation revealed that the Particulars of Members of the Crew of a Ship Arriving HKSAR ("*Particulars of Crew Members*") attached to the said Seafarer's Passport was false. The Appellant admitted that he had sneaked into Hong Kong and claimed that his purpose of coming to Hong Kong was to seek employment.

Held, appeal allowed, the total sentence reduced to 21 months:

(1) The Appellant's act of producing to a police officer a false *Particulars of Crew Member* was a separate offence committed by him after his unlawful entry. Even though the false *Particulars of Crew Members* could not eventually help the Appellant in finding a job in Hong Kong, at least it helped him to remain in Hong Kong

after he had unlawfully entered Hong Kong [11]. The sentencing trend after *HKSAR v Li Chang Li* HCMA 935/2004 is that part of the sentences should run consecutively and this is also more reasonable [13].

(2) However, what the Appellant produced to the police officer was a false *Particulars of Crew Members*, and he was charged with possession of this false document. In the present case, there was no evidence to show that the PRC Seafarer's Passport produced by the Appellant to the police officer was false or forged. Although the Appellant admitted that he came to Hong Kong to seek employment, in fact, the false *Particulars of Crew Members* would not take him any further in finding employment. It could not be compared with a false or forged identity card [14].

(3) The court would not interfere with the individual sentence imposed for each of the two offences. However, it would be more appropriate for 3 months of charge (2) to run consecutively to reflect the seriousness of this case. Therefore, the sentence was so varied and the total sentence was thus reduced to 21 months [15].

TAM WA LUN v HKSAR

COURT OF FINAL APPEAL
FAMC 56/2010
Ma CJ, Bokhary & Chan PJJ

Date of Hearing and Determination: 6 May 2011

Counsel for the Respondent: Edmond Lee SPP
Counsel for the Applicant: H Y Wong

Criminal law and procedure – Application for leave to appeal to the Court of Final Appeal against sentence – Leave granted only in "extremely rare and utterly exceptional circumstances" – Whether the basis for sentencing infringed Applicant's right to silence

刑事法及訴訟程序－針對刑罰向終審法院申請上訴許可－只在「極爲罕見及完全例外的情況」下才給予許可－判刑理據有否侵犯申請人的緘默權

The Applicant pleaded guilty before a magistrate to one count of trafficking in dangerous drugs and one count of possession of dangerous drugs and he was sentenced to a total of 26 months' imprisonment [1]. The Applicant eventually made an application to the Court of Final Appeal for leave to appeal against sentence. In contending that the punishment which he received violated principles or departed from accepted norms, the Applicant argued that he had the right to remain silent as regards the possession charge [4].

At the time of arrest, the Applicant swallowed five packets of dangerous drugs with a view to avoiding detection. While he was being processed for remand at the Lai Chi Kok Reception Centre, the Applicant was warned by a Correctional Services Department ("CSD") officer that any dangerous drugs in his possession had to be surrendered. At that point in time, the Applicant said nothing. Having been told that he would be put under supervision, he eventually told a CSD officer that evening about those dangerous drugs (the subject matter of the possession charge) which he later excreted [2]. The sentencing magistrate took the view that the Applicant had deliberately taken dangerous drugs into the prison and sentenced him on that basis. The Applicant contended that by taking that view, the magistrate had infringed his right to silence [4].

Held, leave refused:

(1) It is only in "extremely rare and utterly exceptional circumstances" that the Appeal Committee would grant leave to appeal to the Court of Final Appeal against sentence. Such circumstances may be found to exist where, for example, "it is reasonably arguable that a defendant has, by reason of a violation of a basic sentencing principle, been sentenced too severely to a material degree" [1].

(2) The point raised by the Applicant was untenable. It was entirely up to the Applicant whether to speak up or remain silent when being processed for remand at the Lai Chi Kok Reception Centre. He remained silent when he so chose, and he eventually spoke up when he so chose. There was no reasonable basis on which leave to appeal against sentence should be granted in this case [4].

HKSAR v MAHAL HARPREET SINGH

COURT OF APPEAL
CACC 462/2010
Stock VP, Barnes & Wright JJ

Date of Hearing: 29 September 2011
Date of Judgment: 7 December 2011

Counsel for the Respondent: Gavin Shiu SADPP
Counsel for the Applicant: J McGowan

Criminal sentencing – Rape – Guideline judgments are intended to assist the judge to arrive at the correct sentence only and do not purport to identify the correct sentence

Criminal sentencing – Rape – Absence of additional aggravating features – Does not mitigate the gravity of the offender's conduct

Criminal sentencing – Rape – No suggestion that rape of a girl or woman in a place familiar to her is less serious than rape elsewhere

Criminal sentencing – Offender entitled to know the factual basis upon which he is being sentenced – Where there exists a report placed before the judge – Copy of the report should have been made available to the offender

刑事罪判刑－強姦－具指引性的判決只是擬協助法官達致正確的判刑，其本意並非指出正確的判刑

刑事罪判刑－強姦－沒有額外的加重刑罰因素－不會減輕罪犯的行爲嚴重性

刑事罪判刑－強姦－並非指婦女在熟悉地方被強姦較在其他地方被強姦嚴重性爲低

刑事罪判刑－罪犯有權知道判刑所依據的事實基礎－如有報告呈交法官考慮－罪犯須獲提供報告副本

The Applicant was convicted after trial of a count of rape and a count of indecent assault and was sentenced respectively to imprisonment for 7½ years and 6 years, to be served concurrently [1]. The starting points adopted by the judge were respectively imprisonment for 8 years and 6½ years [18]. The Applicant applied for leave to appeal against both conviction and sentence [1].

The Applicant and the complainant were introduced to each other by a mutual acquaintance. They exchanged telephone calls from 25 June 2009 and met two days later for lunch. After the meal, the complainant only consented to go to an hourly hotel to chat with the Applicant after the latter promised he would not take advantage of her. Once in the room, the Applicant and the complainant hugged and kissed each other. When the Applicant tried to undress the complainant, she made it clear she did not want to go any further and the Applicant complied [2].

On 2 July 2009, the Applicant tricked the complainant into going to his flat. The complainant initially waited outside the flat but was eventually drawn into it. After telling her he had waited for so long for her, the Applicant then forcibly undressed her, and, despite her resistance and protests, the Applicant forced her to perform oral sex on him (the indecent assault count). Thereafter, despite the complainant's continued struggle and protests, the Applicant had sexual intercourse with the complainant without her consent (the rape count). Initially the Applicant wore a condom, but he removed it at the time the oral sex took place. He did not wear a condom for the intercourse, but he ejaculated outside the complainant's body [2].

The Applicant testified at trial claiming the complainant was a willing and enthusiastic participant who had consented to the oral sex and intercourse [2].

Held, appeal allowed and sentence substituted:

(1) In regard to sentencing for the offence of rape, the Court of Appeal previously had adopted the starting point of 5 years' imprisonment for the offence of rape as then had been adopted in England in *R v Billam* (1986) 82 Cr App R 347, as well as the matters identified by the English Court of Appeal in that decision to be treated as aggravating features. Courts in Hong Kong are entitled to take into account local conditions and to pass sentences that vary from those referred to in the *Billam* sentencing guidelines [19]. Guideline judgments are intended to assist the judge to arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge [22].

(2) The three aggravating features identified by the judge (which are justified) are that: (1) there was a degree of planning to secure the complainant's trust in order to trick her into the situation where she was raped and indecently assaulted; (2) the Applicant abandoned the use of a condom after the complainant performed oral sex on him, with sexual intercourse thereafter continuing unprotected; and, (3) there was a degree of force used to overpower the complainant in excess of that necessary to effect the rape [23].

(3) The fact that there was an absence of additional aggravating features, any one or all of which may theoretically have been present, does not mitigate the gravity of the Applicant's conduct [27]. Once the judge had correctly identified the aggravating features then the sole question became whether the sentences either were manifestly excessive or wrong in principle, not whether they may have been different had other features been present [28].

(4) The comments in the judgment of Hartmann JA in *HKSAR v Chung Chi Wing* CACC 81/2009 that – the sentencing judge should have taken into account the fact that *"the victim was not... driven off to some other place which would have magnified her uncertainty and fear. The vehicle remained parked opposite the school. She knew where she was."* – are not to be taken as suggesting that rape of a girl or woman in a place familiar to her is less serious than rape elsewhere [40]-[42]. Violation of a girl or a woman in her home or at any other place which has been taken by the victim as a personal sanctuary safe from the intrusion of outsiders (such as at or outside of school) is a serious matter indeed [43].

(5) An offender is entitled to know the factual basis upon which he is being sentenced. If one of the factors to be taken into account in assessing sentence is the effect of his conduct on his victim, and there exists a report detailing that effect, the offender is entitled to a copy of it in order to be in a position to make any representations to the judge he may wish. If for any reason the judge is unable to supply the offender with the report, for example where the victim has specifically directed that this not be done, then the judge should disregard the report entirely [33].

(6) The starting point in respect of each offence was manifestly excessive. For the count of rape, the judge should have enhanced the starting point of 5 years by 2 years to cater for the aggravating features. As for the count of indecent assault, the appropriate starting point after trial is 5½ years' imprisonment [36]-[37]. A 6-month-reduction from each starting point is appropriate take into consideration other matters addressed [38]. The sentences of 6½ years and 5 years' imprisonment are substituted and to be served concurrently [39].

Stay of Proceedings

HKSAR v SHUM CHIU (沈超)

COURT OF APPEAL
CACC 424/2008
Stock VP, Hartmann JA, Wright J

Date of Hearing: 10 December 2010
Date of handing down Reasons for Judgment: 28 February 2011

Counsel for the Respondent: Gerard McCoy SC
Counsel for Appellant: Edward Fitzgerald QC, Charlotte Draycott SC & Maggie Wong

Criminal law & procedure – Conviction following guilty plea – Prior unsuccessful application by the Appellant to permanently stay proceedings by reason of a deliberate infringement by ICAC of the co-defendant's legal professional privilege – Whether abuse of process and deprivation of fair trial – Whether conviction unsafe or unsatisfactory – Whether error in refusing to stay proceedings so overriding as to be inconsistent with due administration of justice

刑事法及訴訟程序－認罪後被定罪－上訴人之前以廉政公署蓄意侵犯同案被告人的法律專業保密權爲理由申請永久擱置法律程序而不成功－是否濫用法律程序和剝奪公平審訊機會－定罪是否不穩妥或不令人滿意－錯誤拒絕擱置法律程序是否凌駕一切以致與正當司法相悖

The Appellant and the co-defendants were originally jointly tried in the District Court where they applied for permanent stay on the ground that a defendant's legal professional privilege had been infringed. The prosecution sought to call further evidence. The trial judge ruled (1) that the prosecution was not permitted to resile from its earlier concession that the meeting between the third defendant and his solicitors had been privileged, and that no witnesses would be called; and (2) that there had been an abuse of process. The trial judge thus ordered a permanent stay. In the judicial review initiated by the prosecution, the judge found the first ruling to be wrong and on that basis he remitted the case to the District Court for retrial (without determining the lawfulness of the second ruling). At the commencement of the second trial, the Appellant and his co-defendants renewed their application for a permanent stay of proceedings by reason of a deliberate infringement by ICAC of the co-defendant's legal professional privilege but the application was dismissed. Before the second trial was able to commence, the Appellant was forced to undergo extensive surgery for prostate cancer. With the prognosis for a full recovery remaining uncertain, the trial judge ordered that the trial of the co-defendants should continue without the Appellant and his trial was ordered to be severed.

The co-defendants were convicted after trial and were sentenced to 5 years' imprisonment. They made applications to appeal their convictions and a principal ground was that the trial judge had been in error in refusing a permanent stay of proceedings. Meanwhile, before the appeal was heard, the Appellant applied to the judge to state a case concerning the correctness of the judge's decision refusing the application for a permanent stay of proceedings so that he could effectively join himself in the (ultimately successful) application for leave to appeal made by the co-defendants. When the trial judge declined to do so, the Appellant pleaded guilty to the offence of conspiracy to offer an advantage to public servants and one offence of conspiracy to falsify accounts. He was sentenced to 32 months' imprisonment.

When the Court of Appeal subsequently allowed the appeal by the co-defendants and ordered a permanent stay of the proceedings against them on the basis that the deliberate infringement of legal professional privilege by ICAC amounted to an abuse of process, the Appellant sought leave to appeal his conviction and sentence out of time. His grounds were as follows:

(a) First, criminal proceedings that are rendered unlawful by a prior abuse of process and which, by reason of that abuse, should never have come before the court, cannot result in a verdict that, in terms of s 83(1) of the Criminal Procedure Ordinance (Cap 221), is "safe" or "satisfactory"; and

(b) Second, if those criminal proceedings should never have taken place and therefore should never have proceeded to the stage of taking a plea, it cannot matter whether a conviction was obtained in those proceedings by way of a verdict reached by the court after trial or by way of a guilty plea. In such circumstances, it would be inconsistent with the due administration of justice to allow pleas of guilty to stand.

Held, application for leave to appeal against conviction granted, conviction and sentence set aside and a permanent stay of the proceedings ordered:

(1) Leave was granted for the Appellant to appeal out of time on the basis that the grounds of appeal were of such merits that it was probable that the appeal would succeed: see *Wu Chun Piu* v *R* [1996] 1 WLR 1113 at 1118B [21];

(2) On the authority of *HKSAR* v *Yip Kai Foon* [1999] 1 HKLRD 277, for the Appellant to succeed on appeal, it was necessary for him to establish some "overriding factor" which rendered his conviction unsafe and unsatisfactory [29]. The "overriding factor" relied on by the Appellant was the deliberate infringement of legal professional privilege by officers of the ICAC, an abuse of the criminal process that vitiated the lawfulness of all consequential criminal proceedings [30].

(3) In *R* v *Blackledge and Others* [1996] 1 Cr App R 326, the English Court of Appeal set aside convictions obtained by way of unequivocal pleas of guilty on the basis that there had been a material irregularity in the conduct of the trial, being an abuse of process brought about by the refusal of the Executive to produce witnesses or to disclose highly material documents which, if they had been made available, would have enabled the appellants to make properly informed decisions about their defence [42]. The circumstances of *Blackledge* were in many respects on all fours with the case of the Appellant [45]. The Appellant had originally joined himself to an application for a permanent stay of proceedings and had pursued that application over an extended period of time. It was not surprising, bearing in mind his frailty by way of illness, that when all these attempts failed, the prospect of a reduced sentence persuaded him to capitulate [46]. Plainly, the Appellant's change of plea was "founded upon" the erroneous ruling of the trial judge in the original proceedings dismissing the application for a permanent stay. That erroneous ruling, being a ruling of mixed fact and law, constituted an irregularity in the proceedings [47]. On the basis of *Blackledge* alone, the appellant would have succeeded in having his conviction ruled unsafe or unsatisfactory [48].

(4) The Court was satisfied that the two propositions advanced on behalf of the Appellant were both made out [62]. There was a grave abuse of process which vitiated the lawfulness of the criminal proceedings brought before it. The proceedings as a whole were ordered to be permanently stayed. On a consideration of the relevant authorities, it had to follow that any convictions obtained by reason of those proceedings were rendered unsafe or unsatisfactory [63].

(5) In criminal proceedings, there is a miscarriage of justice when an accused person has been deprived of the opportunity which was fairly open to him of being acquitted by reason of a failure to properly judge the facts and apply the relevant law. If the trial judge had not fallen into error, both in his assessment of the evidence and in his application of the law to the evidence, he would have found there to have been an abuse of process vitiating the integrity of the proceedings before him and would have stayed those proceedings [65]. If not for that error, the Appellant would have benefited from an order that proceedings against him on the charges which he faced be stayed permanently. Had they been stayed, his trial would not have been severed and he would not subsequently have been arraigned [66]. The Appellant's subsequent plea did not detract from this, especially when the circumstances in which it was entered were given due weight. In those circumstances, there would have been an actual miscarriage of justice if the Appellant had not been able, by way of appeal to this Court, to obtain the order of a permanent stay already granted to the co-defendants [67].

Substitution of Verdict

HAU TUNG YING & ANOTHER v HKSAR (侯東迎及其他人 訴 香港特別行政區)

COURT OF FINAL APPEAL
FACC 2 & 3/2010
Bokhary, Chan & Ribeiro PJJ, Mortimer & Lord Hoffmann NPJJ

Date of Hearing: 16 February 2011
Date of Judgement: 9 March 2011

Counsel for the Respondent: Robert SK Lee SC DDPP & Alex Lee SADPP
Counsel for A1: Clare Montgomery QC, Michael Blanchflower SC & Maggie Wong
Counsel for A2: Peter Duncan SC & Tony Ko

Criminal law & procedure – Whether the trial judge entitled to convict on a basis different from the case advanced by the prosecution without affording the defence an opportunity to make submissions – Whether there was a fair trial in the circumstances

Criminal law & procedure – Substitution of verdict under s 83A CPO – Conditions to be satisfied

刑事法及訴訟程序－主審法官是否有權在沒有給予辯方機會作出陳詞下基於有別於控方所提的案情定罪－在此情況下審訊是否公平

刑事法及訴訟程序－根據《刑事訴訟程序條例》第83A條取代裁決－須符合的條件

The Appellants were jointly charged with one count of conspiracy to defraud, i.e. to dishonestly extract funds from companies in which they were directors under the guise of paying "consultation services" purportedly provided by two BVI companies when in fact no such services had been provided. The funds were applied to various uses including that of paying "corporate entertainment expenses". The Appellants also jointly faced four theft charges involving the extraction of large sums of company funds by cheques. The theft charges were originally framed as alternatives to the conspiracy charge.

Counsel prosecuting on fiat took the view that as the funds extracted under the conspiracy and the theft charges were applied to different purposes, they were separate charges. She applied to amend the charge sheet to make the theft charges separate from, and not alternative to the conspiracy charge. Then Senior Counsel for the 1st Appellant insisted that they were alternatives and pressed for an election. The trial judge allowed the amendment and did not require the prosecution to elect.

However, the trial judge in his reasons for verdict proceeded on the original prosecution basis that the theft charges were alternatives. He returned guilty verdicts against the Appellants on the conspiracy charge, but no verdict on the theft charges, obviously treating them as alternatives. He did so without forewarning the Appellants. They were each sentenced to four years' imprisonment. The Appellants appealed.

The Court of Appeal considered that counsel prosecuting on fiat had been wrong to treat the theft charges as separate charges, that the trial judge had the power to depart from her approach and convict the Appellants on the original prosecution basis, and that, while the trial judge should have forewarned the Appellants of his change of approach, no prejudice was occasioned to them. It affirmed the conviction on the conspiracy charge, and did not substitute convictions for the theft charges under s 83A of the Criminal Procedure Ordinance (Cap 221) (CPO).

The Appellants appealed to the Court of Final Appeal on both limbs of "point of law of great and general importance" and "substantial and grave injustice". They complained that there was a breach of the Appellants' right to a fair trial since the trial judge had convicted them on a basis different from the case advanced by the prosecution without first alerting them of this possibility and affording them an opportunity to make submissions on it and that this had resulted in grave and substantial injustice to them.

