Appeal/Procedure

CA 135/98

KONG Kwong-san

Skeleton argument/Duty on prosecution
論點大綱 – 控方的責任

Nazareth VP
Mayo &
Stuart-Moore
JJA

(29.1.99)

*PS Chapman
&
Henry Hung

#Paul
Loughran

In the course of dismissing an application for leave to appeal against a conviction for murder, the court observed '*a considerable amount of time and effort was wasted as a result of our not having the advantage of a skeleton argument from the prosecution. We hope that in future in a case such as this we will be furnished with a skeleton argument in sufficient time to enable us to ascertain the issues which are to be ventilated*.'

CA 35/98

(1) WONG Ka-kuen
(2) LEUNG Yui-kwong

Duty of counsel settling grounds of appeal/*Practice Direction* to be observed
擬備上訴理由的律師的責任 – *實務指引*須予遵守

Nazareth
ACJHC
Mayo &
Stuart-Moore
JJA

(28.1.99)

*Albert Wong

#AA Hoosen
(1)
A2: I/P

In the course of dismissing A1's application for leave to appeal against conviction for two offences of trafficking in heroin hydrochloride, it was observed that:

(1) The second ground of the Amended Perfected Grounds of Appeal was materially different from the originally drafted perfected ground. Counsel were to be reminded of the *Practice Direction* that where amendments were made, they should be underlined in red;

(2) Where criminal appeals were put forward, the *Practice Direction* required that they be settled with care and accuracy.

MA 74/99

BOUTTLE Philip Russell

Appellate court interfering with magistrate's evidential findings/Problem in cross-examining vague witness/Comments on defence role in conducting examination
上訴庭干預裁判法院就證據所作的裁斷 – 盤問含糊證人的問題 – 就辯方在訊問過程中所擔當的角色提出意見

Woo J

(3.5.99)

*K P Zervos

#L Lok SC &
C L Lo

The Appellant was convicted of one charge of soliciting and another charge of accepting an advantage, both contrary to section 3 of the Prevention of Bribery Ordinance, Cap 201, in that he on or about 13 January 1997, without the general permission of the Governor, solicited and accepted an advantage, namely, a loan in the sum of $300,000 from Chan Ka-ho. The solicitation constituted one offence and the acceptance constituted another.

At trial, the only issue was the true nature of the payment of $300,000, whether it was a loan or not. The Appellant's case was that the cheque for $300,000 which he received from Chan Ka-ho represented a share investment.

The magistrate rejected the evidence of the Appellant as being devoid of credence.

The main thrust of the defence case as put to Chan Ka-ho was that the $300,000 was not a loan but a payment relating to the sale of the shares

belonging to the Appellant and that the $150,000 subsequently paid by the Appellant to Chan was for the loss upon the sale. Chan said many times that he could not remember because the matter involved such a small sum (by his own standard) but he eventually accepted that it was possible.

On appeal, the Appellant complained about the quality of the prosecution evidence.

Held :

(1) As the appellate judge had not the same benefit as the magistrate of seeing the witnesses in flesh, the magistrate's findings would not normally be interfered with on the basis of the weight of evidence: *R v Hui Kee-fung* MA 196/94, *R v Yip Kam-lam* MA 731/96. However, the situation was different when, as here, the only witness who talked about the crucial subject of the nature of the money payment particularised in the charges gave one definite version in-chief which had been at least diluted, if not contradicted, in cross-examination. His evidence was not satisfactory;

(2) While the defence case as put to Chan Ka-ho was not as precise as was to be expected, the difficulty with cross-examining so vague and non-committed a witness had to be taken into consideration. The magistrate had himself described the witness as '*frequently extremely guarded in his replies, particularly in cross-examination, and was often markedly unwilling firmly to commit himself for or against any proposition which was put to him*';

(3) Counsel's role in cross-examining at any of the three procedural stages required appreciation. Whilst he must be totally alert and responsive to the answers coming from the witness, and keeping an eye on the reaction of the bench, he had to use his best endeavours to reflect his client's instructions. It was not an easy task and counsel was not to be criticised without full knowledge of the situation in which he was operating.

Result - Appeal allowed.

HCAL 27/98

JIANG Enzhu v LAU Wai-hing

Stock J

(8.6.99)

Alan Hoo SC & Johnny Mok (*For Applicant*)

Gladys Li SC Lawrence Lok SC & Johannes Chan (*For Respondent*)

PD(P)O/Failure to comply with data access request/Whether continuing offence/Right of absent party to be represented by counsel

《個人資料(私隱)條例》 - 沒有依從查閱資料的要求 - 是否屬於持續罪行 - 缺席應訊一方有權由律師代表應訊

The Personal Data (Privacy) Ordinance was enacted in 1996. Section 18 of that Ordinance provided for an individual to make a request to be informed by a data user whether the data user held personal data of which the individual was the data subject; and if there was such data held by that user, to be supplied by that user with a copy of the data. Section 19 of the Ordinance provided that, save in exceptional circumstances and subject to certain conditions, a data user should comply with a request not later than 40 days after receipt of a request. A data user who, without reasonable excuse, contravened that requirement committed an offence.

The Respondent laid a complaint before a magistrate alleging that the Applicant, as a data user, failed to comply with a data access request to be informed within a period of not more than 40 days after receipt of the request as to whether he held personal data of which the Respondent was the data subject, contrary to sections 19(1) and 64(10) of the Personal Data (Privacy) Ordinance, Cap 486. The magistrate issued a summons to appear, which added '*personal appearance is required, even if you plead guilty*'.