Held, appeal against conviction of the conspiracy charge allowed but substituting convictions for the theft charges (with the same sentences imposed):

(1) The prosecution case presented at the trial was narrower in scope than what was alleged in the particulars appearing in the indictment. The stance must have been taken by counsel prosecuting on fiat after careful and conscientious consideration of the whole of the evidence and based on her understanding of the case but such understanding was "not entirely correct" [26]-[28].

(2) The criminality of the offence was the putting in place of a scheme which the Appellants knew was bogus in order to extract money from the companies. The consultancy agreements were a façade; the false accounting was a means to cover up the real purpose of the scheme; and the real purpose of the scheme was to extract money from the companies. How the money so extracted was to be applied was to be decided as and when the need arose. At the time when the bogus scheme was set up, while the conspirators might have a general idea as to what they intended to do with the money in due course, it would not be possible to anticipate when and how the money was to be used. For those reasons, there was no good reason to restrict the prosecution case in the way it was restricted at trial and to concentrate mainly on the falsity of the accounting [30].

(3) In appropriate cases, the judge does have the power to consider the case or direct the jury on the case on a basis different from that presented by the prosecution, provided that this is open on the indictment and the evidence and the parties are given an opportunity to address the judge before he takes that course. This may occur where there is for instance a mistake or omission on the part of the prosecution or for some reason, it has decided to conduct the prosecution in a way with which the judge does not agree. Such situation must be rare and exceptional [46].

(4) The Court had some doubt whether the decision of the Appellants not to give evidence would have been different had they known the case against them was on the wider basis. But the Court agreed that their cross-examination of some of the prosecution witnesses might have been different. The Appellants were also deprived of the opportunity to make submissions to the trial judge on the wider basis of the conspiracy and the consequences of adopting such an approach. The Appellants were thus disadvantaged and prejudiced and it would be difficult in those circumstances to say they had a fair trial. This was a material irregularity [55]-[58].

(5) To substitute a verdict under s 83A of CPO, two conditions have to be satisfied. First, the substituted verdict must be for an offence which is open on the indictment. Second, it must be clear to the appellate court that the jury must have made a finding of the relevant facts [62]-[64]. If the conditions in s 83A are met, the appellate court has a discretion whether to substitute a conviction on the other offence for the conviction on the offence which it has quashed [68]. The evidence on the theft charges was strong against the Appellants and in the absence of any explanation from the Appellants, the conclusion that they had stolen the money with the requisite dishonest intention was inescapable. There was no injustice to the Appellants to substitute a conviction on the theft charges [72]-[74].

(6) In cases involving a jury trial, it will almost certainly be impossible to substitute a verdict of a substantive offence for a conviction for conspiracy as the jury gives no reasons for its decision [117]-[118].

Summing Up

HKSAR v SEE WAH LUN & ORS (施華倫及其他人)

COURT OF APPEAL
CACC 370/2009
Cheung & Kwan JJA, Lunn J

Date of Hearing: 1 March 2011
Date of handing down Judgment: 22 March 2011

Counsel for the Respondent: William Tam SADPP and Franco Kuan Ag SPP
Counsel for A1: Cheng Huan SC and John Haynes
Counsel for A2-A5: David Boyton (re: conviction)
Counsel for A2-A5: C Draycott SC and David Boyton (re: sentence)

Criminal law & procedure – Prosecution witness gave evidence via live television link – Witness had acted in dual capacity of accomplice and police informer – "Witness in fear" within meaning of s 79B of Criminal Procedure Ordinance – Whether judge correct in allowing live television link – Whether to use a screen as an alternative

Whether summing-up imbalanced – Summary of defence points in brief précis form – Whether convictions rendered unsafe

刑事法及訴訟程序－控方證人透過電視直播聯繫作供－證人曾以從犯及警方線人雙重身分行事－《刑事訴訟程序條例》第79B條所指「在恐懼中的證人」－法官准許電視直播聯繫是否正確－可否使用屏風作爲另一選擇

總結詞是否不能持平－以簡短摘要方式撮寫辯方論點－是否令定罪不穩妥

The five Applicants were convicted after trial in the Court of First Instance of "acting as members of a triad society" and "conspiracy to cause grievous bodily harm with intent". A1 was further convicted of "conspiracy to commit murder" and "soliciting to murder". The key prosecution witness was an accomplice who had been recruited by his triad associates to participate in a plot to cause serious injuries or even death to the targeted victim. The accomplice had informed the police of the plot before it was carried out and as a result, the Applicants were arrested and later charged. The accomplice had stated in an affirmation that he was in fear of giving evidence in front of the Applicants. He and his girl-friend had been put under the witness protection scheme and living in a secret location. His father had seen two suspicious males loitering in the vicinity of his home. At trial, the prosecution successfully applied for an order to allow the accomplice to give evidence by way of live television link on the basis that he was a "witness in fear" pursuant to s 79B of the Criminal Procedure Ordinance. Towards the end of the trial, the judge had invited defence counsel to submit written summaries of their "defence points" in order to assist her preparation of the summing-up.

On appeal, the Applicants challenged the decision by the judge to permit live television link. The Applicants also complained that in her summing-up to the jury, the judge only briefly listed many of the matters in the written summaries but without reference to the details of the evidence that was capable of supporting the defence points; as a result, they alleged that the summing-up was unbalanced.

Held, dismissing the applications for leave to appeal against conviction:

(1) The following principles were relevant on the topic of live television link [29] :

(i) An accused is entitled to the fundamental right of a fair trial and to confront his accuser and see him in the eye. However, it appears that the common law right of a face to face confrontation is not guaranteed by the European Convention on Human Rights. Even under common law, the right to confront and see the witness can be curtailed.

(ii) These rights are now subject to statutory intervention by allowing a witness in fear to give evidence by way of live television link.

(iii) It is rare and exceptional to adopt the live television link approach. The Court must consider the interests of the accused.

(iv) At the same time the Court must balance the interests of the accused and the significant public interest of witnesses giving evidence without occasioning danger to themselves or to members of the community. The fact that an accused may suffer some forensic disadvantage does not mean such an order should be refused.

(v) An adult witness can still be a witness in fear. In deciding whether he is a witness in fear, the Court is to have regard to the circumstances of the case and the nature and circumstances of the witness. Factors such as the witness being an accomplice and having been under a witness protection scheme may be taken into account.

(vi) A witness in fear may not be in any actual danger and that his fear may only be that of meeting the assailant face to face.

(vii) The critical issue in determining whether a witness can be characterized as a "witness in fear" is the state of mind of the witness. It is not necessary that his fears be objectively justified or that those fears are directly attributed to conduct on the part of the accused.

(2) The subjective view of the witness was amply supported by the background of the case. The witness was a triad member giving evidence against his triad brothers. The charges were some extremely serious crimes involving a plan to cause serious personal injuries or even death to the targeted victim. The order to carry out these heinous crimes was given by a triad boss. The witness had expressed reluctance to take part in the plan but he was pressurized to agree to do so. He belonged to a secret society in which the members had sworn alliance to be loyal to each other. Instead he was doing the exact opposite and became a supergrass helping the authorities to prosecute his triad associates. With this background, the judge was clearly correct in ordering the live television link evidence. [30]

(3) In the Court below, an alternative suggestion was made that the witness was to be screened so that the Applicants could not see him until such time as a dock identification was required. Section 79B(4) does not require the judge to consider any alternative means of giving evidence once the judge is satisfied that a witness is indeed a witness in fear. The suggested method in fact would defeat the idea of a defendant seeing his accuser. The live television link on the contrary provided the applicants with the opportunity of seeing the accomplice witness on the television screens. [31]

(4) While each judge has his or her individual style in addressing the jury, one would usually expect an outline of the points raised by the defence, particularly those which are said to be important discrepancies of the witness, by more detailed reference to the evidence. The need to do so is particularly important when the prosecution's case hinges on the credibility of an accomplice who has been offered immunity from prosecution [50].

(5) The judge's approach did not affect the safety of the conviction as she had clearly directed the jury that the prosecution's case was dependent on the accomplice's evidence and on three occasions repeatedly given a full warning to the jury of the need to be extra cautious in relying on his evidence [50(1)]. The summaries by the judge also covered the topics that had been canvassed in the cross-examination and defence's final submission and in fact encapsulated the defence's case [50(2) & (4)]. The major issues raised were also adequately covered in other parts of the summing-up. [50(5)] The judge's approach of calling upon the defence to provide a list of points made in final speech was also sanctioned by the Court of Final Appeal: see *Chow Wai Choi & Others v HKSAR* (2005) 8 HKCFAR 623 [50(3.1) & (3.2)].

(6) The summing up by the judge was therefore not unbalanced. On the other hand, it should be firmly stated that it would not be enough for a judge simply to summarise the defence's case by way of a skeletal précis. The summary must be supported by appropriate references to the evidence and the identification of the major discrepancies or conflicts in the evidence [51].

HKSAR v WONG SUI WAI (黃瑞偉)

COURT OF APPEAL
CACC 60/2007
Yeung JA, Lunn & Saw JJ

Date of Hearing: 28 January 2011
Date of handing down Judgment: 3 March 2011

Counsel for the Respondent: Robert SK Lee SC DDPP & David Chan SPP
Counsel for the Applicant: Phillip Ross

Criminal law & procedure – Murder – Trial – Reasons for Verdict – Whether trial judge failed to give proper directions on 'mixed statement' and 'lies' – Whether conviction rendered unsafe

刑事法及訴訟程序－謀殺－審訊－裁決理由－主審法官是否沒有就「混合口供」及「謊言」作出適當指引－是否令定罪不穩妥

The Applicant was convicted, after trial, of one count of "murder" and sentenced to life imprisonment.

The Applicant and the deceased were husband and wife. They had a son nicknamed "Fai Chai". The deceased was then working as a prostitute. The deceased met another man (Mr Chan) and her marriage with the Applicant soon broke down. A decree absolute was granted and the Applicant was granted custody of Fai Chai with reasonable access to the deceased. The Applicant found the divorce unacceptable and began pestering the deceased to give up her work and Mr Chan. There were arguments and violence throughout the relationship, even after the divorce. On the morning in question, there were again rows between the Applicant and the deceased. The Applicant grabbed the deceased's neck and killed her.

The Applicant sought leave to appeal his conviction. The first ground of appeal relates to the response from the Applicant after he was arrested when he said:

> "On that day, my ex-wife and I had a dispute about the right of custody of our son. As a result, we quarrelled and subsequently we got into a conflict and then grappled each other. Both of us grabbed the neck of each other. Then her body began to loosen up and I let go. I started to be a little afraid and put her onto the bed. After that, I left her house."

The Applicant, relying on *Jim Fai v HKSAR* (2006) 9 HKCFAR 85, contended that the Applicant's statement on arrest was a "mixed" statement, containing not only admissions as to elements of the offence but also parts, as the judge directed the jury, capable of being read as excusing or exculpating the Applicant, in particular in respect of the issue of the Applicant's intention to kill or cause grievous bodily harm. The judge had fallen into error by directing the jury that they should ignore what the Applicant said if they were not sure that it was true. She should have told the jury that if what the Applicant said was an assertion of a lack of intention to kill or cause really serious bodily harm, and that assertion "is or may be" true, then they must acquit the Applicant of murder.

The second ground of appeal was that the judge should have given the jury a full "lies direction" in accordance with *R v Lucas* (1981) 78 Cr App R 159, as "there was a risk that the jury might wrongly infer guilt directly from a conclusion that the Applicant was not telling the truth about the issues in interviews" and that "the jury may have engaged in an impermissible line of reasoning to convict".

Held, granting the application for leave, but dismissing the appeal:

(1) Given that in his testimony the Applicant had adopted his out-of-court statements produced in the prosecution case as part of his evidence, supplementing them in his testimony, the out-of-court statements were subsumed into his testimony. In those circumstances the judge was not obliged to give the jury a direction as to the weight to be given to the exculpatory parts of the out-of-court statements of the Applicant (see *R v Vu Trong Minh* [1995] 1 HKCLR 24) [67].

(2) However, having embarked on a direction to the jury in respect of their approach to the out-of-court statement of the Applicant it was incumbent upon the judge to give a correct direction. The direction given was appropriate to admissions relevant to the prosecution case only (see the Judicial Studies Board's Specimen Direction 39), not to a 'mixed' statement, which also included explanations or excuses (see the Judicial Studies Board's Specimen Direction 40). In respect of a mixed statement, the jury ought to have been directed that they were to have regard to the whole statement in determining where truth lay. Further, as they were directed subsequently, if they determined that his account was or might be true that they were to acquit him of murder [68].

(3) There was never any suggestion that the Applicant's lies were supportive of the prosecution case. Indeed the judge had repeatedly reminded the jury that unless the prosecution has made them sure of the guilt of the Applicant, they must acquit him and that the burden of proving the charge so that they are sure about the guilt of the Applicant remained with the prosecution [75].

(4) To suggest that the judge should give a full "Lucas" direction is to suggest that a full "Lucas" direction is necessary in practically every case when the credibility of the accused is involved. Such suggestion contradicts what the Court of Final Appeal said in *Yuen Kwai Choi v HKSAR* (2003) 6 HKCFAR 113 and is simply not correct [77].

香港特別行政區 訴 WWK

高等法院上訴法庭
CACC 204/2009
高等法院署理首席法官鄧國楨、上訴法庭法官張澤祐及關淑馨

判案日期： 2011 年3 月23 日
判案理由書日期： 2011年4月7日

答辯人代表律師： 署理副刑事檢控專員黃惠沖及署理助理刑事檢控專員陳詠嫻
申請人代表律師(定罪)： 孫錦熹
申請人代表律師(刑期)： 無律師代表

刑事法及訴訟程序－強姦罪－肛交罪－若證據存在，法官應否給予陪審團猥褻侵犯交替控罪的指引－有否令陪審團所作出的裁決不穩妥

投訴人是申請人的親生女兒。投訴人約八歲時被專家評定有行爲問題及智商比常人低。投訴人指在 2000 年，即她約 13 歲時，她每逢星期一至五會在院舍居住，到了週末就會返家裡居住，家人會在星期日的下午送她返回院舍。當年夏天的某一個星期日，申請人領她到其工作地點的一間儲物室內，將她放在一張桌子上，脫去她的內褲，然後把陽具插入她的陰道內及摩擦數分鐘（強姦罪）。這次事件發生後不久，由於院舍進行裝修，投訴人返家暫住。有一天，當家中只有投訴人和申請人時，申請人脫去投訴人的褲及內褲，然後把陽具插入她的肛門內及摩擦了數分鐘（肛交罪）。原訟法庭法官及陪審團審理案件後裁定申請人兩項控罪罪名成立。申請人經審訊後被裁定兩項控罪罪名成立，被判總刑期十年監禁。申請人就定罪及刑期提出上訴許可申請。

裁決，上訴得直，兩項定罪撤銷，以兩項「猥褻侵犯罪」代替，刑期改判爲總刑期六年監禁：

(1) 無論申請人如何敘述投訴人的行爲，他在會面記錄及庭上的証供都否認他的陽具曾進入投訴人的陰道或肛門內，但申請人承認所作出的性行爲明顯是構成「猥褻侵犯罪」的犯罪元素。在這情況下，原審法官是有必要引導陪審團去考慮作出「猥褻侵犯」交替罪名的裁決[18]。

(2) 法官給予陪審團交替控罪指引的目的是一名被告人不應該因爲干犯了一項較輕的罪行而被裁定干犯了一項比較嚴重的罪行，從而受到更嚴重的處罰。同樣地，一名干犯了比較嚴重罪

行的被告人亦不應該被裁定干犯了一項較輕的罪行及獲得較輕的判罰。另外，陪審團亦不應該因爲不知道可以改判交替罪名而將一名有罪的被告人釋放，這是不符合公正的原則[19]。

(3) 原審法官給陪審團唯一的選擇是判申請人有罪或無罪。申請人性侵犯親生女兒是極之卑鄙的行爲，所以陪審團極有可能即使接納申請人的辯解可能是真的，即他的陽具沒有進入投訴人的陰道及肛門，但因不恥他的行爲而不願意讓他無罪釋放，繼而裁定他罪名成立。這是不符合法律原則的做法及正是上訴法庭需要推翻裁決的情況 [20]。

(4) 案件存有足夠的證據可讓原審法官向陪審團作出「猥褻侵犯」交替性罪名的指引。但由於陪審團沒有機會考慮「猥褻侵犯」交替控罪，這是令陪審團的裁決不穩妥。無論一名被告人的罪行如何嚴重或行爲如何卑鄙令人反感，法庭仍是有責任確保法律原則得以彰顯，令他獲得公平的審訊，這是維護法治的唯一方法 [21] – [22]。

(5) 法庭是需要考慮整體證據，而不是單單考慮申請人在會面記錄中所說的話或者在法庭上所提出的辯解來決定案件是否存有交替罪行的證據。明理的陪審團是會考慮申請人是否不單只以陽具摩擦投訴人而沒有意圖進入她的體內。如果他沒有聽到妻子在另外一間房間發出的聲音，申請人會否不單只以陽具摩擦投訴人，而會否進入她的體內。這不是牽強的推論而是根據案情極有可能發生的事。在這情況下，當有支持「企圖」罪行的證據，原審法官是有需要就交替企圖控罪向陪審團作出指引的。她沒有給予這個指引是會令到審訊不公。[28] – [31] 。

(6) 申請人干犯極嚴重的猥褻侵犯，他的行爲令人髮指。每項刑期的量刑基準應爲五年監禁。由於申請人承認猥褻侵犯投訴人，故此上訴庭將每項刑期定爲四年監禁，其中第二項控罪的兩年監禁刑期與第一項控罪的四年監禁刑期分期執行，總刑期爲六年監禁 [35] 。

[English Translation of CACC 204/2009 above]

HKSAR v WWK

COURT OF APPEAL
CACC 204/2009
Tang Ag CJHC , Cheung & Kwan JJA

Date of Judgment: 23 March 2011
Date of handing down Reasons for Judgment: 7 April 2011

Counsel for the Respondent: Wesley Wong Ag DDPP & Agnes Chan ADPP
Counsel for the Applicant (re: conviction): Suen Kam Hee
Counsel for the Applicant (re: sentence): In person

Criminal law & procedure – Rape – Buggery – Whether judge should give directions to jury on alternative charge of indecent assault which was open on the evidence – Whether jury's verdicts rendered unsafe and unsatisfactory

The complainant was the natural daughter of the Applicant. At the age of 8, she was professionally diagnosed as having behavioural problem and below normal intelligence quotient. She claimed that in 2000 at the age of about 13, she lived in an institution from Monday to Friday and returned home for the weekend. Members of her family would take her back to the institution in the afternoon on Sunday. On a Sunday during the summer of that year, the Applicant led her into a storeroom at his workplace, placed her on a table, removed her underpants, inserted his penis into her vagina and rubbed against it for a few minutes (the rape charge). Shortly after this incident, the complainant moved back to her home temporarily because the institution underwent renovation. One day, when only the complainant and the Applicant were at home, the Applicant removed the complainant's trousers and underpants, inserted his penis into her anus and rubbed against it for a few minutes (the buggery charge). The Applicant was convicted after trial and was sentenced to 10 years' imprisonment in total for these two offences. He applied for leave to appeal against conviction and sentence.