In the course of allowing the Applicant's judicial review of the decision of the magistrate to issue the summons, it was

Held :

(1) An offence contrary to sections 19 and 64(10) of the Ordinance was not a continuing offence. Whether a statutory provision created a continuing obligation so that failure to comply with it created a continuing offence depended on the language used and its correct construction: *British Telecommunications plc v Nottinghamshire County Council* [1999] Crim LR 217. The general rule was that the court was not eager to find continuing offences created by a statute, and '*certainly not without express words which make clear that was the intention of the legislature when the statute was passed*' : *R v Wimbledon Justices Ex parte Derwent* [1953] 1 QB 380;

(2) Generally speaking, an offence of non-compliance with a '*do*' provision was complete when the period for compliance ended, whereas the courts were more ready to construe a continuing obligation where there was a '*desist*' provision. Section 19 was a '*do*' provision, and there were other provisions which demonstrated legislative intent in this case, not least section 50 which empowered the Commissioner, where he was of the opinion that the data user was contravening a requirement under the Ordinance or had contravened a requirement in circumstances that made it likely that the contravention would continue or be repeated, to direct the data user to remedy the contravention, and failure *then* to comply was specifically made a continuing offence by the terms of section 64(7) of the Ordinance, the reference in which to a continuing offence was in stark contrast to section 64(10). Also to be noted were provisions by which a request might be refused, for example, where a user could not comply without disclosing personal data of another or where another data user controlled the data so as to preclude disclosure. There were no specific provisions or indicia in the Ordinance which warranted a departure from the normal approach to '*do*' provisions; on the contrary, there were indicia which compelled adherence to that approach;

(3) The requirement in the summons for personal attendance ran contrary to section 18 of the Magistrates Ordinance which stipulated that '*At the hearing of a complaint or information, a party may be represented by counsel ….*' The PD(P)O itself did not require personal attendance at the hearing of a prosecution brought pursuant to its provisions. Although the requirement therefore ran contrary to the latitude expressly permitted by section 18, that was not of itself a basis for striking down the summons and the inclusion of the paragraph did not render the summons a nullity. It was surplus to the form of summons prescribed by the Magistrates (Forms) Rules, and was a requirement that was readily amenable to deletion without affecting the efficacy of the summons;

(4) The Applicant was justified in coming to the Court of First Instance to seek relief rather than going to the magistracy and arguing the matter there. The summons required his personal attendance and although that was not a requirement inserted at the Respondent's behest, that requirement conflicted with section 18 of the Magistrates Ordinance, and the disquiet of the Applicant could be well understood.

Result - Applicant's motion allowed for these, and other reasons. Order of *certiorari* issued to quash the summons.

Civ App 123/99

POON Chau-cheong v SJ

Mortimer VP
Mayo &
Rogers JJA

(9.7.99)

*Joseph To

#P J Dykes SC

Review under s 104, Cap 227/Extent of magistrate's power to substitute new information for one dismissed at trial/ Relevance of time limit
根據香港法例第 227 章第 104 條所作的覆核 - 裁判官以新控罪取代審訊中遭撤銷的控罪的權限 - 時限是相關因素

This was an appeal from the judgment of the Court of First Instance, which dismissed the Applicant's application for judicial review.

The background to the review was that the Applicant had been tried and acquitted of a charge of soliciting an advantage, contrary to s 4(2)(a), Cap 201. After the prosecution applied for a review under s 104, Cap 227, the magistrate agreed to set aside the dismissal and to substitute a new offence under s 3, Cap 201 for soliciting an advantage, and to try the Applicant for that new offence on the basis of the evidence already heard. The application was opposed on the grounds that the magistrate had no power to set aside an acquittal in these circumstances and that the time for bringing proceedings under s 3 POBO had expired.

Two issues arose on the judicial review as follows:

(a) What were the limits of a magistrate's power of review under s 104 of the Magistrates Ordinance? Specifically, could a magistrate set aside an order dismissing an information when the decision to acquit was not criticised and the purpose of the review was to introduce new information which could have been preferred at the outset or introduced during the trial?

(b) Assuming that a magistrate could amend an information on a review using powers under s 27 of the Magistrates Ordinance, by substituting one information for another, could that power be exercised when the time limit for laying the new information had expired?

Section 104(6) of the Magistrates Ordinance provided:

If the magistrate on his own initiative reviews his decision or grants an application for a review, it shall be lawful for him upon the review to re-open and re-hear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous decision.

The Applicant submitted that the '*decision*' referred to in the subsection was simply the decision of the magistrate to acquit him of the information laid. That meant that the only '*decision*' which the magistrate had been empowered to make was to confirm or to dismiss the information. It was accordingly not open to the magistrate on the review to make an order pursuant to s 27 of the Magistrates Ordinance to amend the information. The magistrate, it was said, was only empowered to invoke s 27 during the currency of the proceedings before her. It was further contended that having regard to the wording of s 104(6), there was no power to set aside an acquittal for the purpose of laying a new information. There were also said to be policy reasons in favour of promoting a satisfactory degree of finality.

Held :

(1) Section 104(6) was not to be read in isolation. Section 104(7) envisaged that if the rehearing should be before another magistrate the case should be re-opened and wholly reheard. There could be no justification for interpreting those powers in a such a way as to provide for different criteria to be applied if the hearing was before a different magistrate. If there was to be a rehearing of the case there was no reason whatever why the duty to make

amendments pursuant to s 27 should be in any way limited. There was nothing in the Ordinance to suggest such a limitation. That being so, there would seem to be no difference if the amendments were effected during the currency of the hearing or on a review. The important word in s 104(6) was '*vary*', and that was a clear indication that something more than reversing or confirming the decision was contemplated. What was clear was that reviews undertaken by magistrates often extended beyond the simple question of whether or not there should be a conviction or an acquittal. An obvious example was an application to review the sentence passed;

(2) The mere fact of a power to review under the Ordinance militated against finality. Any application to review a decision had to be made timeously and should be resolved without undue delay. In this connection there was the right of the parties to apply to a magistrate to appeal by way of case stated under s 105, Cap 227, and that also detracted from finality. It was of significance that it appeared that the Respondent might have been able to achieve the same objective if instead of seeking a review under s 104 she had applied to the magistrate to state a case under s 105. That suggested that unless the present application was clearly outside the scope of s 104 it was likely that the legislature had it in mind to confer a power on magistrates to achieve a similar result by way of review. The magistrate had the power to proceed as she did;

(3) As to the issue of whether an amendment could be made substituting one offence for another when the time limit for laying the new information had expired, the issue of amendments alleging different offences where there was a time bar operating for the different offences was considered in *R v Newcastle upon Tyne Justices of the Peace Ex parte John Bryce (Contractors) Ltd* [1976] 1 WLR 517. It was there held by the Divisional Court that such amendments could be made in an appropriate case so long as no injustice was done to the defence. That judgment was followed in *AG v Wong Lau trading as Kiu Keung Construction and Engineering Co* [1993] 1 HKCLR 257, and in *AG v Yeung Lee Transportation and Engineering Ltd* [1995] 1 HKCLR 144;

(4) This was not a case of using amendment '*to bring a dead horse to life by throwing a blanket over it*': *AG v Fung Si Tsou* [1986] HKC 567. There was a sufficient similarity between sections 3 and 4, Cap 201 and the Applicant had not been able to establish that he had been occasioned any injustice as a consequence of the amendment. Even had the magistrate declined to amend, it would have been open to the Respondent to require the magistrate to state a case under s 105, Cap 227.

Result - Appeal dismissed.

Obiter - It was not a material matter that when the Respondent had sought the review she had not criticised the magistrate's decision to acquit the Applicant of the s 4(2)(a) offence. The magistrate was properly seized of the review and it was open to her to deal with the application in any way she saw fit so long as she exercised her powers in accordance with the provisions contained in the section.

CA 615/98

Stuart-Moore VP
Mayo JA &
Woo J

(24.6.99)

*A A Bruce SC & I C McWalters

#A C Macrae SC (1)
J P Chandler & M Richmond (2)

(1) LAM Tat-ming
(2) NG Sai-hing
v SJ

Appeal by way of case stated/Whether appeal competent after no evidence offered consequent upon adverse ruling/Issue of *autrefois acquit* not engaged/Comments on use of Reference Procedure
以案件呈述方式上訴 - 因不利裁決而放棄提出起訴證據後，是否仍有權上訴 - 不涉及曾*就同一罪行獲裁定無罪*的問題 - 就把問題轉交上訴法庭的程序的使用事提出意見

This matter came before the Court of Appeal as an appeal by way case stated, pursuant to s 84 of the District Court Ordinance, Cap 336. Section 84 provided:

> *An appeal shall lie at the suit of the Attorney General to the Court of Appeal against a verdict or order of acquittal, which shall include any order quashing or dismissing a charge for any alleged defect therein or want of jurisdiction. Such an appeal shall relate to matters of law only and the following procedure shall apply thereto:*
>
> *(a) within 7 clear days after the reasons for a verdict have been recorded or after the order of acquittal, or within such further period as a judge of the High Court may, whether before or after the expiration of such period, allow, an application may be made in writing to the judge to state a case setting forth the facts and the grounds on which the verdict or order was arrived at or made and the grounds on which the proceeding is questioned for the opinion of the Court of Appeal;*
>
> *(b) ….;*
>
> *(c) at the hearing of the appeal, whether or not the respondent appears, the Court of Appeal shall :*
>
> *(i) if it is satisfied that there is no sufficient ground for interfering, dismiss the appeal; or*
>
> *(ii) reverse the verdict or order and direct that the trial be resumed or that the accused be retried as the case may be, or find him guilty, record a conviction and pass such sentence on him as might have been passed on him by a judge; and*
>
> *(iii) give all such necessary and consequential directions as it shall think fit.*

That right of appeal had to be contrasted to the position in the Court of First Instance when the prosecution had no right of appeal in proceedings which had resulted in the defendant's acquittal. The most the prosecution could do in those circum-stances would be to refer a question of law to the Court of Appeal under s 81D of the Criminal Procedure Ordinance, Cap 221, which, so far as was relevant, provided :

> *(1) Where a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment) the Attorney General may, if he desires the opinion of the Court of Appeal on a question of law which has arisen in the case, refer that question to the Court of Appeal which shall, in accordance with this section, consider the point and give its opinion on it;*
>
> *(4) A reference under this section shall not affect the trial in relation to which the reference is made or any acquittal in that trial.*

It appeared to be accepted that at least in theory the procedure under s 81D, Cap 221, could be followed for appeals from the District Court, although

there was no known precedent for such. In argument, the Appellant submitted that the acquittal of the Respondents in the District Court was brought about as a result of the judge's erroneous approach in law which led to a ruling that the evidence of confessions, allegedly made by the Respondents, was inadmissible. As a result of this, and almost immediately following the trial judge's ruling, the prosecution offered no further evidence and verdicts of not guilty were entered in respect of both Respondents.

The Appellant further contended that the evidence which the judge had ruled inadmissible was so crucially important to the prosecution's case that, despite having some other evidence, the prosecution was realistically unable to offer further evidence once the confession evidence had been excluded.

Before the appeal could be heard, R2 moved the Court to dismiss the appeal for what effectively was a want of jurisdiction. He submitted that where the prosecution took the calculated and deliberate step of offering no further evidence against a defendant, that would operate as a bar to further proceedings being taken against that defendant on appeal by way of case stated pursuant to s 84, Cap 336. It was submitted that R2 was entitled to plead *autrefois acquit*. Furthermore, it was said that in circumstances such as these, where the Appellant sought the Court of Appeal's opinion on a question of law, the Appellant should have proceeded by reference, pursuant to s 81D, Cap 221.

Held :

(1) So far as the point raised related to the principles of *autrefois acquit*, it was misconceived. It was perfectly clear from the provisions of s 84 that a verdict or order of acquittal must have been recorded before any proceedings could be brought under the section. Put differently, a plea of *autrefois acquit* was obviously subject to the right of the Secretary for Justice to appeal on a matter of law against the acquittal. The real issue had nothing whatever to do with a plea of *autrefois acquit*, but with whether this appeal properly came within s 84;

(2) As regards the submission of R2 that s 84 could only apply in circumstances where the Secretary for Justice could show that the impugned acquittal was the direct result of an error of law which had been made by the trial judge and not as the result of a considered decision by the prosecution to offer no evidence, the grounds on which proceedings at trial could be questioned included, to adopt some of the words of s 84(a), errors of law relating to the admissibility of evidence;

(3) As the Appellant contended, it would be highly unsatisfactory if, before an appeal under s 84 could be proceeded with, it was required of the prosecution to adduce all its evidence, however unlikely a conviction might be. It would not be in anyone's interests, in order merely to preserve its right of appeal, that the prosecution should have to proceed with the trial to the point when an almost inevitable verdict of acquittal was announced. It would instead be irresponsible for a prosecutor to continue with the case if he had formed the view that an acquittal was the only likely outcome. Such a continuation of proceedings might, in itself, be described as an abuse of the court's process;

(4) As a result of the judge's ruling in law, the prosecution had been deprived of what was the most substantial part of its evidence by the decision that it was not admissible. The prosecution had every right to challenge the correctness of that ruling under s 84. If the ruling was incorrect in law, it could be rectified. When so viewed, any continuation by the prosecution of the trial below, after the judge's ruling, would not have been in the interests of justice. Far from being an acquittal that had been engineered by the

prosecution, the offering of no evidence was the only sensible course for the prosecution to have adopted.