Held, appeal allowed, the two convictions were quashed with convictions for "indecent assault" substituted and the total sentence was reduced to 6 years' imprisonment:

(1) In whatever way the Applicant described the complainant's conduct, he denied both in his record of interview and in his testimony that he had inserted his penis into the complainant's vagina and anus. However, the sexual acts admitted by the Applicant obviously constituted the elements of indecent assault. In these circumstances, the trial judge was required to direct the jury on the alternative charges of "indecent assault" for their verdict [18].

(2) The objective of placing before the jury an alternative charge is that a defendant who has committed a lesser offence should not be convicted of a greater offence and exposed to a greater punishment than his crime deserves. Similarly, a defendant who has committed a greater offence should not be convicted of a lesser offence and given a lighter sentence. Further, it is not in the interest of justice if a guilty defendant is acquitted because the jury did not know they could have returned an alternative verdict [19].

(3) The only option given by the trial judge to the jury was to convict or acquit the defendant. The sexual assaults by the defendant on his natural daughter were extremely despicable acts. Even if the jury had accepted the Applicant's defence to be true - namely, his penis did not penetrate into the complainant's vagina and anus – it was very likely that they would be reluctant to acquit him because they disapproved what he had done and thus would return a guilty verdict. That would not be in the interest of justice and in those circumstances, the Court of Appeal would be required to quash the convictions [20].

(4) There was a sufficient evidential basis in the present case for the trial judge to give the jury directions on the alternative charges of "indecent assault". Since the jury were not given an opportunity to consider the alternative charges, the jury's verdicts were rendered unsafe and unsatisfactory. No matter how serious an offence or how condemnable an act a defendant has committed, it is the duty of the court to ensure that the interest of justice is served and the defendant is given a fair trial. This is the only way to uphold justice [21]-[22].

(5) In deciding whether there was evidence for an alternative verdict, the court had to consider the overall evidence rather than simply what the Applicant had said in his record of interview or what defence he had advanced in court. A reasonable jury would consider whether the Applicant simply rubbed his penis against the complainant without any intention to penetrate her. If he had not heard the noise made by his wife in the other room, would the Applicant have simply rubbed his penis against the complainant or would he have penetrated her? That would not be a far-fetched deduction and could have happened in the circumstances of the case. In those circumstances, where there was evidence to support an attempted offence, the trial judge was required to direct the jury on the alternative charge of attempt. Her failure to do so rendered the trial unfair [28]-[31].

(6) The sexual assaults committed by the Applicant were of a very serious nature and his acts were outrageous. The starting point for each offence should be 5 years' imprisonment. Since the Applicant admitted those sexual assaults, the Court of Appeal fixed the sentence to be 4 years' imprisonment for each offence. Two years of the second sentence were ordered to run consecutively to the first sentence, making a total of six years' imprisonment [35].

HKSAR v SINGH TERSEM

COURT OF APPEAL
CACC 216/2009
Stock VP, McMahon & Lunn JJ

Date of Judgment: 25 March 2011
Date of handing down Reasons for Judgment: 11 April 2011

Counsel for the Respondent: Wesley Wong Ag DDPP & Eva Chan PP
Counsel for the Appellant: Paul Loughran

Criminal law & procedure – Appeal against conviction – Rape – Complainant's evidence fell short of direct evidence proving penetration by Appellant's penis – Whether alternative verdict of indecent assault should have been left with the jury – Application of principles in *Ho Hoi-shing*

Recent Complaint – Distress – Whether sufficient direction as required by *Leung Chi-keung* that, inter alia, the distressed condition was not feigned and was only referable to the alleged sexual offence and not to any other cause

Summing-up – Whether act of sexual intercourse and, if so, whether consensual not put during cross-examination of complainant – Whether defence case fairly and thoroughly put to the jury

刑事法及訴訟程序－針對定罪的上訴－強姦－申訴人的證供未能構成直接證據證明上訴人陰莖插入－是否應讓陪審團考慮轉以猥褻侵犯的罪名裁決－*何開盛*一案的原則適用

近期投訴－受困擾－是否符合*梁志強*一案的要求給予足夠指引，其中包括受困擾的情況不是假裝的，僅與指稱的性罪行而非其他因由有關

總結－盤問申訴人時有否提出性交的行爲，以及如有的話，有否提出性交的行爲是否經雙方同意－有否向陪審團公平和徹底地提出辯方論據

The Appellant was convicted after trial before a deputy judge and a jury for having raped the complainant, his ex-girlfriend (the rape charge), and thereafter stolen $600 from her (the theft charge). On the evening in question, the complainant visited the Appellant at his flat and they drank beer together. The Appellant later carried the complainant (who had become sleepy) into his bedroom, undressed her, kissed her and fondled her private parts. The complainant resisted but was unable initially to push the Appellant away until she felt a hard object inserted into her vagina and experienced pain. She immediately pushed the Appellant away and then noticed that his penis was erect. The Appellant then desisted.

Some time later, the complainant saw the Appellant standing next to the table where her handbag was placed before he left the room. She checked her handbag and found her wallet missing. Upon the Appellant's return, she asked for the return of the wallet and when produced, $600 was found missing.

The Appellant did not give evidence and was convicted after trial. He later appealed to the Court of Appeal against conviction.

Held, appeal allowed, retrial ordered:

(1) On the rape charge, there is no merit in the Appellant's complaint that the trial judge had failed to sufficiently sum up the defence case that there was insufficient evidence of sexual intercourse and that in any event the intercourse was consensual. Where the defence had simply left these matters to the prosecution to prove without putting them to the complainant in cross-examination, the judge in his summing-up had fairly and thoroughly left these matters before the jury [11].

(2) However, inherent in the trial judge's remarks is an acknowledgment that the prosecution evidence allowed for the possibility that the jury could conclude there may have been a doubt concerning vaginal

penetration by the Appellant because the complainant's evidence fell short of direct evidence proving this, but that they were nevertheless sure that some other form of sexual assault had taken place. Where a possible proper alternative verdict was not left open to the jury, the Appellant was prejudiced by the constraint placed upon the jury to return a verdict which represents something less than their consideration of the whole of the options which should have been available to them: *Ho Hoi-shing v HKSAR* [2008] 5 HKLRD 658. There being no exceptional circumstances in this case, the Appellant's conviction for rape should be quashed [9], [12]-[18].

(3) As regards the Appellant's argument that the judge had erred in his directions regarding the evidence of "recent complaint" and of the complainant's apparent distress when she made those complaints, the trial judge made it sufficiently clear to the jury that the evidence of complaint went no further than being evidence consistent with and therefore capable of supporting the credibility of the complainant's testimony that she was "sexually assaulted". It remained a matter for the jury to decide whether the complainant's evidence, even if credible, established the elements of the offence of rape [22]-[24]. However, evidence of distress is capable of being independent probative evidence as to matters in issue and a jury may rely upon it as evidence which, in its own right, may be relevant to proof of a fact and not be restricted solely to the issue of the complainant's credibility. Where in this case, the jury were left to consider evidence of distress as independently probative, directions on how to approach this evidence were required to be given by the trial judge: *Leung Chi Keung v HKSAR* (2004) 7 HKCFAR 526. In particular, The jury must be satisfied that the distressed condition was genuine and that there was causal connection between the distressed condition and the sexual offence [25]-[29].

(4) On the theft charge, since there was also the potential for confusion in a juror's mind as to whether the evidence of distress might be applied to both the rape and theft charges and no express direction was given in this regard, the theft conviction should also be set aside given the evidential inter-connection between the two counts [30].

(5) Given the nature of the prosecution evidence, the basis for allowing the appeal and the period of imprisonment served, a retrial of both counts was ordered on a fresh indictment with an expedited trial date [32]-[33].

HKSAR v PUNSALANG ELMER UMALI

COURT OF APPEAL
CACC 116/2010
Stock VP, Yuen JA, Lunn J

Date of Judgment: 15 March 2011
Date of handing down Reasons for Judgment: 7 April 2011

Counsel for the Respondent: Martin Hui SPP
Counsel for the Applicant: Paul Loughran

Criminal law & procedure – Summing-up – Judicial intervention – Judge's right to comment upon the defence case – Summing up so unbalanced as being largely "the stuff of advocacy" and in substance a closing speech for the prosecution – Not desirable for a judge to prompt prosecutor to cover matters in his closing speech – Failure to properly direct the jury as to the exercise of right to silence – Error in direction on lies

刑事法及訴訟程序－總結詞－司法干預－法官評論辯方案情的權利－總結詞不能持平因主要流於「訟辯之類內容」及實質上爲控方的結案陳詞－法官不宜提示檢控人員須在結案陳詞中涵蓋某些事宜－沒有就行使緘默權適當引導陪審團－就謊言作出指引時犯錯

The Applicant was convicted after trial before a deputy judge and a jury of one count of trafficking in a dangerous drug (718.4 gms of heroin) and was sentenced to 22 years and 1 months' imprisonment. It was the prosecution case that the Applicant was intercepted by Customs officers upon his arrival in Hong Kong on a flight from Manila and two packets of heroin wrapped in tape and placed in cardboard sleeves were concealed inside the interior lining of the suitcase that he was carrying. The suitcase was filled with clothes. Under caution, the Applicant claimed *inter alia* that he had come to Hong Kong to buy some counterfeit clothing for his

mother's business and that he had obtained the suitcase in the Philippines from a friend whom he had come to know only recently. He claimed to have no idea that the suitcase contained drugs.

The Applicant testified at trial and with certain variations, some of them material, his account was much the same as in his interview.

Upon conclusion of the prosecution's closing speech, in the presence of the jury, the judge prompted the prosecutor to cover a matter that he had failed to address in his closing speech. The prosecutor acceded to such invitation and went on to address the jury further. He drew the jury's attention to a number of inconsistencies between the Applicant's interview and his oral testimony and to comments in the interview which undermined the Applicant's suggestion that he had been confused and tired at the time of the interview.

In the relatively brief summing-up, having dealt with the standard directions as to the law and the prosecution case, the judge examined the defence evidence by listing out the assertions made by the Applicant and then undermining each one of them in turn by a lengthy exposition of contradictions.

In respect of the alleged failure of the Applicant to respond to the caution immediately after his arrest, the judge directed the jury in the following terms:

> "*Counsel for the defendant… said in his final submission that if the defendant knew there was a dangerous drug would you not expect him to give a tailored explanation. The fact that the defendant appeared perplexed after caution means he was caught by surprise. Now, members of the jury, is this a reasonable explanation of his silence, given that he* ***could*** *have been exercising his right of silence. I leave this matter to you."* (emphasis added)

The judge also directed the jury on 'lies' in the following terms:

> "*Please, bear in mind that if the defendant tells a lie, that is not* ***necessarily*** *evidence of guilt."* (emphasis added)

On appeal, the main contention on behalf of the Applicant was that the trial judge's summing-up was largely "the stuff of advocacy" and the Applicant did not have a fair trial; not only was there "judicial intervention to reopen the prosecution's closing speech", the "summing-up raised and presented points in such number and manner as to amount to both a further construction of the prosecution case and a destruction of the defence case, giving the overall feel of being in substance a closing speech for the prosecution".

Held, appeal allowed, conviction quashed and retrial ordered:

(1) It is open to a judge to comment upon the evidence and, if the circumstances so warrant, do so in forceful terms. Where a defence is less than convincing or credible, the judge is often tempted to comment on it with the intention of assisting the jury. This is permissible. If common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities, there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. However, what the judge says to a jury is very often the last word they hear before they retire and carries more weight than what defence counsel says in a closing address and what the judge says must be fair and balanced. Whether a summing-up is fair and balanced is always case and context specific: *Lin Ping Keung v HKSAR* (2005) 8 HKCFAR 52 [13] & [14(1), (2)].

(2) Each and every defendant in a criminal court is entitled to a fair trial and to have his defence, however apparently threadbare, fairly elicited in evidence and accurately put to the jury for its consideration. Integral to such a fair trial is the principle that the judge should hold the ring as umpire, rather than descend into the arena as counsel. Another balance, often difficult to strike, is between, on the one hand, a robust and reasoned indication of the judge's own view of the merits or demerits of the defence case properly offered for the jury's consideration with the legitimate view of assisting them, and, on the other hand, so vigorous and partial a summing-up as effectively, despite the conventional direction to the contrary, to substitute the judge's own view for that of the jury: *R v Nelson* [1997] Crim L R 234 [14(3)].

(3) What a judge must not do is to comment in such a way as to make the summing-up as a whole unbalanced. A summing-up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that "it is a matter for the jury" [14(4)].

(4) Where the evidence points strongly to the guilt of the defendant, the judge may feel that he has to supplement deficiencies in the performance of the prosecution and the defence, in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into error for this reason. However, if the system is trial by jury, then the decision must be that of the jury and not of the judge using the jury as something akin to "a vehicle for his own views" [14(4)].

(5) Ultimately, it is a question of context, degree and "feel" of the summing-up as a whole. It is one thing for a judge to offer for the consideration of the jury key apparent illogicalities and implausibilities so as to assist them in their analysis, but quite another to devote almost the entire summing-up to a topic by topic destruction of details of the defence case so as to render almost otiose the reminder that the decision is that of the jury's [14(5)].

(6) As a general rule, it is not desirable for a judge to prompt prosecuting counsel to cover ground in his closing speech that he has failed to cover. There is nothing to stop a judge in his summing-up pointing out an obvious deficiency in the defence case, even if not alluded to in the closing speech of the prosecutor. That would have been the preferable course in this case [18].

(7) The judge failed to properly direct the jury as to the exercise of the right to silence, in that he failed to tell the jury that they were not to hold against the Applicant his silence and that the exercise of the right cannot amount to an admission of any kind nor can it be taken to reflect a guilty conscience. Whilst the judge was drawing a distinction between two possible reasons for silence, he nonetheless failed to give the required standard direction and by the use of the word "*could*" in "*could* have been exercising his right of silence", he left open the possibility of an adverse inference to be drawn [21(1)].

(8) The judge also made an error in his direction on "lies". By using the word "*necessarily*" in "not *necessarily* evidence of guilt", the unfortunate implication was that there may be circumstances in which a lie was evidence of guilt, which is contrary to established authority [32].

(9) Because of its tenor and imbalance, the summing as a whole was not fair and the Applicant was not accorded a fair trial [30].

CACC 202/2010

HKSAR v POSSO Vergara Cristhian Enrique

COURT OF APPEAL
CACC 202/2010
Stock VP, Yuen JA, Wright J

Date of Judgment: 7 July 2011
Date of Reasons for Judgment: 28 July 2011

Counsel for the Respondent: Edmond Lee SPP
Counsel for the Appellant: Paul Loughran

Criminal law and procedure – Summing-up – whether trial was rendered unfair by the judge's "*point by point demolition of almost every aspect of the defence case*" in his summing-up – whether judge's comments on defendant's failure to give details in police interview amount to a misdirection – whether it was improper to direct jury not to consider version of events put to witness which had been disagreed

Closing speech – Counsel makes submissions but not expresses his or her own opinion

刑事法及訴訟程序－總結詞－審訊是否因法官在總結詞中*「幾乎逐點摧毀辯方的各方面論據」*而不公平－法官評論被告人沒有在警方會面中提供細節是否構成錯誤指引－證人不同意辯方就事件提出的說法，法官指示陪審團無須對此考慮，此舉是否不適當

結案陳詞－律師作出陳詞，但不能表達個人意見

The Applicant was convicted after trial of one count of trafficking in dangerous drugs and sentenced to 8 years and one month's imprisonment. He took out an application for leave to appeal against the conviction. The main ground was that his trial was rendered unfair by the manner in which the judge summed-up the case to the jury.

Held, appeal allowed, retrial ordered:

(1) In summing-up to a jury, whilst the judge is not required to sit mute if he perceives an imbalance and whilst he may make robust comments, the issue is whether he has overstepped the mark from, on the one hand ensuring that a jury is seized of factors relevant to the strengths of both prosecution and defence cases and on the other hand, addressing issues that he has assumed the role of the prosecutor. It is a question of degree and feel. In this case, the judge unfortunately crossed the boundary from a robust indication of suggested flaws in the defence case to a point by point demolition of almost every aspect of the defence case, in such a manner as to render the summing-up akin to a prosecution speech. The problem was aggravated by the fact that some of the points made were new, in the sense that the Applicant and his counsel had not had the opportunity of addressing them [19]-[20].

(2) The judge in his summing-up drew to the jury's attention that the Applicant refused to explain in detail about certain items in the interview until one year later in the trial. By so doing, he was inviting the jury to draw an adverse inference against the Applicant for not providing his account at the time of the interview. It was an inappropriate direction. It would have been different had the Applicant given an account during the interview omitting material facts which were then introduced for the first time at trial. The judge should have made it clear that insofar as the Applicant was exercising that right of silence, no adverse inference against him was to be drawn [24].

(3) The judge in the summing-up told the jury that they "*need not consider the version put by defence counsel because they are not evidence*". The matter was unfortunately phrased as the jury was invited to ignore altogether what had been put whereas insofar as what had been put was supported by evidence, it was certainly not to be ignored [25].

(4) It is fundamental that counsel never expresses his or her own opinion in the presentation of the case. Counsel makes submissions. Accordingly it is not proper for counsel to tell the jury what his or her hopes were, nor to tell the jury that he or she personally disbelieved the defendant. That would always be an inappropriate mode of address and it is particularly inappropriate to say that to a jury who are unversed in the law or in criminal procedure [28]-[29].

HKSAR v HONG TSZ YIN

COURT OF APPEAL
CACC 189/2010
Stock VP, Hartmann JA, Tong J

Date of Hearing: 18 March 2011
Date of Judgment: 26 September 2011

Counsel for the Respondent: Simon Tam SADPP & Monica Chan PP
Counsel for the Applicant: Mahinder Panesar

Criminal law and procedure – Murder – Duty of trial judge to summarize issues and evidence relating to the issues clearly, accurately and fairly to the jury

刑事法及訴訟程序－謀殺－原審法官有責任向陪審團清楚準確並公平地撮述各爭論點及與該等爭論點有關的證據

The Applicant was convicted after trial of two counts of murder. Both victims were sex workers and the killings took place over a time span of about 3 weeks. It was not in dispute that the Applicant had unlawfully killed both victims and the succinct issue for the jury to determine was therefore one of intention [12]-[14] & [25].

At trial, it was an admitted fact that the Applicant had visited both victims in their apartments and killed both of them. It was not in dispute that the Applicant had unprotected sexual intercourse with both victims. It was also not in dispute that when he went into the victims' apartments, he had with him a small towel to which he had applied chloroform. When bodies of the victims were discovered lying on their beds, the towels were placed over their faces and chloroform was found in their blood. In both cases, death was caused by the application of sufficient force to obstruct the victim's mouth and nose for a sufficient period of time to result in suffocation. Autopsy reports revealed the presence of multiple abrasions and similar injuries caused by the application of blunt force. The ingestion of chloroform, while it might have been a contributing factor, was not the cause of death. The Applicant, who was in debt at the time, had searched for and stolen certain of the victims' properties [12]-[22].