Result - Application to dismiss the case stated refused.

MA 426/99 CHEUNG Man-hong

Woo J

(21.9.99)

*Jonathan Man

#Roland Lau

Privilege against self-incrimination/Extent of/Defence counsel inviting court to warn witness/Comments on defence complaints over exercise of rights

不使自己入罪的特權 - 特權的範圍 - 辯方律師請法庭提醒證人 - 就辯方對證人行使權利提出申訴作出評論

The Appellant was charged, with another accused and persons not in custody, with a single offence of theft of about 100 video compact discs, the property of Chen Hin-wai, and valued at $6,000. He was convicted after trial.

On appeal, it was argued that the magistrate erred in law in allowing the victim, Chen Hin-wai, not to answer a number of questions on the ground of privilege against self-incrimination. The matter arose after defence counsel asked Mr Chen if he sold pirated VCDs without copyright, and Mr Chen said '*Yes*'. When defence counsel then asked Mr Chen if he had employed someone else to be at the shops to be arrested instead of himself when his shops were raided by the Police or the Customs, he, defence counsel, invited the magistrate to give a warning to Mr Chen against self-incrimination, and this he did. Mr Chen then refused to answer these four questions:

(1) Whether he had made a false statement to the police after he admitted that two of the names of his employees given in his statement to the police were wrong;

(2) Where to find his business partner;

(3) Whether it was he or his partner who paid the employees; and

(4) What was his share of the profits made by the business every month after everything was discounted.

Defence counsel raised no objection or made no point to the magistrate after these refusals.

In his statement of findings the magistrate dealt with the privilege against self-incrimination and said:

> *The privilege (which applies to a witness giving evidence, as in the present case) derives both from statutory provisions and common law rules. S 10 of the Evidence Ordinance, Cap 8, provides:*
>
> > '*Nothing in this Ordinance …shall render any person in any proceedings compellable to answer any question tending to criminate himself.*'
>
> *In addition, there are common law rules establishing that a witness is entitled to refuse to answer questions which might tend to incriminate him, (R v Garbett (1847) 2 C&K 474; R v Lam Chi-ming [1991] 2 HKLR 191).*

The magistrate further referred to *R v Minihane* (1922) 16 Cr App R 38, to make the point that the privilege did not extend to prevent the incrimination of others. He went on:

> *The unanswered questions, by PW1, at trial could broadly be divided into two categories, namely: (a) whether he had hired*

> *anyone, who always stationed at the shops, as scapegoat in the event of a police raid; (b) whether he deliberately misled the police, when giving a witness statement, by providing false information. I was satisfied that if PW1 was compelled to answer the unanswered questions, he would ultimately place himself in danger. The nature of danger being misleading the police and exposing the structure, in detail, of his unlawful business, namely: 'offering for sale infringing copies of copyright works for the purpose of trade or business without the licence of the copyright owner'. I was satisfied, in the circumstances, that the objections PW1 raised were genuine; it was not an attempt to escape examination altogether or to avoid incriminating others.*

The Appellant relied on *Brebner v Perry* [1961] SASR 177, for the proposition that where a witness had already made an admission on a particular topic, he could not later claim privilege with respect to testimony on the same subject.

Held :

(1) The decision in *Brebner v Perry* [1961] SASR 177, related to the right of a witness to claim the privilege. The party who called him in that case objected to his refusal to answer questions. That was why when the magistrate ruled against the prosecutor, the prosecutor applied to have a case stated before the judge. In the present case, when Mr Chen talked about his selling pirated discs and when he was asked whether he gave wrong names in the statement to the police as to his employees, he was not warned by anyone. It was defence counsel who invited the magistrate to warn the witness, and when the witness declined to answer the four questions defence counsel did not object or apply to the magistrate to compel Mr Chen to answer the questions;

(2) Not only were the reasons given by the magistrate as to why he allowed the witness not to answer questions correct, but the defence should not be allowed to blow hot and cold. Defence counsel made no point at trial when Mr Chen refused to answer the questions. If the defence were to be allowed to rely on the absence of answers to those questions as a basis for appeal, it would be unfair to the magistrate and to the administration of justice.

Result - Appeal dismissed.

CA 253/99 CHAN Wai-hong

Prosecutor not supporting conviction/Duty to inform the court in advance
控方不支持定罪 - 有責任預先知會法庭

Stuart-Moore VP
Mayo &
Leong JJA

(28.9.99)

*Derek Pang

#Steve Chui

In the course of allowing an appeal against conviction, the court said:

> *At the commencement of the hearing before us* (counsel for the prosecution) *advised us that he would not be supporting the conviction. It has to be said that it would have been helpful if we could have been informed of this at an earlier date. In this connection we would observe that it is the practice of counsel representing Appellants to provide us with a skeleton of the submissions they will be making to us. At the very least we should be informed if the conviction is not being support.*

MA 379/99 LI Wa-san

McMahon DJ

(22.9.99)

*Maggie Yang

#Andy Hung

Appeal against conviction after guilty plea/Whether plea a nullity/Section 113 Cap 227 not available if plea not a nullity/Availability of other remedies
認罪後作出不服定罪的上訴 - 認罪是否無效 - 如認罪並非無效則香港法例第 227 章第 113 條不適用 - 有否其他補救方法

The Appellant pleaded guilty to an offence of remaining in Hong Kong without the authority of the Director of Immigration after having landed unlawfully, contrary to s 38(1)(b) of the Immigration Ordinance, Cap 115.

The Appellant was sentenced to 15 months' imprisonment to be served concurrently with a similar sentence imposed upon him at the same time for an offence of possessing a forged identity card, contrary to s 7A(1) of the Registration of Persons Ordinance, Cap 177, and to which he had pleaded guilty.

He appealed against his conviction for unlawful remaining on the basis that he falsely pleaded guilty to it so as to be repatriated to the Mainland, and because he thought his defence would not be accepted by the court as he had lost his two-way entry permit which recorded his lawful entry into Hong Kong.

The Appellant filed an Affirmation which stated that his real name was '*WONG Sap-yee*', and that he used the name '*LI Wa-san*' under which he was convicted as a pseudonym and that he had in fact come to Hong Kong legally on 13 July 1998 through the Lo Wu Check Point upon his presentation of a valid two-way permit in his name issued under the authority of the PRC. The Appellant further stated that it was a condition of his admission into Hong Kong that he was permitted to stay only until 9 August 1998. He remained in Hong Kong in breach of that condition until 15 January 1999, on which day he was arrested for the present offences. The Appellant additionally stated that in November 1998 he lost his two-way permit and no longer had it. It was apparently that loss which led him to the conclusion that any defence he mounted to the charge would be futile.

The grounds of appeal against conviction relied upon the factual allegations which, it was said, rendered the conviction for the offence contrary to s 38 (1)(b) Cap 115, unsafe and unsatisfactory.

The Respondent accepted that the position was as the Appellant claimed as to his having come legally into Hong Kong, and also, in consequence, accepted that he could not have committed the offence to which be pleaded guilty, contrary to s 38(1)(b), Cap 115.

Held:

(1) On the face of it, the Appellant's conviction for an offence which it was accepted he did not commit was unsafe and unsatisfactory. The difficulty, however, was that the appeal was brought pursuant to s 113(1) Cap 227, which read:

> *Any person aggrieved by any conviction, order or determination of a magistrate in respect of or in connection with any offence,* ***who did not plead guilty*** *or admit the truth of the information or complaint, may appeal from the conviction, order or determination, in manner hereinafter provided to a judge.* (emphasis added)

It was apparent that in the normal course of events an Appellant who had pleaded guilty to an offence could not bring an appeal under s 113(1), Cap 227, as it specifically exempted convictions following pleas of guilty;

(2) The appeal might have been brought pursuant to s 105, Cap 227, which did not exempt appeals after a guilty plea from its operation. In the scheme of legislation relating to appeals under Part VII of Cap 227, s 105 was the primary method of bringing an appeal, and s 113 was an alternative procedure presumably incorporated as a more convenient and perhaps faster way of allowing convicted persons to appeal. But although s 113 was the most common provision used so far as persons who had been convicted of offences were concerned, it could not be overlooked that it did not apply to persons who had pleaded guilty to an offence so as to allow them to appeal;

(3) However, where the plea of guilty was a nullity there was an exception, and the proviso to s 113(1), which prevented appeals following pleas of guilty, did not apply. There had, in other words, been in law no plea of guilty and s 113(1) continued to operate so as to allow an appeal against conviction: *HKSAR v Au Yeung Boon-fai* [1999] 3 HKC 605;

4) In *R v Wong Wai-leung* [1990] 1 HKC 144, it was indicated that in determining whether a notice of abandonment could be treated as a nullity the test was one of whether or not the abandonment resulted from a deliberate and informed decision, or, in other words, whether the mind of the Appellant went with his act. That was the applicable test as to what rendered a plea a nullity. It covered circumstances such as a plea being entered by fraud on a defendant or by his fundamental mistake. A plea obtained by duress would also result in a defendant's mind not having truly gone with his act. A plea would also not have been entered as the result of a deliberate and informed decision where it was not an offence known to the law, perhaps in circumstances where the charge was defective and did not state any offence or where the admitted facts did not reveal any offence;

(5) The Appellant stated that he pleaded guilty to the offence of unlawful entering and remaining, contrary to s 38(1)(b) Cap 115, because he thought he had lost his two-way permit and also because he thought he would be repatriated to the Mainland soon after sentence. He did not suggest that he pleaded guilty as a result of any force or fraud perpetrated on him or from any mistake as to the nature of the offence charged. He knew he was not guilty of the offence charged and pleaded guilty anyway as a matter of expedience. The plea was a calculated one and the Appellant was well aware of both the true facts of the case and the facts upon which the charge was based. His plea was, therefore, although it might have been wrong, not a nullity;

(6) Although the circumstances of the plea rendered the conviction unsafe and unsatisfactory, such that it should be set aside, that could not be done pursuant to the provisions of s 113(1) Cap 227. The plain words of the sub-section denied the court jurisdiction. In cases of this sort, where there was any doubt as to the court's jurisdiction, the proper course would be to proceed pursuant to s 105, Cap 227. That course, however, in this case, given the time that had elapsed, might be difficult.

Result - Appeal dismissed.

Obiter - Section 113A, Cap 227, which authorised the Chief Executive to refer a case to a judge, provided a safety net for this sort of situation and, failing any other available remedy, seemed to be properly available to bring the matter back before the court.

MA 1229/98 HUI Chun-man

Mr Recorder Wong SC

(30.7.99)

*Lily Wong

#Chan Siu-ming

Guilty plea/Jurisdiction of court to entertain an appeal against conviction considered
承認控罪 - 考慮法庭接受不服定罪上訴的權限

The Appellant, who was represented by the Duty Lawyer Scheme, was convicted of three offences upon his own pleas. He admitted the facts. One of those offences, namely, Charge 3, was one of remaining in Hong Kong without the authority of the Director of Immigration, contrary to s 38(1)(b), Cap 115. For that conviction, he was sentenced to 15 months' imprisonment.

He appealed, out of time, against the conviction on Charge 3. He alleged, *inter alia*, that he landed in Hong Kong lawfully and produced fresh evidence, namely his passport, which was authenticated, and affirmations.