When the Applicant was arrested, he asserted that he had not intended to kill either woman. Thereafter, in a series of seven video-recorded cautioned interviews and in two recorded re-enactments, he went on to explain how it was that each woman had died as a result of his actions even though he had had no intention to kill either of them or to cause either of them serious bodily harm. At trial, the video-recorded interviews and re-enactments were admitted into evidence and the Applicant elected not to testify [23]-[24].

The grounds of appeal included: (1) the judge's summing up was unfair and unbalanced; (2) the judge had wrongly described the towels to which the Applicant had applied chloroform as being "soaked" in the substance; and (3) the judge had wrongly referred to two matters of uncontested evidence on the basis that both were capable of giving rise to the inference the Applicant had intended to kill or cause serious bodily harm to the victims [44]-[48].

Held, appeal allowed and retrial ordered:

(1) It is fundamental that in a criminal trial before a jury, every defendant is entitled to have his defence – however implausible, even if it appears to be an affront to common sense – fairly and accurately put to the jury for its consideration. In the context of this present appeal, the principle has been forcefully stated by the Court of Appeal of England and Wales in *R v Marr* (1990) 90 Cr App R 154, which was cited with approval by the Court of Final Appeal in *Lin Ping Keung v HKSAR* (2005) 8 HKCFAR 52 [63]-[65].

(2) A balanced summing-up means one that, on objective consideration, contains a fair statement and analysis of the case for both sides. Determining whether a summing-up is balanced in this sense is often the most difficult of matters especially when, as in the present case, the judge had the unenviable task of dealing accurately and fairly with a defence that was confused, shot through with implausibilities and, in many of its aspects, distasteful in the extreme. Ultimately, whether a summing-up, when read as a whole, is balanced is a matter of impression and 'feel' [2] & [66].

(3) In the present case, it was simply not sufficient for the judge to leave the records of interview to the jury to make of them what they thought best without any real attempt to summarise the nature of the defence case. It is not suggested that a slavish recitation of every aspect of the records of interview had to be conducted. Patently, that would have been of no assistance to the jury. But, as the authorities make clear, an overview of the essential elements of the defence case presented in an impartial way, no matter how implausible that defence, was required. This was of particular importance for two reasons. First, the Applicant's records of interview constituted the entirety of the defence case. Second, the factual issues arising out of the various records of interview were multi-layered and complex, sometimes seemingly contradictory, sometimes coloured with ambiguity [3] & [67]-[69].

(4) In the present case, the judge did remind the jury that questions of fact were for them only. However, her observations as to the defence case were inexorably critical. As has been observed in *HKSAR v Umali* (unreported) CACC 116/2010, "it is one thing for a judge to offer for the consideration of the jury key apparent

illogicalities and implausibilities so as to assist them in their analysis but quite another to devote almost the entire summing-up to a topic by topic destruction of details of the defence case so as to render almost otiose the reminder that the decision is that of the jury's". On a reading of the summing-up as a whole, the impression gained is that the jury were given a wholly one-sided view of the case [4]-[7] & [73]-[74].

(5) In respect of the second ground of appeal that the judge was wrong in describing the towels as being "soaked" in chloroform, there is strength in the criticism that the regular use of the word "soaked" by the judge was not accurate. During the Applicant's interviews, he used a Cantonese expression the equivalent of which in English is the word 'dip'. In one of his re-enactments, he described how, before entering the apartment of his second victim, he applied chloroform to a towel. He spoke of adding just a small quantity of chloroform to the towel. In the circumstances of this case, the constant use of the word "soaked" had added to the impression of an unbalanced summing-up [8]-[10] & [75]-[80].

(6) The third ground of appeal alleges that the judge had wrongly referred to two matters on the basis that they were capable of supporting an inference of intent to commit murder. On the first matter that the Applicant was in debt and, before leaving each apartment, had stolen certain property, the Court was satisfied that the judge was correct to give the direction she did. It was the prosecution case that the Applicant was motivated by two desires: sex and greed. It was accepted that he was heavily in debt at the time. It was central to the prosecution case that theft from the two women was therefore pre-planned by the Applicant. On the second matter that the Applicant had prior to his arrest attempted to dispose of a container of chloroform, the Court took the view that the primary facts were simply not capable of allowing for an inference to be drawn as to the exact intent of the Applicant at the time of the killing of each victim [81]-[87].

(7) On behalf of the Applicant, it was submitted that this was an appropriate case to substitute convictions for manslaughter. The court disagreed because the facts warranted a trial for murder. A retrial was accordingly ordered [96].

Telecommunications

HKSAR v SZETO WAH & ORS

COURT OF FIRST INSTANCE
HCMA 164/2011
M Poon J

Date of Hearing: 21 July 2011
Date of Judgment: 11 August 2011

Counsel for the Respondent: Johnny Mok SC & Ira Lui SPP
Counsel for A1, A3, A4 & A5: Martin Lee SC & Charleen Tong
Counsel for A2 & A6: Douglas Kwok

Criminal law and procedure – Constitutional challenge – Appeal by way of case stated pursuant to s 105 of Magistrates Ordinance (Cap 227) – Constitutionality of the Class 3 Offence under s 23 of the Telecommunications Ordinance (Cap 106)

刑事法及訴訟程序 - 質疑是否符合憲法 - 依據香港法例第227章《裁判官條例》第105條以案件呈述方式上訴 - 香港法例第106章《電訊條例》第23條下的第3級罪行是否符合憲法

The Appellants were each convicted of an offence contrary to s 23 of the Telecommunications Ordinance (Cap 106), which alleged that each had, knowing or having reason to believe that a means of telecommunications was being maintained in contravention of the Ordinance (namely, being maintained without

a licence granted by the Chief Executive in Council or an appropriate licence granted or created by the Telecommunications Authority), delivered messages for transmission by such means of telecommunications ('Class 3 Offence'). The Appellants pleaded not guilty to the charges but were convicted after trial. They appealed against conviction by way of case stated [1] & [3].

The preliminary issue raised at trial was the constitutionality of the Class 3 Offence, i.e. whether it is contrary to Article 16 of the Hong Kong Bill of Rights, as provided in section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383), and Article 27 of the Basic Law, which collectively guarantee the right to freedom of expression in Hong Kong. The magistrate ruled that the Class 3 Offence was not unconstitutional [2].

On appeal, the Appellants contended that the magistrate was wrong to rule that the Class 3 Offence has a rational connection with the legitimate aims of preventing chaos in telecommunications and the undue interference with the rights of others, and more specifically, that the legitimate aim of legislating is "not only against those who seek to avoid the licensing requirements but also against those who seek to promote or encourage unlicensed 'pirate' stations in their illegal activities" and that the Class 3 Offence is necessary and proportionate to those legitimate aims [5]-[8].

The Appellants further sought leave of the court to raise one more question of law, which was not included in the Case Stated, namely: -

> "Does the class three offence under Section 23 of the Telecommunications Ordinance apply to a person who participates in a programme which he/she knows/has reason to believe would be broadcast (live) by an unlicensed radio station?" [9]

Held, appeal dismissed:

(1) Leave to allow the Appellants to raise the additional question of law in the appeal was refused. The Appellants' submission that the court should allow a point not taken at the trial nor stated in the Case Stated to be argued if the question of law is "one which no evidence could alter" is plainly fallacious because if it is correct, it would mean that whenever an appeal is where no evidence could alter, the appeal court can give an opinion to any questions of law raised even if they had neither been raised at the trial nor stated in the Case Stated. That would render the procedural provisions governing Case Stated in the Magistrates Ordinance such as ss 105, 107 and 112 nugatory and that is contrary to decided cases. In any event, the new question of law is fact-sensitive and the Class 3 Offence does not make any distinction between the various forms of participation. In so far as a participant who delivers the message with the requisite intent, he will be caught by that section [14]-[16].

(2) As to the constitutionality issue, it is not disputed that the Class 3 Offence by itself imposed a restriction over the right to freedom of expression [23]-[24].

(3) The legitimate aim of the Class 3 Offence is not in issue. The magistrate has found that s 23 seeks to outlaw those who "seek to promote or encourage unlicensed 'pirate' stations in their illegal activities" with the requisite *mens rea* [25].

(4) As to the issue of "rational connection", whilst s 20 of the Telecommunications Ordinance targets the physical setup or establishment of a broadcasting system without licence, s 23 targets the user of that illegal system in furtherance of the illegal setup. Both sections go hand in hand to serve the legitimate aim. The purpose of s 23 is to restrict those who deliberately jeopardize the legitimate aim. Once it is accepted that the s 23 offence targets those who "seek to promote or encourage unlicensed 'pirate' stations in their illegal activities" with the requisite *mens rea*, it goes without saying that the "rational connection" limb is satisfied [27].

(5) It was held in *Secretary for Justice v Ocean Technology Ltd & Ors* [2009] 1 HKC 271 that it is necessary to have an effective system to regulate the use of the spectrum the Ordinance due to the scarcity of resources. Section 23 complements s 8 in that it is to assist the operation of s 8 and enforcement of the licensing system and targets those users of that illegal system in furtherance of the illegal setup by way of a criminal sanction. Both sections share a common aim, namely, to regulate the use of the spectrum and to prevent chaos and undue interference with others' rights. Once it is reckoned that the law ought to put a stop to broadcasting without a licence because this might cause chaos directly, a piece of legislation which merely outlaws the activities of those who establish or maintain the radio equipment without illegalising the activities of those who

deliver messages to be broadcast through such radio equipment will be otiose and powerless in preventing the illegal use of the radio wave spectrum [30].

(6) In considering whether the Class 3 Offence is "no more than is necessary", the magistrate has rightly taken into account the following factors, namely, (1) s 23 does not attract any prison term and an offence under it is punishable by a fine only up to $50,000; and (2) that the Class 3 Offence requires the prosecution to prove two different elements of *mens rea* in addition to knowledge or belief that such were illegal means of communication. As the requisite *mens rea* is required, the Class 3 Offence would not catch, for instance, a passer-by interviewed by a programme host engaged by an unlicensed radio station. With these requirement, the number of potential defendants caught under that provision would be greatly reduced [32]-[33].

(7) Whilst the freedom of expression is not confined only to the substance but also to the mode, the Class 3 Offence does not interfere with one's freedom to express the same message by other modes; it only bans one mode of expressing whatever the message one wishes to express, namely, illegal broadcasting, and does not interfere with his freedom to express the same by other modes. It is thus only a limited restriction [34].

(8) The Class 3 Offence is a permissible fetter to the right to freedom of expression in that it is rationally connected to the legitimate aim and no more than necessary to accomplish that aim, and is thus a justified derogation [35].

Telephone Nuisance

香港特別行政區 訴 湯美清

高等法院原訟法庭
HCMA 121/2011
高等法院原訟法庭暫委法官李瀚良

判案日期：2011 年 8 月 23 日

答辯人法律代表： 檢控官黃俊賢
上訴人法律代表： 無律師代表，親自出庭

刑事法及訴訟程序 - 無合理因由而不斷打電話 - 被告人無律師代表 - 裁判官確保公平審訊的責任 - 程序錯誤是否關鍵性

上訴人面對一項控罪，指她於控罪期間，使用電話傳送極爲令人厭惡的訊息給控方第二和第三證人，在審訊時她沒有律師代表。最後，裁判官判上訴人罪名成立。上訴人不服定罪，提出上訴。上訴人指裁判官對她有偏見，又指審訊不公平。此外，裁判官沒有依程序裁斷上訴人的警誡供詞是否自願，卻將警誡供詞列作證物。爲補救這錯誤，裁判官表示他不會考慮警誡供詞招認的部份，只會考慮上訴人辯解的部份。

裁決，上訴得直，撤銷定罪和取消刑罰：

（1） 裁判官未有盡量協助上訴人組織問題，反而處處批評，令上訴人無所適從。在衡量裁判官是否過度干預審訊時，法庭必須顧及裁判官控制審訊進度的責任和難處，適當的干預每每是須要的。除此之外，干預的次數並非決定性，應考慮是否有需要干預、所用的方法和態度等等。至於裁判官的行爲是否導致不公平審訊，法庭應考慮一個瞭解情況的聽審者會否覺得審訊不公平[10]-[12]。

（2） 沒有律師代表或沒有法律知識都不是肆意浪費法庭時間的理由，更不是胡亂扯上無關議題和刁難證人的藉口。縱然如此，裁判官應該在開審前嘗試瞭解上訴人的辯護理據，確定爭議的重點，盡量協

助上訴人組織論據，收窄爭議。這是艱難的工作，裁判官要確保公平審訊，也須平衡與訟各方的利益。裁判官在開審前曾詳細解釋程序，不過到審訊的中段，由於種種原因，對上訴人的盤問方式批評多於協助，更幾次表示不會幫她組織問題。期間，裁判官在不必要的情況下多次厲聲警告上訴人。這情況至審訊完結，一直沒有改善。裁判官對上訴人的態度，令審訊不公平[14]-[16]。

（3） 裁判官沒有依程序裁斷上訴人的警誡供詞是否自願，卻將警誡供詞列作證物。爲補救這錯誤，裁判官表示他不會考慮警誡供詞招認的部份，只會考慮上訴人辯解的部份。裁判官的處理方法十分牽強，因爲這可能是關鍵性的程序錯誤，他應該在裁斷陳述書詳細解釋。在決定一項嚴重程序錯誤是否關鍵性時，處理上訴的法庭不應直接代入自己的意見，應該考慮若沒有該項嚴重程序錯誤，下級法院是否會達致同樣的裁決。以本案而言，應考慮假若沒有上訴人的警誡供詞，是否肯定裁判官會達致同樣的裁決。在此案中，就算沒有上訴人的警誡供詞，裁判官肯定會作出同樣裁決。所以，裁判官的錯誤並非關鍵性[17]-[19]。

[English Translation of HCMA 121/2011 above]

HKSAR v TONG MEI CHING CAT

COURT OF FIRST INSTANCE
HCMA 121/2011
Li DJ

Date of Judgment: 23 August 2011

Counsel for the Respondent: Nicholas Wong PP
Counsel for the Appellant: In person

Criminal law and procedure – Persistently making telephone calls without reasonable cause – Defendant unrepresented – Magistrate's duty to ensure fair trial – Whether procedural error material

The Appellant faced one charge which alleged that at the time of the offence she sent grossly offensive messages to PW2 and PW3 by telephone. She was unrepresented at trial and finally convicted by the magistrate. She appealed against conviction on the basis that the magistrate was biased against her and the trial was unfair. Moreover, the magistrate failed to follow the procedures to decide on the voluntariness of the Appellant's cautioned statement, but he still marked it as an exhibit. In an attempt to remedy such a mistake, he stated that he would only consider the exculpatory rather than the inculpatory parts of the statement.

Held, appeal allowed, conviction quashed and sentence set aside:

(1) Instead of trying his best to help the Appellant organize her questions, the magistrate repeatedly criticized the Appellant, rendering her at a loss as to what to do. In assessing whether there was excessive intervention by the magistrate at the trial, the court must recognize his duty to exercise proper management over the proceedings in difficult conditions, and appropriate interventions in many cases were justifiable. Apart from this, interruptions by their number alone were not decisive. The factors to be taken into account included whether the intervention was necessary, the method employed and the attitude adopted. As to the question of whether the magistrate's conduct had rendered the trial unfair, the consideration for the court was whether his conduct was such that it would have caused an informed bystander listening to the case to say that the trial was unfair [10]-[12].

(2) Having no legal representative or legal knowledge could neither be a reason for arbitrarily wasting the court's time nor an excuse for thoughtlessly bringing up irrelevant topics and making life difficult for the witnesses. Despite that, the magistrate, before the trial began, should have made an effort to understand the Appellant's defence, confirmed the disputed issues, helped the Appellant as far as possible to organize her arguments, and narrowed down the scope of dispute. This was a difficult task because magistrate on the one hand had to ensure the fairness of the trial and on the other hand to balance the interest of all parties. Although the magistrate before the trial had explained the procedures in detail, the criticisms he made about the Appellant's way of cross-examination for various reasons in the middle of the proceedings were more than the

assistance he gave to her. He even indicated several times that he would not help her organize her questions. In the meantime, he repeatedly and unnecessarily warned the Appellant loudly. This situation continued until the end of the trial without improvement. The attitude of the magistrate towards the Appellant rendered the trial unfair [14]-[16].

(3) The magistrate failed to follow the procedures to decide on the voluntariness of the Appellant's cautioned statement, but he still marked it as an exhibit. In an attempt to remedy such a mistake, he stated that he would only consider the exculpatory rather than the inculpatory parts of the statement. His approach to this matter was very unconvincing because it could be a material procedural irregularity. He should have given a detailed explanation in his statement of findings. In deciding whether a serious procedural irregularity was material, the appellate court should not directly apply its own view. The consideration should be whether the court below would have reached the same verdict had there been no such serious procedural irregularity. As regards the present case, the court should consider whether the magistrate would undoubtedly have reached the same verdict had there been no cautioned statement of the Appellant. In the present case, the magistrate would have certainly reached the same verdict even without the Appellant's cautioned statement. Therefore, the magistrate's error was not material [17]-[19].

Time Bar

HKSAR v KONG WAI CHUN & ORS

COURT OF APPEAL
CACC 252/2009
Stock VP, McMahon & Wright JJ

Dates of Hearing: 15-17 February 2011
Date of Judgment: 20 May 2011

Counsel for the Respondent: A P Campbell-Moffat & Nicholas Adams
Counsel for A1 (on conviction): In person
(on sentence): David Boyton & Gary Lau
Counsel for A2: Bruce Lau
Counsel for A3 & A4: Chan Wai-ming
Counsel for A5 & A6: Oliver Davies

Evidence – Identification – Courtroom identification – Not inadmissible per se – Whether to admit first-time dock identification evidence is a matter of trial judge's discretion – Discretion to be exercised rarely

Criminal law and procedure – Time bar – s 120A of Copyright Ordinance (Cap 528)

Evidence evaluation – Important for a judge to give proper consideration to respective strengths and weaknesses of evidence – Equally important for judge to stand back to assess the evidence as a whole

證據－辨認－庭上辨認－本身並非不可接納的證據－是否接納首次辨認犯人欄內被告人的證據屬主審法官行使酌情權決定的事宜－甚少行使此酌情權

刑事法及訴訟程序－時效－香港法例第528章《版權條例》第120A條

證據評估－法官分別對證據的強項及弱項給予適當考慮是重要的－但法官退一步對證據作出全面評估亦同樣重要

The Customs and Excise Department ("C & E") conducted an operation which involved covert surveillance being maintained on 3 premises and a number of suspects. As a result of the operation, the Applicants were charged with conspiring with one another and other persons to sell, without the licences of the copyright owners, infringing copies of copyright works [2]. A1 & A2 were further charged with a count of dealing with property known or believed to represent the proceeds of an indictable offence [3] whilst A5 & A6 were further charged with two counts of exposing for sale infringing copies of copyright works [4]. The Applicants were convicted after trial and they sought leave to appeal against both conviction and sentence.

For A3-A6, the prime ground of appeal was that of identification of the various Applicants with particular emphasis on the propriety of the courtroom identifications permitted by the judge. Another common ground of appeal related to the sufficiency of evidence against each Applicant in the event that the identifications were upheld. A2 further submitted that the proceedings were time-barred [14].