Held:

(1) The jurisdiction of the court to hear appeals from a magistrate was entirely contained in the Magistrates Ordinance, Cap 227. The only avenue open to a party for bringing an appeal from a magistrate was via the use of either s 105 or s 113, Cap 227. S 113(1) provided

> *Any person aggrieved by any conviction …, **who did not plead guilty**, or admit the truth of the information or complaint, may appeal …* (emphasis added)

The court did have jurisdiction to entertain an appeal under s 113, Cap 227, if it were found that the guilty plea tendered was a nullity. A plea of guilty, which was a nullity, did not amount to a plea at all. It was not caught by s 113. The classic example of an unequivocal plea of guilty being a nullity was where the plea was tendered involuntarily: *HKSAR v Au Yeung Boon-fai* [1999] 3 HKC 605. Another example was when an unequivocal plea of guilty was tendered under a mistake or misunderstanding of law. This might come about because of incorrect legal advice having been given to an appellant on the plea or indeed the personal misunderstanding of an appellant who had not had the benefit of legal advice;

(2) The court could entertain an appeal against conviction under s 113, even when an apparently unequivocal plea of guilty had been recorded, if, upon the admitted facts, an appellant could not in law have been convicted of the offence with which he had been charged: *R v Li Tung-hing* [1992] 2 HKC 427;

(3) The question in the present case was whether there was sufficient evidence to justify a finding of any of the above situations and accordingly to hold that the unequivocal plea of guilty was a nullity. It was conceded that the Appellant was the genuine holder of the Chinese passport and that he landed in Hong Kong lawfully. With this additional evidence, the offence under Charge 3 could not be proved. The guilty plea must have been tendered because of a misunderstanding of the law.

Result – Appeal allowed. Conviction for breach of condition of stay substituted.

Bail

CA 249/99

Leong JA

(8.9.99)

*C Ko

#G J X McCoy SC

WONG Wai-man

Bail pending appeal/Questions for court to ask itself
申請保釋等候上訴 - 法庭本身要考慮的問題

The Applicant, who had been sentenced to 2 years' imprisonment, sought bail pending appeal.

Held:

(1) The first question in an application of this nature was whether the Applicant would have served the sentence by the time of the hearing of the appeal. To that the answer was '*no*';

(2) The second question was whether there was any reasonable chance of success on appeal. There was no such chance.

Result – Application dismissed.

Basic Law/BOR

MA 563/98

Power VP Mayo & Stuart-Moore JJA

(23.3.99)

*A A Bruce SC & Anthea Pang

#P Harris & L Lau (1) (2) Absent

[Reserved to Court of Appeal, pursuant to s 118 (1)(d), Cap 227]

(1) NG Kung-sin
(2) LEE Kin-yan

Desecration of national and regional flags/Whether Flag Ordinances consistent with guarantees of freedom of expression in Basic Law/Flag Ordinances not necessary for protection of public order
侮辱國旗和區旗 – 《國旗及國徽條例》和《區旗及區徽條例》有否抵觸《基本法》對發表自由的保證 – 《國旗及國徽條例》和《區旗及區徽條例》無須用來維護公共秩序

On 18 May 1998, the Appellants were each convicted after trial on two summonses.

The first pair of summonses alleged against A1 and A2 in identical terms that they had desecrated the national flag by publicly and wilfully defiling it, contrary to s 7 of the National Flag and National Emblem Ordinance. The second pair of summonses also alleged in identical terms that A1 and A2 had desecrated the regional flag by publicly and wilfully defiling it, contrary to s 7 of the Regional Flag and Regional Emblem Ordinance. Each offence was said to have occurred on 1 January 1998.

At trial, there was no issue as to the facts. There was only one central question calling for the magistrate's decision, namely, whether the two Flag Ordinances were inconsistent with the guarantees of freedom of expression in the Basic Law. He concluded that although the relevant legislation was inconsistent with Article 19 of the ICCPR, it was justified under paragraph 3 of the same Article. On appeal, it was submitted that the charges were null and void as they breached the ICCPR (Article 19) as applied to Hong Kong by Article 39 of the Basic Law.

The Respondent submitted that the restriction on freedom of expression by criminalising the desecration of the National and Regional flags was justified on the ground that it was *necessary* for the protection of public order, as contemplated by Article 19(3)(b) ICCPR.

Held :

(1) The formal enactment of the Flag Ordinances occurred after the Basic Law came into operation. No similar laws had been thought necessary before that time. Clearly, the burden of justifying this apparent limitation on a guaranteed right of freedom of expression lay with the Respondent;

(2) As regards the necessity for such legislation, the magistrate failed to give due weight to the fact that the law already catered for a large variety of situations arising out of abuse of the flag which might lead to charges ranging from those as serious as riot and unlawful assembly to relatively minor offences such as conduct which was likely to cause a breach of the peace. Where the flag was public property, charges of arson, or causing criminal damage or destroying property would also be available depending on the circumstances of the case. Those were examples of a wide range of offences which would cover not only the situations which gave rise to the concern of the magistrate but others as well;

(3) The United States of America was the first country to have a written constitution which guaranteed rights to its citizens. The First Amendment to the United States Constitution guaranteed the right to freedom of expression. That right had twice in recent years been held by the US Supreme Court to include the right to burn the national flag. In addition, none of the leading common law jurisdictions had criminalised the defacing of the national flag;

(4) The enactment of the Flag Ordinances was not necessary for the normal operation of the HKSAR. Nor could the submission that what was '*necessary*' was primarily a matter of political judgment be acceded to. Ultimately it was for the courts to decide what was necessary having given due consideration and respect to the legislature which enacted these provisions;

(5) Whilst it was true to say of most, if not all, nations that great value was placed upon the symbol of the nation in the form of the national flag, s 7 of each Ordinance was inconsistent with Article 19 of the ICCPR and, by the same token, contravened Article 39 of the Basic Law. The magistrate materially misdirected himself when he found that the legislation was '*justified*' as being '*necessary for the protection of public order*' under paragraph 3 of the Article. There was no evidence and no basis for arriving at that conclusion.

Result – Appeal allowed.

[The Court of Appeal certified that points of law of great and general importance were involved in its decision, pursuant to s 32(2) Cap 484: Ed.]

FAMC 8/99

Litton Ching & Bokhary PJJ

(23.6.99)

*Sir Sydney Kentridge QC, Cheng Huan SC & Jason Pow

WONG Yeung-ng v SJ

Contempt of court/Scandalising the court by scurrilous abuse/ Right to free speech not absolute/Civilised community requires protection from conduct aimed at undermining administration of justice/Sentence for grave contempts of court
藐視法庭－以粗鄙辱罵惡意中傷法庭－言論自由的權利並非絕對－文明社會必須防止目的在於破壞司法的行為－嚴重藐視法庭的判刑

The Applicant, editor of the *Oriental Daily News*, was convicted on 23 June 1998 of two contempts of court and sentenced by the High Court to a total 4 months' imprisonment. His appeal against conviction and sentence was dismissed by the Court of Appeal on 9 February 1999.

#Ronny Tong SC & Johannes Chan

On 26 March 1999, the Court of Appeal granted a certificate that a point of law of great and general importance was involved in the case in these terms:

> *In the light that Article 16(2) of the Bill of Rights Ordinance, read together with Article 27 of the Basic Law, require that the freedom of expression shall only be subject to restrictions that are necessary for the maintenance of public order (ordre public), whether the offence of 'scandalising the court' by scurrilous abuse can only survive in Hong Kong if the offence requires proof that the acts complained of constituted a clear, present and imminent danger to the administration of justice.*

At the same time the Court of Appeal declined to certify other questions of law as sought by the Applicant.

The Applicant applied under s 32(3), Cap 484, for a reformulation of the questions of law for certification and leave to take the matter to the Court of Final Appeal. At the same time he sought leave to appeal against the Court of Appeal's dismissal of his sentence of 4 months' imprisonment, on the ground that by such a sentence a substantial and grave injustice had been done.

The charges of which the Applicant stood convicted fell into two types. The first was that he '*sought to threaten, harass and/or intimidate Godfrey JA during 13, 14 and 15 January 1998 (by having him pursued by employees and/or agents and/or others) by reason of a judgment which he had previously delivered, thereby wrongfully interfering with the administration of justice.*' The second charge was that he '*published articles between 11 December 1997 and 13 January 1998 which contained passages of crude and vicious abuse of the judiciary … with little if any reasoned argument and which alleged systematic bias and wilful abuse of power (those allegations being without any justification whatsoever). The articles also contained threats to the judiciary. The articles, considered separately and cumulatively, were calculated to undermine public confidence in the administration of justice in Hong Kong.*'

Charge 2 came first in time, and it related to a campaign of vilification and intimidation aimed at members of the Obscene Articles Tribunal and the judiciary, conducted by the Applicant in the pages of the *Oriental Daily News* over a period of time, which the High Court in sentencing the Applicant described as '*without parallel in modern times*'. The features of the campaign which made it so unique included '*the venom of the language used, the outrageousness of the motives ascribed to the targets and the impact the campaign has on confidence in the ability of the judges to dispense justice conscientiously and impartially*'.

As regards charge 2, the Applicant accepted that the articles were published maliciously, in bad faith, and were '*scurrilous, abusive, shocking and reprehensible*'. The Applicant also accepted that there was a *real risk* of the articles diminishing the authority of the court and impairing public confidence in the administration of justice. In other words, the articles were '*calculated to undermine public confidence in the administration of justice in Hong Kong*', in terms of charge 2. It was submitted, nonetheless, that arguably Article 16(2) of the Hong Kong Bill of Rights and Article 27 of the Basic Law which guaranteed to the Applicant freedom of expression, rendered the conviction for contempt unlawful.

As to charge 1, this related to a campaign to threaten, harass and intimidate Godfrey JA, by having him pursued night and day by employees of the *Oriental Daily News*, following an appeal in the Court of Appeal in which Godfrey JA had given the leading judgment adverse to the Oriental Press Group. The avowed purpose of the campaign was to '*educate*' the judge, but

the real purpose, as the High Court found, was to take revenge for the Court of Appeal's judgment and to punish the judge for his part in it. That was, as the High Court said in sentencing the Applicant, unprecedented in the common law world.

Held :

(1) The constitutional right of free speech as contained in the Basic Law, adopting the norms set out in the ICCPR, was not an absolute right. Every civilised community was entitled to protect itself from malicious conduct aimed at undermining the due administration of justice. It was an important aspect of the preservation of the rule of law. Where the contemnor went beyond reasoned criticism of the judicial system and acted in bad faith, as the Applicant had done in this case, the guarantee of free speech could not protect him from punishment;

(2) There was no prospect of the Court of Final Appeal differing from the conclusion of the Court of Appeal. Despite the Court of Appeal's certification, leave to appeal against conviction would be refused;

(3) As to sentence, having regard to the gravity of the contempts, the Applicant's role as editor and his admitted bad faith, the sentence of 4 months' imprisonment appeared extremely lenient. The notion that a substantial and grave injustice had been done was absurd. Leave to appeal against sentence would be refused.

Result – Application dismissed with costs.

HCCC 427/98

V Bokhary J

(29.7.99)

(1) MOK Tsan-ping
(2) SEE Cheung-shun
(3) CHENG Po

*Ian Lloyd

#R Forrest (1)
W Stirling (2)
J McNamara (3)

Murder/Effect of Basic Law and Bill of Rights on requirement for intent/Definition of mental element of murder as an intention to kill or cause really serious injury consistent with Basic Law and Bill of Rights/Intent of secondary party

謀殺 - 《基本法》及《人權法》對犯罪意圖規定方面的影響 - 把謀殺罪的心理狀態因素定為意圖殺人或導致確實極嚴重的傷害是符合《基本法》和《人權法》的 - 協從一方的意圖

The three accused were jointly charged with one count of murder. The case for the prosecution was that they, acting in pursuit of a joint enterprise, murdered a man by stabbing him to death.

The accused submitted that the Bill of Rights (which came into force on 8 June 1991) and/or the Basic Law (which came into force on 1 July 1997) had changed the common law so that the mental element for murder was no longer an intention either to kill or to cause grievous bodily harm, i.e. really serious injury, but had become instead an intention either to kill or to endanger life. In other words, it was submitted that the alternative to an intention to kill had been raised from an intention to cause really serious injury to an intention to endanger life. Reliance for the submission was placed upon two decisions of the Superme Court of Canada, namely, *Vaillancourt v R* (1988) 47 DLR (4th) 399, and *R v Martineau* (1990) 58 CCC 353, which applied the Canadian Charter of Rights and Freedom.

The provisions upon which the accused relied were article 5 of the Bill of Rights, which provided that '*everyone has the right to liberty and security of person*', article 10, which guaranteed a fair trial, and article 11(1), which provided that '*everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law*'.

In the Basic Law, reliance was placed upon article 28, which provided that '*the freedom of the person of Hong Kong residents shall be inviolable*', and article 87, which provided that accused persons '*shall be presumed innocent until convicted*'.