Held, (i) leave to appeal against conviction for A3-A6 granted, and treating the hearing as the appeals proper, the appeals dismissed; (ii) applications for leave to appeal against conviction for A1 and A2 dismissed:

(1) No identification parade had been held prior to the commencement of the trial [18]. The prosecution took the view that the situation was akin to that where a witness recognised an accused person. On the other hand, the Applicants asserted that they remained as total strangers to the surveillance officers and formal identification parades should have been held [19]. The Court took the view that there was simply no justification for the failure to hold parades in these circumstances. The decision taken by the C&E not to hold identification parades on an "operational" basis was plainly wrong [20].

(2) Courts have consistently displayed antipathy towards permitting a courtroom identification where the identification is not a case of recognition or where there has been no earlier identification by the witness [26]. Whether to admit first-time dock identification evidence is a matter for the discretion of the trial judge, a discretion which is to be exercised rarely [32].

(3) It is inappropriate for a judge to regard the evidence of a police officer, or member of other disciplined forces, as being more creditworthy than that of any other witness simply by virtue of his position [40]. However, commonsense dictates that the fact that a number of witnesses are able positively to identify any given individual must lend weight to the evidence of identification of that particular individual, particularly where there was specific surveillance and the opportunities of surveillance were in good conditions [41].

(4) In the present matter, the judge required full evidence to be detailed from each identifying witness in respect of each individual identification of the same accused as to the nature, extent, frequency, duration and circumstances in which that witness had had opportunities of identifying a given accused before she would entertain any application for that accused person to be pointed out by the witness. Each witness was cross-examined at length [34]. It is abundantly clear that the judge brought her mind to bear upon the sufficiency of the evidence given by each individual witness against each individual accused in regard to identification before allowing the witness to point out that accused [35]. The judge was abundantly alive to the inherent difficulties of identification in general and the dangers of court identification in particular; she was satisfied that the officers were being truthful in their evidence, their credibility having been challenged in cross-examination; she took cognizance of the fact that these witnesses were trained observers rather than inexperienced members of the public [44]; and she was also aware of the lapse of time factor [45]. There is nothing to show that the judge exercised her discretion incorrectly in admitting the evidence, nor that she was wrong to place reliance upon it [46].

(5) Section 120A of the Copyright Ordinance prohibits prosecution in two circumstances: first, after the expiry of 3 years from the date of commission of the offence; and second, after 1 year from the date of discovery of the offence. For the former, given the offence of conspiracy is a continuing offence, the 3-year-period will not commence to run until the cessation of the conspiracy; thus in this case, time did not run until the operation turned overt [49]-[52]. As for the latter, time would not start to run against an accused until he or she has been "discovered" to be a participant in *that* conspiracy no matter what previous evidence there may have been or suspicions may have existed in regard to the commission of other offences [56]. In respect of a conspiracy, time runs from the date upon which the individual conspirator's participation is "discovered" [57].

(6) Whilst it self-evidently is important for a judge to give proper consideration to the individual facets of evidence, to assess their respective strengths and weaknesses, their relevance and importance to the prosecution

case and their specific probative value, it is equally important for the judge to stand back, having heard all the evidence, and to assess it as a whole, considering what overall mosaic emerges from the sum of the individual tiles comprising it. It may be that, in a given case, a number of individual facts established by the evidence each prove little by themselves, or may be capable of more than one interpretation individually, but, when viewed together as a whole, slot cumulatively into places where, when viewed together, they paint a comprehensive and comprehensible picture of the overall conduct [96]. The judge correctly considered the totality of the admissible evidence against each Applicant and was correct in her conclusion that there was but one conspiracy [97 & 98].

Town Planning

香港特別行政區 訴 鄧觀有及另七人

高等法院原訟法庭
HCMA 404/2011
高等法院原訟法庭暫委法官陳慶偉

裁決日期：2011 年 11 月 1 日

答辯人法律代表： 檢控官戚雅琳
申請人法律代表： 張鵬

刑事法及訴訟程序—《城市規劃條例》—在發展審批地區內的土地上的強制執行—地盤在法定圖則上被規劃爲農業用途—飼養蚯蚓是否農業一種

八名上訴人各面對一項控罪，他們被指沒有遵從根據《城市規劃條例》第 23(1)條所發出的通知書內的規定而中止有關事項。他們是新界元朗八鄉梁屋村兩部份地段的註冊業主或註冊業主的司理。地盤在有關法定圖則上被規劃爲農業用途，除獲得城市規劃委員會的規劃許可，否則不得用作儲物及工場用途。2008 年 2 月，規劃署人員到達地盤進行視察，發現地盤已被平整。新保思生物科技有限公司租用地盤及毗鄰另一地盤將廚餘和馬糞混成有機肥料供應給農場。另一地盤亦存放一些大型容器、盛載著液態肥料的膠桶、袋裝物及一堆堆的馬糞肥料堆[1]-[4]。

根據上訴一方所說，新保思於 2007 年開始租用上述兩地盤作蚯蚓養殖場之用。在飼養蚯蚓過程中，蚯蚓會產生排泄物，新保思視之爲收成物，排泄物亦稱蚯蚓肥。 新保思亦在地盤栽種不同品種的植物，其中的一個目的是觀察蚯蚓肥的成效。上訴一方傳召的專家證人指蚯蚓是動物，但不屬昆蟲，飼養蚯蚓比飼養雞隻或豬隻容易得多，蚯蚓的飼料只是一些農業廢料，例如廢棄的蔬菜，腐爛的水果或其他動物的糞便等，他亦指飼養蚯蚓生產蚯蚓肥，屬農業作業[7]-[10]。

裁決，上訴得直，定罪撤銷，刑罰擱置：

（1） 飼養動物並不等同農業作業，香港賽馬會飼養馬匹作比賽之用，便是一明顯例子；同樣地，有利農業的事業並不等同農業，化工廠製造化肥有利耕種，並不表示它是農業。但是，本案的證供顯示，新保思在地盤內的主要活動是飼養動物，新保思從飼養蚯蚓的活動中取得兩項產品：一是蚯蚓本身、二是蚯蚓的排泄物。蚯蚓本身被出售作魚餌及餵飼魚類之用，至於蚯蚓排泄物則直接被收集成有機肥料，用於有機耕種上[17]。換句話說，新保思絕非在地盤調配飼料出售，也非接收有機廢物，透過化學、電子及機械工程等，即一般人理解的所謂純工業活動將之轉化爲商品[19]。

（2） 飼養及出售蚯蚓本身，是農業用途。至於飼養蚯蚓以獲取其排泄物，法庭相信這亦與牛津互聯網辭典內講及的農業(agriculture)之其他產品(other products)相乎。實際上，飼養蚯蚓與養蠶取絲性質上並無分別，兩者都是採集動物排出體外的物質，提取牠們的副產品，目的都是滿足人類的其中一基本生活需求，只不過養蠶取絲已有數千年的歷史，至於大規模飼養蚯蚓在香港而言則屬新的事物[20]。

（3） 城市規劃委員會在一信函表示飼養蚯蚓並非農業之用，不過函件並沒有進一步解釋箇中原因。法庭亦注意到城市規劃委員會希望有關的土地最終可被作爲復耕之用，不過農業用途並不局限在泥土上耕種。城市規劃委員會的用途釋義並不是徹底及完全的(exhaustive)，當人類對飼養動物有更多認識，發現更多新的用途時，法庭看不到飼養蚯蚓爲何不屬農業活動。在沒有其他的證供反駁辯方專家證人證供的情況下，法庭亦看不到裁判官何以拒納飼養蚯蚓屬農業此一說法[21]-[23]。

（4） 爲滿足蚯蚓的食量，新保思需在毗鄰的另一地盤處理頗爲大量的飼料。新保思將收集得來的報紙、禾稈草等先混合起來，再堆放一段時間，讓混合物產生一定的溫度，消滅其內有害的寄生蟲卵、微生物等。當混合物達到適合餵飼的狀態時，新保思將混合物轉移至飼養蚯蚓的泥土上。故此，在地盤內所混合的飼料，除自用外，沒有其他的商業用途。基於以上所述，法庭信納這可被視作附屬或直接與飼養蚯蚓業有關的活動[24]。

（5） 法庭強調，此裁定純粹是針對八名上訴人所擁有的地盤而作出，至於另一地盤是否違規，因另一地盤的擁有人沒有提出上訴，在未聽取進一步論據的情況下，法庭不表意見[25]。

（6） 裁判官可將兩地盤的活動一併考慮，從而決定土地的整體用途，這是正確的。但是當裁判官考慮針對八名上訴人的控罪是否得以證實時，他必須謹記八名上訴人所面對的控罪僅針對他們所擁有的土地，他們不是另一地盤的擁有人，也非新保思的人。從裁斷陳述書的整體佈局看，裁判官確沒有針對性地處理此地盤是否主要用作飼養蚯蚓之用[27]。

（7） 基於以上所述，法庭信納飼養蚯蚓是農業活動之一，八名上訴人沒有違反《城市規劃條例》的規定更改土地的用途。另外，法庭亦不能排除裁判官在處理八名上訴人的定罪裁決時，將另一地盤的用途列入考慮之列的可能性，這亦令定罪存有不穩妥的地方[28]。

[English Translation of HCMA 404/2011 above]

HKSAR v TANG KOON YAU & ORS

COURT OF FIRST INSTANCE
HCMA 404/2011
A Chan DJ

Date of Judgment: 1 November 2011

Counsel for the Respondent: Noelle Chit, PP
Counsel for the Appellant: Geoffrey Chang

Criminal law & procedure – Town Planning Ordinance – Enforcement on land within development permission area – Site designated for agricultural use on statutory plan – Whether rearing earthworms a type of agricultural activities

The eight Appellants each faced one charge. They were alleged to have failed to comply with the requirement of a notice issued under s 23(1) of the Town Planning Ordinance to discontinue the relevant activities. They were the registered owners of two lots of land at Leung Uk Tsuen in Pat Heung, Yuen Long, New Territories or managers on behalf of those owners. The site was designated for agricultural use on the statutory plan. Except with the planning permission given by the Town Planning Board, it was not allowed to be used for storage and workshop purposes. In February, 2008, officers of the Planning Department conducted a site inspection and found that the land had been changed for another use. Sunburst Biotechnologies Limited rented the site and another adjoining site for mixing kitchen waste and horse manure into organic fertilisers before supplying them to the farm. In the adjoining site, some large containers, plastic drums containing liquid fertilizers, bagged items and compost heaps of horse manure were also stored [1]-[4].

It was the Appellants' case that Sunburst began to rent the aforesaid two sites as an earthworm farm since 2007. During the process of earthworm rearing, the earthworms would produce excretion, which Sunburst

regarded as harvest. The excretion was also known as earthworm fertiliser. Sunburst grew various plant species at the site. One of the purposes was to observe the effectiveness of the earthworm fertiliser. The expert witness called by the Appellants testified that the earthworm was an animal rather than an insect; it was much easier to rear earthworms than chickens or pigs, and the fodder for earthworms was simply some agricultural wastes such as decomposing vegetables, rotten fruits or droppings from other animals. He also stated that the production of earthworm fertilisers by rearing earthworms was an agricultural operation [7]-[10].

Held, appeal allowed, convictions quashed and sentences set aside:

(1) Rearing animals was not equivalent to agricultural operation. An obvious example was the Hong Kong Jockey Club raising horses for racing. By the same token, a business beneficial to agriculture was not necessarily agricultural. The manufacture of chemical fertilisers at chemical plants was beneficial to cultivation, but it did not mean that the process was agricultural. Nevertheless, the evidence of this case showed that Sunburst's predominant activity at the site was animal rearing. Sunburst obtained two products from the activity of earthworm rearing: one, the earthworms themselves; two, the earthworm excretion. The earthworms were for sale as fishing bait and fish feed, while the earthworm excretion would be directly collected for use as organic fertilisers in organic farming. [17] In other words, Sunburst was clearly neither preparing fodder at the site for sale, nor collecting the organic waste and converting it into a commodity by means of chemical, electronic or mechanical engineering, namely, the so-called pure industrial activity as commonly understood [19].

(2) The rearing and sale of earthworms itself was for agricultural use. As to the rearing of earthworms for collection of excretion, the court believed that it was consistent with the "other products" in "agriculture" as defined by the *Oxford Dictionaries Online*. Essentially, earthworm rearing by nature was no different from silkworm breeding in that both involved the collection of substances excreted by animals, from which by-products were then extracted. The common purpose was to fulfil some basic human needs in life, only that sericulture had existed for thousands of years, whereas large-scale vermiculture was a novelty to Hong Kong [20].

(3) The Town Planning Board expressed in a letter that rearing earthworms was not of agricultural use but the letter did not further explain why. It also came to the court's attention that the Town Planning Board hoped the land in question would ultimately be restored for the use of cultivation. However, agricultural use was not confined to arable farming. The Town Planning Board's interpretation of use was not exhaustive. As humans became more knowledgeable about animal rearing and more innovative uses arose, the court could not see why the rearing of earthworms was not an agricultural activity. In the absence of any other evidence to rebut the expert witness of the defence, the court could not see why the magistrate refused to accept that rearing earthworms was agricultural [21]-[23].

(4) In order to fill the appetite of the earthworms, Sunburst had to process a considerable quantity of fodder at an adjoining site. It first mixed up various collected items such as newspaper and straws and then put the mixture aside for a period of time for it to reach a certain temperature so as to destroy the harmful substances such as parasitic ova and micro-organisms. When the mixture became fit for feeding, Sunburst would move the mixture to the soil of the worm bed. As such, the fodder mix at the site was not of any other commercial use except for internal consumption. On the basis of the aforesaid, the court was satisfied that it could be regarded as being ancillary to or directly connected with the activity of earthworm rearing [24].

(5) The court stressed that this finding was merely made in relation to the site owned by the eight Appellants. As to whether the other site was in breach, the court had no comments to make because the owners of the other site did not lodge any appeal and no further argument was heard [25].

(6) It was correct that the magistrate had considered the activities at the two sites as a whole in determining the general use of the land. However, when the magistrate came to decide whether the charges faced by the eight Appellants had been proved, he had to bear in mind that the charges that they were facing were only in relation to the land they owned. They were neither the owners of the other site nor the people from Sunburst. As shown by the way the statement of findings was drafted, the magistrate indeed did not specifically deal with the issue of whether the site had been predominantly used for rearing earthworms [27].

(7) On the basis of the aforesaid, the court was satisfied that rearing earthworms was a type of agricultural activities and held that the eight Appellants who changed the land use were not in breach of the provision under the Town Planning Ordinance. Besides, the court could not rule out the possibility that the magistrate might

have taken into consideration the use of the other site when convicting the eight Appellants. That also rendered the convictions unsafe [28].

Trade Descriptions Offences

HKSAR v LAU HOK TUNG & ORS (劉學東及其他人)

COURT OF FIRST INSTANCE
HCMA 500/2010
McMahon J

Date of Hearing: 28 October 2010
Date of Judgment: 5 January 2011

Counsel for the Respondent: Alice Chan SPP
Counsel for the Appellants: Andrew Bruce SC, Sammy Ho & David Khosa

Possession for sale or for any purpose of trade or manufacture, of goods to which forged trademarks had been applied, contrary to s 9(2) of the Trade Descriptions Ordinance (Cap 362) – Persuasive burden placed upon a defendant under section 26(4) – Component of reasonable diligence

爲售賣或任何商業或製造用途而管有應用僞造商標的貨品，違反香港法例第362章《商品說明條例》第9(2)條－根據第26(4)條被告人須負說服責任－「合理努力」的要件

A1 and his wife A2 were directors of their company A3. The three Appellants were each convicted after trial of the same 11 offences of possession for sale or for any purpose of trade or manufacture, of goods to which forged trademarks had been applied, contrary to section 9(2) of the Trade Descriptions Ordinance (Cap 362) ("the Ordinance").

A1-A3 appealed their convictions on the grounds that (i) the magistrate erred in his application of the burden of proof; (ii) the magistrate erred in holding that section 26(4) of the Ordinance required the Appellants to satisfy a persuasive burden of proof; and (iii) the magistrate imposed too high a standard as to what enquiries were "reasonable" in the circumstances of the case so as to satisfy the requirements of section 26(4).

Held, appeal dismissed:

(1) As to ground (i), the suggestion that the magistrate may have thought that, if there was some aspect of the prosecution case which aided the Appellant's case that he could not take it into account as evidence assisting the Appellant, was untenable. There was nothing of substance to suggest the magistrate may have thought he could only consider defence evidence as a source of reasonable doubt. If, on the prosecution's case, there remains a doubt as to a defendant's guilt then he must acquit. Indeed, that the magistrate was well aware that he was not restricted to the defence case as suggested was confirmed by his careful consideration of the evidence of one of the prosecution witnesses as to whether it did or could give any support to the defence case [13].

(2) As to ground (ii), by providing the statutory defence in s 26(4) of the Ordinance, our legislature has recognised that a defendant should not be convicted of an offence under section 9(2) where the circumstances defined in s 26(4) apply [22]. It logically follows that as s 26(4) imposes a persuasive burden upon a defendant, and as the defendant "may be convicted while a reasonable doubt exists", s 26(4) breaches the presumption of innocence [23]. The ultimate question then arises whether in the circumstances of a s 9(2) offence this derogation from the presumption of innocence can be justified. The burden of establishing that justification lies upon the Respondent (*HKSAR* v *Lam Kwong Wai* (2006) 3 HKLRD 808; *HKSAR* v *Ng Po On* (2008) 4 HKLRD 176) [24]. Two matters are relevant [25]. The first is whether the derogation is rational. The circumstances set

out in s 26(4) are designed to impose a reverse onus on a defendant so as to aid the conviction of persons who are involved in dealing with counterfeit goods. That is a rational societal aim and a proper one [26]. The real question before the court concerning s 26(4) is whether its placing of a persuasive burden on a defendant prosecuted under s 9(2) is proportionate [27]. The Respondent was right in adopting the reasoning of *R* v *Johnstone* (2003) 3 All ER 884 and *R* v *S* [2003] 1 Cr App R 35 and the factors enunciated as constituting compelling reasons as to why a persuasive burden should be placed upon the defendant, namely (i) those who trade in brand products are aware of the need to be on guard against counterfeit goods; (ii) the statutory defence relates to facts within the accused person's own knowledge: his state of mind, and the reasons why he held the belief in question; and (iii) it is to be expected that those who supply traders with counterfeit products, if traceable at all by outside investigators, are unlikely to be co-operative. So, in practice, if the prosecution must prove that a trader acted dishonestly, fewer investigations will be undertaken and fewer prosecutions will take place [32]-[34]. The factor of safety might also apply to some s 9(2) prosecutions [34]. Perhaps as cogent a factor is that Hong Kong shares a trade border with a region of China where historically counterfeit products have been a serious trade problem. Our proximity to that problem creates a greater societal need for regulatory legislation and a greater justification for the persuasive onus in respect of s 26(4) being placed on a defendant [35]. The 5-year maximum penalty is a potentially severe penalty but there are safeguards. A first offender is unlikely to attract that maximum. A defendant who is unable to convince a court that he probably did fall within the parameters of s 26(4) may still, in sentencing, receive credit for whatever he had done, or what safeguards he had set up in his business, to minimize the risk of its dealing with counterfeit goods [38]. It is therefore both rational and proportionate for the onus placed upon a defendant by s 26(4) to be persuasive and to be established on the balance of probabilities [39].

(3) As to ground (iii), given that the burden is upon the Appellants to establish all three elements of the s 26(4) defence and no challenge has been made as to this aspect of the magistrate's findings, which are self-evidently correct, that would in the normal course be sufficient to dispose of the ground [42]. In any event, the totality of the reasoning of the magistrate was unimpeachable. Given the factual circumstances of the Appellant's possession of the counterfeit clothing considerably more than what was done (or not done) was required to satisfy the element of "reasonable diligence" [46]. In the present case, there were aspects of the Appellants' possession of the goods and characteristics of the goods themselves which would as a matter of common sense have required a higher degree of diligence than that which was appropriate to a more typical transaction. Such matters as the very low price paid for the goods, the fact that they were purchased in assorted batches, that other goods in those batches were regarded as of doubtful provenance, and finally the knowledge of the Appellants that the factories in China from which the goods were purchased would or could provide no confirmation of the legitimacy of the goods would, at the least, have required the Appellants to have taken matters further. As the magistrate said, had they done so and responded with an appropriate degree of diligence (which simply required them to contact the factories or the agents of the trademark owners) the Appellants would have readily discovered the garments were counterfeit [49 & 50].

Transcripts of Proceedings

香港特別行政區 訴 陳錦文及其他人

高等法院上訴法庭
CACC 293/2009
上訴法庭法官楊振權、關淑馨及朱芬齡

聆訊日期： 2011年6月14日
判案理由書日期： 2011年6月29日

答辯人代表律師： 高級檢控官陳淑文
第一申請人代表律師： 潘英賢
第二、第四及第五申請人代表律師： 李倩文
第三申請人代表律師： 蕭國辰

常規與程序－處理刑事案件上訴的備審工序－取得聆訊謄本目的－要求大量無用的聆訊謄本對真正有用的聆訊記錄的謄寫造成延誤－大律師有責任確保要求提供的聆訊謄本是必需的

本案原審時共涉 10 名被告人，分別被控兩類共 18 項"串謀詐騙控罪"。本案案情雖不複雜，但審訊時間長達 176 天。經審訊後，各申請人最終被裁定罪名成立，各申請人提出不服定罪的上訴許可申請。

準備上訴期間，代表第二至第五申請人的律師兩次要求法庭提供聆訊謄本。獲聆案官批准，最終導致約 3,500 頁的聆訊謄本出現。

代表第二、四及五申請人的大律師之書面陳述內提及的謄本只有約 50 頁。而代表第三申請人的大律師之書面陳述只提及其中一名證人的幾頁證供謄本，對取得的其他證人的證供謄本隻字不提。兩名大律師口頭陳述時，更沒有主動提及過聆訊謄本的任何一頁。法庭向代表第二、四及五申請人的大律師查詢爲何她要取得這麼多頁無用的聆訊謄本時，她表示取得該些謄本的目的是避免提出一些不能爭拗的論點及浪費法庭時間。代表第三申請人的大律師更沒有向法庭解釋爲何要法庭提供大批無用的聆訊謄本。兩名大律師在原審時都是獲法援署指示分別代表第二至第五申請人。他們在長達 176 天的審訊都有在場，亦應對有關證供瞭如指掌。

裁決，駁回針對定罪的上訴許可申請：

(1) 法庭提供聆訊謄本，並非是給予控辯雙方一份紀念品，亦非是協助辯方律師找尋及／或提出上訴理由。聆訊謄本目的只是協助法庭解決上訴理由所引發的爭議[19]。

(2) 處理刑事案件上訴的大律師必須明白，謄寫聆訊謄本涉及大量人力、物力。準備 3,500 頁的聆訊謄本涉及的費用數以 10 萬元計，而在本案，上述費用更全屬公帑。再者，準備一些無用的聆訊謄本會對一些真正有用的聆訊記錄的謄寫造成延誤，影響其他上訴的進行。大律師亦應明白，法庭決定是否批准發給聆訊謄本時，極度依賴大律師的誠信及能力，因此大律師有責任確保他們要求法庭提供的聆訊謄本是必需的，而要求的聆訊謄本的數目亦應盡量減至最少，避免浪費社會資源。遺憾地，處理本案的大律師，部分沒有適當地履行他們的責任[20]。

[English Translation HCMA 293/2009 above]

HKSAR v CHAN KAM MAN, BARRY AND OTHERS

COURT OF APPEAL
CACC 293/2009
Yeung, Kwan & Chu JJA

Date of Hearing: 14 June 2011
Date of Reasons for Judgment: 29 June 2011

Counsel for the Respondent: Alice Chan SPP
Counsel for A1: Albert Poon
Counsel for A2, A4 & A5: Cindy Lee
Counsel for A3: Gibson Shaw

Practice and Procedure – Preparation for criminal appeal cases – Purpose for obtaining transcripts of proceedings – Requests for large quantities of unnecessary transcripts cause delay to transcription of genuinely useful records of proceedings – Duty of counsel to ensure that the requested transcripts are essential

There were 10 defendants at trial. They were charged with a total of 18 offences of "conspiracy to defraud". The facts of this case were not complicated but the trial lasted for as long as 176 days. All the Applicants were convicted after trial and they applied for leave to appeal against conviction.

While preparing for the appeal, counsel for the A2 to A5 made two requests to the Court of Appeal for provision of transcripts of the proceedings below. Their requests were granted by the Master, resulting in the production of about 3,500 pages of transcripts.

In her written submissions for the appeal, counsel for A2, A4 & A5 referred to only 50 pages or so of the transcripts. In his written submissions, counsel for A3 referred to only a few pages of the transcripts of evidence from one of the witnesses; he did not refer to any of the transcripts of evidence from other witnesses. The two counsel, in their oral submissions, did not even, out of their own volition, mention one page of the transcripts of proceedings. When counsel for A2, A4 & A5 was queried by the Court about obtaining a large quantity of transcripts she had no use for, she explained that the purpose was to avoid raising untenable arguments and wasting court time. Counsel for A3 did not explain to the Court the reason for requesting the lot of transcripts he had no use for. Both counsel were instructed by the Legal Aid Department to act for A2 to A5 in the trial. They were present throughout the 176 days of hearing. Hence, they should have a good knowledge of the evidence.

Held, application for leave to appeal against conviction refused:

(1) Transcripts provided by the Court are neither intended as souvenirs for both parties nor to assist defence counsel in finding and/or preparing grounds of appeal. The purpose of the transcripts of proceedings is only to assist the Court to resolve the issues arising from the grounds of appeal [19].

(2) Counsel in criminal appeals must appreciate that a great deal of manpower and resources are involved in transcribing the proceedings. The costs for preparation of 3,500 pages of transcripts amount to hundreds of thousands of dollars. In the present case, the costs were all paid for by public funds. In addition, preparation of unnecessary transcripts will cause delay to transcription of genuinely useful records of proceedings, which in turn will hamper the progress of other appeals. Counsel should also be aware that the Court in deciding whether to grant requests for transcripts of proceedings relies almost entirely on the integrity and competence of counsel. Hence, counsel have a responsibility to ensure that they only request for transcripts that are necessary and keep the quantity of transcripts to a minimum, so as not to waste public resources. Regrettably, not all counsel in this case have performed their duties properly [20].

Triad Offence

香港特別行政區 訴 何國柱及其他人

高等法院原訟法庭
HCMA 129/2010
原訟法庭法官湯寶臣

聆訊日期：2010年6月29日及2011年1月20日
判決日期：2011年4月11日

答辯人代表律師：高級檢控官馮美琪
第一上訴人代表律師： 2010 年6 月29 日： 無律師代表，親自出庭
2011 年1 月20 日： 謝志浩及黃麗貞
第二及第三上訴人代表律師： 無律師代表，親自出庭

刑事法 － 聲稱是三合會社團的成員罪 －《社團條例》第20(2)條－ 並非是「嚴格責任」的罪行 － 有意識下的聲稱 － 控罪要素是「聲稱」不是「聲稱而令人受驚」

刑事法及訴訟程序 － 主審裁判官有責任去維持法庭的尊嚴及秩序 － 裁判官必須持平審訊 － 控方在陳詞時呈上一份涉及上訴人名字的案例 － 可能引起偏見的後果 － 裁判官應特別提醒自己須排除相關訊息的不當影響，否則會影響審訊的公平性

證據 － 控方主要證人證供內容的可靠性被另一案件(源自同一卧底調查行動)的法官質疑 － 其他法官或裁判官未必能在無合理疑點下全盤接受類似的證供 － 有否影響到定罪的穩妥性

警方一次卧底調查行動結束後，三名上訴人分別被控聲稱是三合會社團的成員罪及/或以三合會社團的成員身份行事罪，三人經審訊後被定罪。控方主要證人爲卧底警員。

三名上訴人不服定罪，提出上訴。

其中一個上訴理據(第1項)針對的是在聆訊時，裁判官因爲某上訴人似乎對法庭的表現有欠尊重而不滿而表示：「我亦都唔係第一次審黑社會，我做大律師嘅時候，我亦都係代表過一啲龍頭阿哥，所謂阿公，我都幫佢代表過，打過官司。」。上訴人認爲裁判官對上訴人或辯方存有偏見 。

另一上訴理據(第3項)指控方在陳詞時呈上了一份涉及上訴人名字的案例，而該案與正在審理中的案件又屬相同類形，令上訴人失去公平審訊。

上訴理據第6項指控方主要證人證供內容的可靠性被另一案件(源自同一卧底調查行動)的法官裁定爲不能被法庭所依賴，因此在本案中裁判官亦不應依賴其證供把上訴人定罪。

裁決，三名上訴人的上訴得直，定罪撤消，刑罰擱置：

(1) 「聲稱是三合會社團的成員」罪並非是「嚴格責任」的罪行，否則就算講者是在酒醉後亂語或胡扯，也可能會被定罪。但另一方面，與「刑事恐嚇」罪相比，聲稱的罪行確是更爲寬鬆。就「刑事恐嚇」罪行而言，講者所用的表達須要構成恐嚇，控方亦須證明被告是有威脅意圖而非是在盛怒之下一時衝動的表達。聲稱爲三合會社團成員的控罪卻祇涉及有意識下的聲稱。一般來說，市民不會無緣無故地作出這種聲稱，但這種聲稱可以帶有威脅性，也可以不帶威脅性的，情況不能一概而論 [30]。「胡扯」或「說謊」都有可能構成控罪，尤其是後者，前者則要視乎情況而定，而不同的案情基礎可以引至不同的判刑結果。重要的是，這方面的法例正正就是要制止有人因不同原因或目的而去聲稱爲三合會的成員，這是立法機構要壓止三合會活動的做法。如果市民是可以隨便向人自稱爲三合會會員或「說笑」可以構成辯護的話，那這項法例就變得意義不大。法例本身確是寬鬆，而控罪元素裡並沒有要求有關的支持證據必須要特別「可靠」及「準確」才可定罪 [31]。在審理這類案件時，裁判官當然要如其他案件一樣對

證供作小心評估，如果證據不可靠，或證人所說的不準確，那法庭當然不應定罪。另一方面，裁判官也不應在審理有關控罪額外要求控方的證供有更高程度的「準確性」才可定罪。一切要視乎個別案件的證據而言 [32]。

(2) 「聲稱是三合會社團的成員」罪的要素是「聲稱」不是「聲稱而令人受驚」。當有人向另一人表示自己是三合會成員，不論其目的是在告知對方他的三合會身份，或是在恐嚇對方，或祇是在表演錯以爲是威風的事情，這都會構成聲稱之控罪。就算這人是在向第三者作聲稱，如果有另一人聽到，而裁判官亦接受其證供屬實的話，法庭都可判控罪成立 [39]。

(3) 主審裁判官有責任去維持法庭的尊嚴及秩序，如有人對法庭表現不敬，裁判官當然可以直接提出甚至以藐視法庭的原則處理。但不論情況如何，上文所述裁判官表示曾代表「一啲龍頭阿哥...打過官司」類似的說話，絕對不應出自正在審案的裁判官。從某角度看來，他的表達也確實會令旁觀的第三者覺得他認爲接受審訊的被告是黑社會人士，或是與黑社會有關人士，但其地位不比他以前代表過的龍頭阿公或阿哥高，因此不應在他面前表現囂張。這絕對不是提醒被告人須要尊重法庭，尊重法律的恰當表達。這對裁判官必須持平審訊的原則必定構成負面的影響 [51]。

(4) 控方在陳詞時呈上了一份涉及上訴人名字的案例 [41]，而當中涉及的問題與本案並無直接大關係 [44]。作爲控方的代表應該要小心，就算案例真的與本案有關而必須呈堂去協助裁判官，在這特殊的情況下，她應先與辯方大律師商討，較爲妥善的方法是將上訴人名字從案例副本上塗白，即可避免顯示上訴人的名字。上訴人曾經被刑事檢控及被裁判官定罪是與本案無關及會引起偏見的資料，根本不應讓原審裁判官知道 [45]。主控以此方式透露上訴人曾經被控的背景可能引起偏見的後果是無可避免的。在記錄上，看不到控方有作回應或裁判官有處理過這個問題 [46]。裁判官應特別提醒自己須排除相關訊息的不當影響，但他似乎忽略了這點，這會影響審訊的公平性 [47]。

(5) 控方主要證人在同一卧底調查行動中的另一案件作供，法庭認爲他的證供不可被法庭依賴，並裁定各被告人罪名不成立。控方後來決定不再起訴其他候審人士 [52]。雖然在一般情況下，法庭對同一證人的可信性或可靠性可以有不同的結論，但該法官看來並非是在否定控方證人的基本誠信，問題在於其證供內容的可靠性。一位證人的整體可靠性在被法官質疑後，其他法官或裁判官可否能在無合理疑點下全盤接受類似的證供是值得商確。正因如此，控方正確地決定不再控訴其他的被告人。雖然這是在本案審訊之後的發展，但以"重審"的角席再審視控方證人的證供，如果其證供的可靠性被質疑的話，那就必定會影響到定罪的穩妥性 [53]。

[English Translation of HCMA 129/2010 above]

HKSAR v HO KWOK CHU TOMMY & ORS

COURT OF FIRST INSTANCE
HCMA 129/2010
TONG J

Date of Hearing: 29 June 2010 & 20 January 2011
Date of Judgment: 11 April 2011

Counsel for the Respondent: Mickey Fung, SPP
Counsel for A1: 29 June 2010: In person
20 January 2011: Bruce Tse & Anita Wong
Counsel for A2 & A3: In person

Conviction – Claiming to be a member of triad society – Section 20(2) of the Societies Ordinance – Not "strict liability" offence – To make the claim consciously – Essence of offence being "claiming" and not "claiming to cause alarm"

Criminal law and procedure – Duty of trial magistrate to maintain dignity and order of court – Magistrate must try the case fairly – Prosecution submitted judgment of a case involving the name of the Appellant – Possible prejudicial effect – Magistrate should have especially warned himself to exclude prejudicial effect of such information lest fairness of trial be affected

Evidence – Reliability of evidence from main prosecution witness doubted by judge in another case (originating from same undercover operation) – Another judge or magistrate might not accept all such similar evidence beyond reasonable doubt – Whether safety of conviction affected

As a result of an undercover investigation, the three Appellants were respectively charged with claiming to be a member of a triad society and /or acting as a member of a triad society. They were convicted after trial. The main prosecution witness was an undercover police officer.

The three Appellants appealed against conviction.

One of the grounds of appeal (Ground 1) was that the magistrate during the hearing, being displeased that one of the Appellants seemed to have shown little respect for the court, said: "*It is not the first time that I hear a triad society case. When I was a barrister, I had also represented some big brothers, the so called protectors. I had represented them in law suits…*" The 1st Appellant claimed that the magistrate was biased against him and/or the defence.

Another ground of appeal (Ground 3) was that the prosecution submitted an authority involving the name of the Appellant and it was similar in nature to the case being heard. Thus the 1st Appellant was denied a fair trial.

Ground 6 of the appeal was that the evidence of the main prosecution witness was not relied upon by a judge in another case (originating from the same undercover operation). Hence the magistrate in the present case should not have relied on the evidence from the same witness to convict the Appellants.

Held, appeals allowed, convictions quashed and sentences set aside:

(1) "Claiming to be a member of a triad society" is not a "strict liability" offence. If it were, then a drunken person who babbled or talked nonsense would be convicted. Compared with "criminal intimidation", the claiming offence is much wider. For "criminal intimidation", the expression uttered must constitute a threat and the prosecution is required to prove that the defendant intended to threaten rather than to utter words in a spur of anger. The offence of "claiming to be a member of a triad society" only involves a claim made consciously. Generally speaking, a person would not make such a claim without a cause. Such a claim might or might not be threatening. It all depends on the circumstances [30]. "Talking nonsense" or "lying", the latter in particular, could possibly constitute an offence. For the former, it depends on the circumstances of the case. Different factual foundations result in different sentences. Importantly, the purpose of the legislative provision is to prevent people from claiming to be members of a triad society for various reasons or purposes. This is a way of the legislature to contain triad activities. If a member of the public could casually claim to be a triad member or "joking" could be accepted as a defence, the legislative provision would have little meaning. The provision itself is no doubt wide, and the elements of the offence do not require the supporting evidence to be especially "reliable" or "accurate" for a conviction [31]. When hearing this type of cases, the magistrate must, like other cases, carefully assess the evidence. If the evidence is unreliable, or the testimony of the witness inaccurate, the court must not return a guilty verdict. Despite that, the magistrate should not additionally require a higher standard of "accuracy" from the prosecution evidence in order to convict. It all depends on the evidence of individual cases [32].

(2) For "claiming to be a member of a triad society", the essence of the offence is "claiming" and not "claiming to cause alarm". When a person tells another that he is a member of a triad society, whether his purpose is to reveal to the other person his triad identity, or to threaten the other person, or just to show off thinking it is something to be proud of, the act constitutes the claiming offence. Even when the claim was made to a third person but overheard by another, if the latter's evidence is accepted by the magistrate as true, the court is still entitled to return a guilty verdict [39].

(3) It is the duty of the trial magistrate to maintain the dignity and order of the court. If anyone is not respectful to the court, the magistrate can of course directly raise it or even deal with it along the principle of contempt. However, no matter what the circumstances were, the trial magistrate should not have said words like "*I had also represented some big brothers…in law suits*" as quoted above. In a way the trial magistrate's words would indeed cause a bystander to feel that the magistrate considered the defendants standing trial were members of a triad society or people related to a triad society, but their positions were not as high as the protectors or the big brothers that the trial magistrate had represented in the past, and therefore the defendants should not be so proud of themselves before the trial magistrate. Those remarks were definitely inappropriate for reminding the defendants to show respect for the court and the law. This must have caused a negative effect on the principle that the magistrate must try the case fairly [51].

(4) The prosecution submitted the judgment of a case involving the name of the 1st Appellant [41]. The issues involved were of little relevance to the present case [44]. The prosecution should have been more careful. Even if the case was really relevant to an issue at trial and must be submitted to the trial magistrate in order to assist the court, in such special circumstances the prosecuting counsel should have discussed with the defence counsel in advance, and a more appropriate way of doing it was to whiten out the 1st Appellant's name from the judgment so that his name would not appear. That the 1st Appellant had been prosecuted and convicted by a magistrate in a previous trial was irrelevant to the present case and was information that would cause prejudice; it should not have been made known to the magistrate [45]. It was an unavoidable consequence that prejudice was potentially caused by the prosecution's disclosure in this way of the 1st Appellant's background of having been previously prosecuted. According to the records, neither the prosecuting counsel made any reply nor did the trial magistrate deal with the problem [46]. The trial magistrate should have especially warned himself that he must exclude the prejudicial effect of such information but it appears that he had overlooked this. This would affect the fairness of the trial [47].

(5) The main prosecution witness gave evidence in another case originating from the same undercover operation. The court ruled that his evidence could not be relied upon and the defendants were acquitted. After that, the prosecution decided not to proceed with the charges against other defendants pending trial [52]. Generally speaking, the court's view towards the credibility and reliability of the same witness could be different. The judge did not seem to have doubts about the credibility of the prosecution witness; the question was the reliability of his evidence. Once the reliability of a witness on the whole was doubted by a judge, it is worth considering whether another judge or magistrate could beyond reasonable doubt accept all such similar evidence. And it was because of this very reason that the prosecution had rightly decided not to prosecute the outstanding defendants. Although it was a development after the present case was concluded, when the evidence of the undercover officer is looked at again in the "re-hearing" and doubts were cast on its reliability, the safety of the convictions would surely be affected [53].

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香港特別行政區 訴 蕭卓明

高等法院上訴法庭
CACC 273/2009
高等法院上訴法庭法官張澤祐、楊振權及朱芬齡

聆訊日期 ： 2011年7月19日
判案書日期: 2011年7月19日
頒發判案理由書日期: 2011年7月29日

答辯人法律代表： 高級檢控官程慧明
申請人法律代表： 無律師代表，親自應訊

刑事法及訴訟程序—「猥褻侵犯」及「與 16 歲以下女童非法性交」—「以威脅手段促致他人作非法的性行爲」—受害人的日記不當地被接納爲證供—「早前作出的一致陳述」(previous consistent statement)—並非「新近投訴」(recent complaint) —行使「但書」(proviso)

申請人被控八項控罪，包括第一、二項「猥褻侵犯」罪，第三項「與 16 歲以下女童非法性交」罪，第四、六項「以威脅手段促致他人作非法的性行爲」罪和與該兩項控罪交替的第五及第七項「與 16 歲以下女童非法性交」罪，另加第八項「向 16 歲以下兒童作出猥褻行爲」罪。申請人在區域法院經審訊後被裁定第一、三、四、六及八項控罪罪名成立，但第二項控罪不成立。第五、七項交替控罪撤回。就該五項控罪，申請人被判刑共 5 年半監禁。申請人不服定罪，提出上訴許可申請。

案情指，受害人 X 於案發時年僅 14 歲多，是一名中學生。2006 年暑假，X 和一名同學參加了課餘日文課程，申請人是該課程的導師。X 和同學上了幾課日文後，申請人就問她們是否想當模特兒。X 向申請人表示希望當模特兒。其後 X 和其同學都將手機號碼給了申請人，申請人隨後安排和她們在校外會面，以便向她們介紹模特兒工作的性質。期間申請人亦出示一些雜誌和模特兒照片，並向她們介紹聲稱爲他的公司。

2007 年 1 月，申請人打電話給 X 向她提及當模特兒一事及要求 X 去度身，並表示這是公司的規定。其後於控罪相關時段（即 2007 年 6、7 月至 2008 年 7 月），申請人多次向 X 作出猥褻侵犯和非法性交等行爲。

原審時，控方在辯方沒有反對的情況下，將 X 在 2007 年 8 月 20 日及 9 月 12 日的日記及和該兩篇日記有關的錄影會面記錄呈堂。日記內容和 X 指在 2007 年 8 月 20 日申請人和他性交一事吻合。

裁決，批准上訴許可申請，但行使「但書」，駁回申請人的上訴，維持原判：

(1) X 在日記的指稱屬"早前作出的一致陳述"，故不具舉證效力，不能用以證明日記內容正確或強化 X 的證供[67]。本案中 X 就申請人行爲作出的筆記，不可被視爲"新近投訴"而被採納爲證。

(2) "投訴"，顧名思義，必須向另一人作出。X 在日記的記錄，只是作爲個人的記錄，無意供他人參閱，亦不會交給別人，故不可能構成"投訴"。*R v B* [1997] Crim LR 220 須予區分[68]–[69]。

(3) 原審時，控方不應要求將 X 的日記和涉及日記的錄影會面記錄呈堂。整體而言，X 的日記是對申請人不利的。原審法官亦表明他對 X 的日記給予相當重的份量[71]–[72]。

(4) 原審法官在處理 X 的日記一事上犯錯。雖然辯方沒有反對，更曾利用 X 的日記盤問 X，但原審法官不應容許 X 的日記呈堂爲證，亦不應給予 X 日記任何比重[74]。

(5) 但本案的重點是 X 的證供的可信性及可靠性。X 不可能有誣告申請人的動機，更不可能編造一些虛假事故陷害申請人。X 在多次的錄影證供及在盤問下，都有極爲詳細列出申請人對她作出過的不當

行爲。X 亦能準確描述申請人性侵犯的地點。故此，以整體證據而言，合理的審裁機構必會將申請人定罪。申請人被裁定罪名成立，沒有任何不穩妥或令人不滿意之處。原審法官就 X 日記的錯誤處理方法，不影響其定罪決定的安全[75]–[76]。

[English Translation of CACC 273/2009 above]

HKSAR v SIU CHEUK MING, GARY

COURT OF APPEAL
CACC 273/2009
Cheung , Yeung & Chu JJA

Date of Hearing: 19 July 2011
Date of Judgment: 19 July 2011
Date of Handing Down Reasons for Judgment: 29 July 2011

Counsel for the Respondent: Jasmine Ching SPP
Counsel for the respondent: In person

Criminal law and procedure – "Indecent assault" and "unlawful sexual intercourse with a girl under the age of 16 years" – "Procurement by threats to do unlawful sexual act" – Victim's diary improperly admitted as evidence – "Previous consistent statement" – Not "recent complaint" – Application of "proviso"

The Applicant was charged with 8 offences including "indecent assault" (charges 1 and 2), "unlawful sexual intercourse with a girl under the age of 16 years" (charge 3), "procurement by threats to do unlawful sexual act" (charges 4 and 6) and the alternative charges to charges 4 and 6, "unlawful sexual intercourse with a girl under the age of 16 years" (charges 5 and 7), as well as the offence of "indecent conduct towards a child under the age of 16 years" (charge 8). After trial in the District Court, he was convicted of charges 1, 3, 4, 6 and 8 but was acquitted of charge 2. The alternative charges were withdrawn. The Applicant was sentenced to a total of 5½ years' imprisonment for those 5 charges. The Applicant applied for leave to appeal against conviction.

The facts showed that the victim X was a secondary student who was barely over 14 years old at the material times. During the summer holiday of 2006, X and a schoolmate attended an extracurricular Japanese language course. The Applicant was the tutor of the course. After attending a few lessons, X and her schoolmate were asked by the Applicant whether they wanted to be models. X told the Applicant that she wanted to be a model. Subsequently X and her schoolmate gave the Applicant their mobile phone numbers. The Applicant then arranged to meet them outside school to explain to them the nature of modelling work. In the course of it, the Applicant produced some magazines and model photos and told them that it was his company.

In January 2007, the Applicant called X and talked about becoming a model. He asked X to take measurements, claiming that it was the company's rule. During the relevant period (that is from June 2007 to July 2008), the Applicant indecently assaulted X and had unlawful sexual intercourse with her on a number of occasions.

During the trial, the prosecution produced, without objection from the defence, X's diary entries dated 20 August 2007 and 12 September 2007 respectively and the video-recorded interview relating to these diary entries. The diary entries were said to support X's allegation that the Applicant had sexual intercourse with her on 20 August 2007.

Held, application for leave to appeal granted, but "proviso" applied, appeal dismissed and conviction upheld:

(1) X's allegations in her diary were "previous consistent statements" which had no evidential value and could not be used to prove the truth of the diary or to strengthen X's testimony. In the present case, the notes X made about the Applicant's conduct could not be regarded as a "recent complaint" and admitted as evidence.

(2) A "complaint", as the term suggests, had to be made to another person. The records X made in her diary were only personal records not intended to be read by others or given to others. Therefore such records could not possibly constitute a "complaint". *R v B* [1997] Crim LR 220 distinguished [68]-[69].

(3) During the trial, the prosecution should not have sought the production of X's diary and the video-recorded interview relating to the diary. On the whole, X's diary was prejudicial to the Applicant. The trial judge had also made it clear that he had given much weight to X's diary [71]-[72].

(4) The trial judge had erred in dealing with X's diary. Even though the defence had not raised any objection and even made use of X's diary to cross-examine her, the trial judge should not have allowed the production of X's diary in court or given any weight to it [74].

(5) But the crux of the case was the credibility and reliability of X's testimony. X could not possibly have any motive in falsely accusing the Applicant, let alone making up a story to frame him up. In her video-recorded evidence and under cross-examination, X had many times given a detailed account of the Applicant's improper conduct towards her. X could also give an accurate description of the locations where the Applicant indecently assaulted her. Therefore, taking the evidence as a whole, a reasonable tribunal would certainly convict the Applicant. The conviction of the Applicant was not in any way unsafe or unsatisfactory. The fact that the trial judge erroneously dealt with X's diary would not render the conviction unsafe [75]-[76].

Voir Dire

HKSAR v RAZAQ NADEEM

COURT OF APPEAL
CACC 261/2009
Stock VP, Kwan JA , Lunn J

Dates of Hearing: 8 & 9 March 2011
Date of Judgment: 13 May 2011

Counsel for the Respondent: Robert SK Lee SC DDPP & Irene Fan SPP
Counsel for the Applicant: John Haynes, Mahinder Panesar & Edward Chan

Criminal law and procedure – Evidence – Letter of request issued by HKSAR under s 77E(1) of Evidence Ordinance (Cap 8) – No evidence that it was not reasonably practicable to secure deponent's attendance at trial in Hong Kong – Whether deposition evidence obtained in Macau pursuant to letter of request in relation to criminal proceedings admissible under s 77F(1)

Criminal law and procedure – Evidence – Buccal swab obtained after charge – Whether breach of right against self-incrimination – Police permitted to take more than one buccal swab – art 11(2)(g) of Hong Kong Bill of Rights Ordinance (Cap 383) – s 59C of Police Force Ordinance (Cap 232) – s 7(2) of Interpretation and General Clauses Ordinance (Cap 1)

Criminal law and procedure – Voir dire – Duty of Judge to give reasons for admitting confession – Whether failure to provide reasons constitutes material irregularity

刑事法及訴訟程序－證據－根據香港法例第8章《證據條例》第77E(1)條由香港特區發出請求書－沒有證據顯示要確使作供詞人在香港審訊時出庭並非合理地切實可行－依據有關的刑事法律程序的請求書在澳門取得的書面供詞證據根據第77F(1)條是否可接納爲證據

刑事法及訴訟程序－證據－在檢控後被套取口腔拭子樣本－是否違反免使自己入罪的權利－警方獲准套取超過一個口腔拭子樣本－香港法例第383章《香港人權法案條例》第十一(二)(庚)條－香港法例第232章《警隊條例》第59C條－香港法例第1章《釋義及通則條例》第7(2)條

刑事法及訴訟程序－案中案程序－法官就接納招認而須給予理由的責任－沒有提供理由是否構成重大不當之處

The Applicant (D) was convicted after trial of three counts of murder. It was alleged that he killed three female sex workers, ransacked their premises and took away property. He attempted to withdraw money from an ATM machine using a bank card belonging to the third victim. After the killings he went to Macau. D was later intercepted by Macau Judiciary police officers at the ferry terminal in Macau, which interception was witnessed by the Hong Kong police officers. The Macau officers found on D's person incriminating evidence connecting him to the victims, including mobile phones, bank cards and a cash withdrawal slip relating to D's earlier attempt to withdraw money from the ATM machine in Hong Kong. The Hong Kong police officers took over these exhibits and escorted D back to Hong Kong. Upon arrival in Hong Kong, D made verbal admissions under caution that he had been forced to kill the victims. Two cautioned video interviews were later conducted with D during which he described in detail each of the killings and demonstrated how he had killed the women. His account was that he had borrowed money from three men in Macau but was unable to repay them and it was at their behest that he killed the three victims. He identified the items which had been seized from him by the Macau police.

D gave evidence at trial and his testimony differed significantly from his account in the course of the interviews. He testified that he had not killed any of the women but rather he had been told that if he secured entry for the three men into the various premises, the debt which he owed them would be forgiven. This he had done with no knowledge that any killing had been intended or had in fact been carried out.

Before trial, the prosecution had applied to the trial judge for the issue of a letter of request to the Macau authorities to obtain evidence from an officer ("Yip") of the Judiciary Police in Macau. Yip was one of the officers who apprehended and searched D at the ferry terminal in Macau and seized the incriminating items from D. He also accompanied D to two premises in Macau in which house searches were conducted, before handing him over to the Hong Kong police. In support of the application, the prosecution filed an affirmation which outlined the involvement of Yip in the Macau investigation. It was stated in the affirmation that Yip's evidence was essential to the prosecution and that the Macau authorities would assist in arranging for evidence to be obtained from him. However, the affirmation did not contain any assertion that it was not reasonably practicable to secure Yip's attendance at D's trial in Hong Kong.

At the hearing of the application, no evidence was placed before the judge concerning the practicability or otherwise of securing the attendance of Yip at the trial in Hong Kong. There was an assertion from the Bar table by the prosecutor that efforts had been made to secure Yip's attendance in Hong Kong but in vain. No reason was proffered for Yip's refusal or inability to come to Hong Kong. Having heard what counsel said, and in the absence of any objection by the defence, the judge granted the application and ordered the issue of a letter of request to the courts in Macau.

Pursuant to the letter of request, proceedings were held in Macau to obtain evidence from Yip. After the conclusion of the Macau hearing, a deposition of Yip's evidence was transmitted by the authorities in Macau to Hong Kong under s 77F(5) of the Evidence Ordinance (Cap 8). At the trial in Hong Kong, D objected to the admissibility of such evidence and the matter was argued in a *voir dire*. The judge held that the issue and transmission of the letter of request had been properly sought and supported and that the need for such a procedure was established. The judge was satisfied that the proceedings in Macau were carried out within the ambit of the letter of request and, given that no unfairness was likely to occur, the deposition and the exhibits could, without further proof, be admitted as *prima facie* evidence of the facts stated therein. The judge also ruled as admissible the cautioned admissions made by D upon and after his arrival in Hong Kong, but she did not give reasons for her decision to admit the cautioned admissions.

On appeal, a number of grounds were advanced by D. It was contended inter alia that the deposition obtained pursuant to the letter of request was inadmissible as there was no evidence to justify the conclusion that Yip was unable to attend the trial in Hong Kong to testify. D also asserted that there had been a material

irregularity in that the judge had failed to give reasons for her decision to rule as admissible his admissions against interest.

D also complained that the police had improperly obtained a second buccal swab from D after he had been charged and that constituted a material irregularity. It was said that the taking of the second swab was in breach of D's right against self-incrimination protected under Art 11(2)(g) of the Hong Kong Bill of Rights Ordinance. It was also argued that there was statutory authority for obtaining only one swab, not two, and that, by analogy with the rules governing the taking of statements from suspects after they have been charged, it was impermissible to take the second swab because by that time, D had already been charged.

Held, granting leave to appeal against conviction but dismissing the appeal by applying the proviso:

Admissibility of the deposition evidence

(1) There is a distinction between, on the one hand, the validity of the issue of the letter of request, and, on the other hand, the admissibility of the deposition obtained pursuant to it. In this case, the conditions precedent set by s 77E(1) of the Evidence Ordinance (Cap 8) appeared to have been fulfilled. The letter of request was lawfully issued [53]-[54].

(2) There was no evidence placed before the trial court as to the practicability or otherwise of securing the attendance of the deponent Yip. No evidence was filed in support of the assertion that efforts had been made to secure Yip's attendance in Hong Kong. There was not even a hint of a reason for Yip's refusal or inability to come to Hong Kong. The trial judge appeared to have accepted the say-so of counsel that it was impracticable to secure Yip's attendance and to have enquired no further as to the basis of the suggested impracticability. That was not a proper basis upon which to come to a determination of the issue under s 77F (1)(d)(i) of the Evidence Ordinance (Cap 8). As a key condition precedent had not been established, the deposition evidence ought not to have been admitted [57]-[66].

(3) Whilst the deposition should not have been admitted, its admission into evidence had resulted in no injustice in all the circumstances of the case. It could have had no material effect on the judge's conclusions as to the admissibility of the various cautioned statements made by D upon and after his arrival in Hong Kong and no material impact upon the jury's assessment of the evidence and of the chain of evidence of the exhibits seized from D in Macau [67]-[80].

Duty to give reasons as to admissibility of confessions

(4) A judge is not obliged to give reasons for making a ruling on the admissibility of a confession statement. However, there may be occasions where a good practice requires a reasoned ruling, such as, where there is a question of law or there is an exercise of discretion. *Chau Ching Kay v HKSAR* (2002) 5 HKCFAR 540 applied [94].

(5) Whilst it would have been preferable in this case for the judge to have stated in terms why the absence of evidence from the Macau police as to what transpired in Macau caused her no doubt as to the voluntariness of statements made by D after his hand-over to the Hong Kong police, given that the underlying issue of facts was clear enough, the failure to provide reasons in this case did not constitute a material irregularity [95].

Buccal swabs

(6) The power to obtain 'non-intimate sample' from a suspect for forensic analysis is derived from s 59C of the Police Force Ordinance (Cap 232). Quite apart from the provision of s 7(2) of the Interpretation and General Clauses Ordinance (Cap 1) that words and expressions in the singular include the plural, it would be an entirely non-purposive construction of s 59C to hold that the legislature intended to restrict the power to the taking of one sample only [100]-[102].

(7) As for the taking of the second sample after charge, it cannot have been intended by the legislature to bring down the curtain at the time of charge, come what may. It would have been a question of the judge's discretion as to whether to admit the evidence and the circumstances of this case did not warrant an exercise of her discretion in D's favour [103].

(8) The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. It does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath and urine samples and bodily tissues for the purpose of DNA testing. *Saunders v United Kingdom* (1997) 23 EHRR 313 applied [104].

Vulnerable Witness

HKSAR v SEE WAH LUN & ORS (施華倫及其他人)

COURT OF APPEAL
CACC 370/2009
Cheung & Kwan JJA, Lunn J

Date of Hearing: 1 March 2011
Date of handing down Judgment: 22 March 2011

Counsel for the Respondent: William Tam SADPP and Franco Kuan Ag SPP
Counsel for A1: Cheng Huan SC and John Haynes
Counsel for A2-A5: David Boyton (re: conviction)
Counsel for A2-A5: C Draycott SC and David Boyton (re: sentence)

Criminal law & procedure – Prosecution witness gave evidence via live television link – Witness had acted in dual capacity of accomplice and police informer – "Witness in fear" within meaning of s 79B of Criminal Procedure Ordinance – Whether judge correct in allowing live television link – Whether to use a screen as an alternative

Whether summing-up imbalanced – Summary of defence points in brief précis form – Whether convictions rendered unsafe

刑事法及訴訟程序－控方證人透過電視直播聯繫作供－證人曾以從犯及警方線人雙重身分行事－《刑事訴訟程序條例》第79B條所指「在恐懼中的證人」－法官准許電視直播聯繫是否正確－可否使用屏風作爲另一選擇

總結詞是否不能持平－以簡短摘要方式撮寫辯方論點－是否令定罪不穩妥

The five Applicants were convicted after trial in the Court of First Instance of "acting as members of a triad society" and "conspiracy to cause grievous bodily harm with intent". A1 was further convicted of "conspiracy to commit murder" and "soliciting to murder". The key prosecution witness was an accomplice who had been recruited by his triad associates to participate in a plot to cause serious injuries or even death to the targeted victim. The accomplice had informed the police of the plot before it was carried out and as a result, the Applicants were arrested and later charged. The accomplice had stated in an affirmation that he was in fear of giving evidence in front of the Applicants. He and his girl-friend had been put under the witness protection scheme and living in a secret location. His father had seen two suspicious males loitering in the vicinity of his home. At trial, the prosecution successfully applied for an order to allow the accomplice to give evidence by way of live television link on the basis that he was a "witness in fear" pursuant to s 79B of the Criminal Procedure Ordinance. Towards the end of the trial, the judge had invited defence counsel to submit written summaries of their "defence points" in order to assist her preparation of the summing-up.

On appeal, the Applicants challenged the decision by the judge to permit live television link. The Applicants also complained that in her summing-up to the jury, the judge only briefly listed many of the matters

in the written summaries but without reference to the details of the evidence that was capable of supporting the defence points; as a result, they alleged that the summing-up was unbalanced.

Held, dismissing the applications for leave to appeal against conviction:

(1) The following principles were relevant on the topic of live television link [29] :

(i) An accused is entitled to the fundamental right of a fair trial and to confront his accuser and see him in the eye. However, it appears that the common law right of a face to face confrontation is not guaranteed by the European Convention on Human Rights. Even under common law, the right to confront and see the witness can be curtailed.

(ii) These rights are now subject to statutory intervention by allowing a witness in fear to give evidence by way of live television link.

(iii) It is rare and exceptional to adopt the live television link approach. The Court must consider the interests of the accused.

(iv) At the same time the Court must balance the interests of the accused and the significant public interest of witnesses giving evidence without occasioning danger to themselves or to members of the community. The fact that an accused may suffer some forensic disadvantage does not mean such an order should be refused.

(v) An adult witness can still be a witness in fear. In deciding whether he is a witness in fear, the Court is to have regard to the circumstances of the case and the nature and circumstances of the witness. Factors such as the witness being an accomplice and having been under a witness protection scheme may be taken into account.

(vi) A witness in fear may not be in any actual danger and that his fear may only be that of meeting the assailant face to face.

(vii) The critical issue in determining whether a witness can be characterized as a "witness in fear" is the state of mind of the witness. It is not necessary that his fears be objectively justified or that those fears are directly attributed to conduct on the part of the accused.

(2) The subjective view of the witness was amply supported by the background of the case. The witness was a triad member giving evidence against his triad brothers. The charges were some extremely serious crimes involving a plan to cause serious personal injuries or even death to the targeted victim. The order to carry out these heinous crimes was given by a triad boss. The witness had expressed reluctance to take part in the plan but he was pressurized to agree to do so. He belonged to a secret society in which the members had sworn alliance to be loyal to each other. Instead he was doing the exact opposite and became a supergrass helping the authorities to prosecute his triad associates. With this background, the judge was clearly correct in ordering the live television link evidence. [30]

(3) In the Court below, an alternative suggestion was made that the witness was to be screened so that the Applicants could not see him until such time as a dock identification was required. Section 79B(4) does not require the judge to consider any alternative means of giving evidence once the judge is satisfied that a witness is indeed a witness in fear. The suggested method in fact would defeat the idea of a defendant seeing his accuser. The live television link on the contrary provided the applicants with the opportunity of seeing the accomplice witness on the television screens. [31]

(4) While each judge has his or her individual style in addressing the jury, one would usually expect an outline of the points raised by the defence, particularly those which are said to be important discrepancies of the witness, by more detailed reference to the evidence. The need to do so is particularly important when the prosecution's case hinges on the credibility of an accomplice who has been offered immunity from prosecution [50].

(5) The judge's approach did not affect the safety of the conviction as she had clearly directed the jury that the prosecution's case was dependent on the accomplice's evidence and on three occasions repeatedly given a

full warning to the jury of the need to be extra cautious in relying on his evidence [50(1)]. The summaries by the judge also covered the topics that had been canvassed in the cross-examination and defence's final submission and in fact encapsulated the defence's case [50(2) & (4)]. The major issues raised were also adequately covered in other parts of the summing-up. [50(5)] The judge's approach of calling upon the defence to provide a list of points made in final speech was also sanctioned by the Court of Final Appeal: see *Chow Wai Choi & Others v HKSAR* (2005) 8 HKCFAR 623 [50(3.1) & (3.2)].

(6) The summing up by the judge was therefore not unbalanced. On the other hand, it should be firmly stated that it would not be enough for a judge simply to summarise the defence's case by way of a skeletal précis. The summary must be supported by appropriate references to the evidence and the identification of the major discrepancies or conflicts in the evidence [51].

Witness Credibility

香港特別行政區 訴 何國柱及其他人

高等法院原訟法庭
HCMA 129/2010
原訟法庭法官湯寶臣

聆訊日期：2010年6月29日及2011年1月20日
判決日期：2011年4月11日

答辯人代表律師：高級檢控官馮美琪
第一上訴人代表律師：2010 年6 月29 日： 無律師代表，親自出庭
2011 年1 月20 日： 謝志浩及黃麗貞
第二及第三上訴人代表律師： 無律師代表，親自出庭

刑事法 － 聲稱是三合會社團的成員罪 －《社團條例》第20(2)條－ 並非是「嚴格責任」的罪行 － 有意識下的聲稱 － 控罪要素是「聲稱」不是「聲稱而令人受驚」

刑事法及訴訟程序 － 主審裁判官有責任去維持法庭的尊嚴及秩序 － 裁判官必須持平審訊 － 控方在陳詞時呈上一份涉及上訴人名字的案例 － 可能引起偏見的後果 － 裁判官應特別提醒自己須排除相關訊息的不當影響，否則會影響審訊的公平性

證據 － 控方主要證人證供內容的可靠性被另一案件(源自同一卧底調查行動)的法官質疑 － 其他法官或裁判官未必能在無合理疑點下全盤接受類似的證供 － 有否影響到定罪的穩妥性

警方一次卧底調查行動結束後，三名上訴人分別被控聲稱是三合會社團的成員罪及/或以三合會社團的成員身份行事罪，三人經審訊後被定罪。控方主要證人爲卧底警員。

三名上訴人不服定罪，提出上訴。

其中一個上訴理據(第1項)針對的是在聆訊時，裁判官因爲某上訴人似乎對法庭的表現有欠尊重而不滿而表示：「我亦都唔係第一次審黑社會，我做大律師嘅時候，我亦都係代表過一啲龍頭阿哥，所謂阿公，我都幫佢代表過，打過官司。」。上訴人認爲裁判官對上訴人或辯方存有偏見 。

另一上訴理據(第3項)指控方在陳詞時呈上了一份涉及上訴人名字的案例，而該案與正在審理中的案件又屬相同類形，令上訴人失去公平審訊。

上訴理據第6項指控方主要證人證供內容的可靠性被另一案件(源自同一卧底調查行動)的法官裁定爲不能被法庭所依賴，因此在本案中裁判官亦不應依賴其證供把上訴人定罪。

裁決，三名上訴人的上訴得直，定罪撤消，刑罰擱置：

(1) 「聲稱是三合會社團的成員」罪並非是「嚴格責任」的罪行，否則就算講者是在酒醉後亂語或胡扯，也可能會被定罪。但另一方面，與「刑事恐嚇」罪相比，聲稱的罪行確是更爲寬鬆。就「刑事恐嚇」罪行而言，講者所用的表達須要構成恐嚇，控方亦須證明被告是有威脅意圖而非是在盛怒之下一時衝動的表達。聲稱爲三合會社團成員的控罪卻祇涉及有意識下的聲稱。一般來說，市民不會無緣無故地作出這種聲稱，但這種聲稱可以帶有威脅性，也可以不帶威脅性的，情況不能一概而論 [30]。「胡扯」或「說謊」都有可能構成控罪，尤其是後者，前者則要視乎情況而定，而不同的案情基礎可以引至不同的判刑結果。重要的是，這方面的法例正正就是要制止有人因不同原因或目的而去聲稱爲三合會的成員，這是立法機構要壓止三合會活動的做法。如果市民是可以隨便向人自稱爲三合會會員或「說笑」可以構成辯護的話，那這項法例就變得意義不大。法例本身確是寬鬆，而控罪元素裡並沒有要求有關的支持證據必須要特別「可靠」及「準確」才可定罪 [31]。在審理這類案件時，裁判官當然要如其他案件一樣對證供作小心評估，如果證據不可靠，或證人所說的不準確，那法庭當然不應定罪。另一方面，裁判官也不應在審理有關控罪額外要求控方的證供有更高程度的「準確性」才可定罪。一切要視乎個別案件的證據而言 [32]。

(2) 「聲稱是三合會社團的成員」罪的要素是「聲稱」不是「聲稱而令人受驚」。當有人向另一人表示自己是三合會成員，不論其目的是在告知對方他的三合會身份，或是在恐嚇對方，或祇是在表演錯以爲是威風的事情，這都會構成聲稱之控罪。就算這人是在向第三者作聲稱，如果有另一人聽到，而裁判官亦接受其證供屬實的話，法庭都可判控罪成立 [39]。

(3) 主審裁判官有責任去維持法庭的尊嚴及秩序，如有人對法庭表現不敬，裁判官當然可以直接提出甚至以藐視法庭的原則處理。但不論情況如何，上文所述裁判官表示曾代表「一啲龍頭阿哥...打過官司」類似的說話，絕對不應出自正在審案的裁判官。從某角度看來，他的表達也確實會令旁觀的第三者覺得他認爲接受審訊的被告是黑社會人士，或是與黑社會有關人士，但其地位不比他以前代表過的龍頭阿公或阿哥高，因此不應在他面前表現囂張。這絕對不是提醒被告人須要尊重法庭，尊重法律的恰當表達。這對裁判官必須持平審訊的原則必定構成負面的影響 [51]。

(4) 控方在陳詞時呈上了一份涉及上訴人名字的案例 [41]，而當中涉及的問題與本案並無直接大關係 [44]。作爲控方的代表應該要小心，就算案例真的與本案有關而必須呈堂去協助裁判官，在這特殊的情況下，她應先與辯方大律師商討，較爲妥善的方法是將上訴人名字從案例副本上塗白，即可避免顯示上訴人的名字。上訴人曾經被刑事檢控及被裁判官定罪是與本案無關及會引起偏見的資料，根本不應讓原審裁判官知道 [45]。主控以此方式透露上訴人曾經被控的背景可能引起偏見的後果是無可避免的。在記錄上，看不到控方有作回應或裁判官有處理過這個問題 [46]。裁判官應特別提醒自己須排除相關訊息的不當影響，但他似乎忽略了這點，這會影響審訊的公平性 [47]。

(5) 控方主要證人在同一卧底調查行動中的另一案件作供，法庭認爲他的證供不可被法庭依賴，並裁定各被告人罪名不成立。控方後來決定不再起訴其他候審人士 [52]。雖然在一般情況下，法庭對同一證人的可信性或可靠性可以有不同的結論，但該法官看來並非是在否定控方證人的基本誠信，問題在於其證供內容的可靠性。一位證人的整體可靠性在被法官質疑後，其他法官或裁判官可否能在無合理疑點下全盤接受類似的證供是值得商確。正因如此，控方正確地決定不再控訴其他的被告人。雖然這是在本案審訊之後的發展，但以"重審"的角席再審視控方證人的證供，如果其證供的可靠性被質疑的話，那就必定會影響到定罪的穩妥性 [53]。

[English Translation of HCMA 129/2010 above]

HKSAR v HO KWOK CHU TOMMY & ORS

COURT OF FIRST INSTANCE
HCMA 129/2010
TONG J

Date of Hearing: 29 June 2010 & 20 January 2011
Date of Judgment: 11 April 2011

Counsel for the Respondent: Mickey Fung, SPP
Counsel for A1: 29 June 2010: In person
20 January 2011: Bruce Tse & Anita Wong
Counsel for A2 & A3: In person

Conviction – Claiming to be a member of triad society – Section 20(2) of the Societies Ordinance – Not "strict liability" offence – To make the claim consciously – Essence of offence being "claiming" and not "claiming to cause alarm"

Criminal law and procedure – Duty of trial magistrate to maintain dignity and order of court – Magistrate must try the case fairly – Prosecution submitted judgment of a case involving the name of the Appellant – Possible prejudicial effect – Magistrate should have especially warned himself to exclude prejudicial effect of such information lest fairness of trial be affected

Evidence – Reliability of evidence from main prosecution witness doubted by judge in another case (originating from same undercover operation) – Another judge or magistrate might not accept all such similar evidence beyond reasonable doubt – Whether safety of conviction affected

As a result of an undercover investigation, the three Appellants were respectively charged with claiming to be a member of a triad society and /or acting as a member of a triad society. They were convicted after trial. The main prosecution witness was an undercover police officer.

The three Appellants appealed against conviction.

One of the grounds of appeal (Ground 1) was that the magistrate during the hearing, being displeased that one of the Appellants seemed to have shown little respect for the court, said: "*It is not the first time that I hear a triad society case. When I was a barrister, I had also represented some big brothers, the so called protectors. I had represented them in law suits*…" The 1st Appellant claimed that the magistrate was biased against him and/or the defence.

Another ground of appeal (Ground 3) was that the prosecution submitted an authority involving the name of the Appellant and it was similar in nature to the case being heard. Thus the 1st Appellant was denied a fair trial.

Ground 6 of the appeal was that the evidence of the main prosecution witness was not relied upon by a judge in another case (originating from the same undercover operation). Hence the magistrate in the present case should not have relied on the evidence from the same witness to convict the Appellants.

Held, appeals allowed, convictions quashed and sentences set aside:

(1) "Claiming to be a member of a triad society" is not a "strict liability" offence. If it were, then a drunken person who babbled or talked nonsense would be convicted. Compared with "criminal intimidation", the claiming offence is much wider. For "criminal intimidation", the expression uttered must constitute a threat and the prosecution is required to prove that the defendant intended to threaten rather than to utter words in a spur of anger. The offence of "claiming to be a member of a triad society" only involves a claim made consciously. Generally speaking, a person would not make such a claim without a cause. Such a claim might or might not be threatening. It all depends on the circumstances [30]. "Talking nonsense" or "lying", the latter in particular,

could possibly constitute an offence. For the former, it depends on the circumstances of the case. Different factual foundations result in different sentences. Importantly, the purpose of the legislative provision is to prevent people from claiming to be members of a triad society for various reasons or purposes. This is a way of the legislature to contain triad activities. If a member of the public could casually claim to be a triad member or "joking" could be accepted as a defence, the legislative provision would have little meaning. The provision itself is no doubt wide, and the elements of the offence do not require the supporting evidence to be especially "reliable" or "accurate" for a conviction [31]. When hearing this type of cases, the magistrate must, like other cases, carefully assess the evidence. If the evidence is unreliable, or the testimony of the witness inaccurate, the court must not return a guilty verdict. Despite that, the magistrate should not additionally require a higher standard of "accuracy" from the prosecution evidence in order to convict. It all depends on the evidence of individual cases [32].

(2) For "claiming to be a member of a triad society", the essence of the offence is "claiming" and not "claiming to cause alarm". When a person tells another that he is a member of a triad society, whether his purpose is to reveal to the other person his triad identity, or to threaten the other person, or just to show off thinking it is something to be proud of, the act constitutes the claiming offence. Even when the claim was made to a third person but overheard by another, if the latter's evidence is accepted by the magistrate as true, the court is still entitled to return a guilty verdict [39].

(3) It is the duty of the trial magistrate to maintain the dignity and order of the court. If anyone is not respectful to the court, the magistrate can of course directly raise it or even deal with it along the principle of contempt. However, no matter what the circumstances were, the trial magistrate should not have said words like "*I had also represented some big brothers…in law suits*" as quoted above. In a way the trial magistrate's words would indeed cause a bystander to feel that the magistrate considered the defendants standing trial were members of a triad society or people related to a triad society, but their positions were not as high as the protectors or the big brothers that the trial magistrate had represented in the past, and therefore the defendants should not be so proud of themselves before the trial magistrate. Those remarks were definitely inappropriate for reminding the defendants to show respect for the court and the law. This must have caused a negative effect on the principle that the magistrate must try the case fairly [51].

(4) The prosecution submitted the judgment of a case involving the name of the 1st Appellant [41]. The issues involved were of little relevance to the present case [44]. The prosecution should have been more careful. Even if the case was really relevant to an issue at trial and must be submitted to the trial magistrate in order to assist the court, in such special circumstances the prosecuting counsel should have discussed with the defence counsel in advance, and a more appropriate way of doing it was to whiten out the 1st Appellant's name from the judgment so that his name would not appear. That the 1st Appellant had been prosecuted and convicted by a magistrate in a previous trial was irrelevant to the present case and was information that would cause prejudice; it should not have been made known to the magistrate [45]. It was an unavoidable consequence that prejudice was potentially caused by the prosecution's disclosure in this way of the 1st Appellant's background of having been previously prosecuted. According to the records, neither the prosecuting counsel made any reply nor did the trial magistrate deal with the problem [46]. The trial magistrate should have especially warned himself that he must exclude the prejudicial effect of such information but it appears that he had overlooked this. This would affect the fairness of the trial [47].

(5) The main prosecution witness gave evidence in another case originating from the same undercover operation. The court ruled that his evidence could not be relied upon and the defendants were acquitted. After that, the prosecution decided not to proceed with the charges against other defendants pending trial [52]. Generally speaking, the court's view towards the credibility and reliability of the same witness could be different. The judge did not seem to have doubts about the credibility of the prosecution witness; the question was the reliability of his evidence. Once the reliability of a witness on the whole was doubted by a judge, it is worth considering whether another judge or magistrate could beyond reasonable doubt accept all such similar evidence. And it was because of this very reason that the prosecution had rightly decided not to prosecute the outstanding defendants. Although it was a development after the present case was concluded, when the evidence of the undercover officer is looked at again in the "re-hearing" and doubts were cast on its reliability, the safety of the convictions would surely be affected [53].

END