Held :

(1) If the defence submission was right, it followed that not only had the law of murder been changed but so had the law of manslaughter: either there had been created a new category of manslaughter for which the mental element was an intention to cause really serious injury, or else the mental element for the category known as '*unlawful act*' manslaughter had been expanded to include that intention;

(2) Reliance could not be placed upon the two Canadian authorities. What those cases did was to strike down constructive murder, i.e. murder which did not involve intention to kill or cause really serious injury but was committed, even without any such intention, where death was caused in the course of committing a violent felony or while escaping after having committed such a felony. Constructive murder had long since ceased to be part of the law of Hong Kong;

(3) The law of murder as presently understood did not involve cutting down the presumption of innocence. It did not take a lesser intent or degree of participation to presume a greater intent or degree of participation. What it did was to say that the lesser intent or degree of participation was enough for murder;

(4) The liberty and security of the person were not taken away by a rule that an accused was liable to a mandatory life sentence for unlawfully killing someone even though he did not intend death provided that he intended really serious injury;

(5) Although the accused sought to reinforce their argument by reference to the position of secondary parties, by submitting that it was particularly objectionable that a secondary party to a joint enterprise might be convicted of murder on the basis of foreseeability of death or serious bodily harm even though nothing less than an intention to kill or to cause serious bodily harm would suffice for the conviction of the principal offender, it had to be remembered that, as it was put in *Archbold* 1999, at p.1566, para 19-30:

> *mere foresight is not enough: the secondary party, in order to be guilty, must have foreseen the relevant act of the principal as a possible incident of the common unlawful enterprise and must, with such foresight, have participated in the enterprise: Hui Chi-ming v R [1992] 1 AC 34, PC.*

Lord Steyn had said that a '*precise and sensible solution*' would be '*that killing should be classified as murder if there is an intention to kill or an intention to cause really serious bodily harm coupled with awareness of the risk of death*' : *R v Powell* [1999] 1 AC 1, 15. Questions of reform, however, were the sort on which people who valued the liberty and security of the person, the presumption of innocence, the right to a fair trial, etc., could reasonably hold different views, all of which the Basic Law and the Bill of Rights would accommodate. That was a matter for the legislature;

(6) It was not the duty of a judge to say whether, or how, the definition of the mental element of murder as an intention to kill or cause really serious injury could be improved by law reform. The question to be decided was

simply whether that definition was incompatible with the Bill of Rights and/or the Basic Law. It was not incompatible with either. Neither the Bill of Rights nor the Basic Law had changed the mental element of murder.

Result - In directing the jury, they would be told that the mental element of murder was an intention to kill or cause really serious injury.

Obiter - The conclusion reached in this matter was the same as that of Gall J in *HKSAR v Pun Gandra Chardra* [1999] 2 HKC 579, and of Nguyen J in *HKSAR v Chan Chui-mei* HCCC 378/98.

FACC 4/99

SJ v
(1) NG Kungsiu
(2) LEE Kin-yun

Li CJ
Litton
Ching &
Bokhary PJJ
Mason NPJ

(15.12.99)

*GJX McCoy SC
A A Bruce SC
&
K Chow

#I/P (1)
Audrey Eu SC,
P Y Lo,
Paul Harris &
Lawrence Lau
(2)

Desecration of national and regional flags/Flag Ordinances consistent with Basic Law/Ambit of 'public order, *ordre public*'/Justifiable restriction to right of freedom of expression/ Desecration includes dishonouring
侮辱國旗及區旗 - 《國旗及國徽條例》及《區旗及區徽條例》符合《基本法》 - "public order、*ordre public*"的範疇 - 限制發表自由的權利有充分理據支持 - "侮辱"一詞包含"玷辱"的意思

The Respondents faced two charges of desecration of the national flag and the regional flag, contrary to section 7 of the National Flag Ordinance, and section 7 of the Regional Flag Ordinance. The particulars of each offence were that the Respondents on 1 January 1998 in Hong Kong desecrated the national flag and the regional flag respectively by publicly and wilfully defiling the same.

On 18 May 1998, both Respondents were convicted of the two offences. Each Respondent was bound over to keep the peace on his own recognisance of $2,000, for 12 months for each offence.

The facts showed that during a public procession the Respondents were seen carrying in their hands and waving in the air what appeared to be a defaced national flag and a defaced regional flag. At the end of the procession, they tied those two objects to the railings of the Central Government Offices. The police seized the two objects. Both flags had been extensively defaced. As to the national flag, a circular portion of the centre had been cut out. Black ink had been daubed over the large yellow five-pointed star and the star itself had been punctured. Similar damage appeared on the reverse side. Further, the Chinese character '*shame*' had been written in black ink on the four small stars and on the reverse side, a black cross had been daubed on the lowest of the small stars. As to the regional flag, one section had been torn off obliterating a portion of the bauhinia design. A black cross had been drawn across that design. Three of the remaining four red stars had black crosses daubed over them. The Chinese character '*shame*' was written on the flag in black ink. As was part of a Chinese character which had been rendered illegible by the tear in the flag. Similar damage appeared on the reverse side.

During the procession, the Respondents shouted '*build up a democratic China*'. R2 was reported to have stated to the press that '*the damaging and defiling of the national and regional flags was a way to express the dissatisfaction and resistance to the ruler who was not elected by the people*'.

On 23 March 1999, the Court of Appeal, to which the appeal had been reserved, allowed the appeals.

Both before the magistrate and the Court of Appeal, the only issues were whether section 7 of the National Flag Ordinance and section 7 of the Regional Flag Ordinance contravened the Basic Law. It was contended by the defence at both levels that these provisions were inconsistent with Article 19 of the ICCPR - right to freedom of expression - and accordingly contravened Article 39 of the Basic Law. The Court of Appeal quashed the convictions.

On 20 May 1999, the Appeal Committee granted the Secretary for Justice leave to appeal to the Court of Final Appeal, certifying two points of law of great and general importance, namely: (1) Does s 7 of the National Flag Ordinance contravene the Basic Law? (2) Does s7 of the Regional Flag Ordinance contravene the Basic Law?

In addition, R2 raised a new argument, namely, that there was no evidence of either Respondent having desecrated the flags by publicly defiling them. The evidence was that they carried or waved defaced national and regional flags and, so it was said, it was not an offence to publicly and wilfully display a damaged or defiled flag.

Held :

(1) Flag desecration was a form of non-verbal speech or expression. A person desecrating a national flag as a means of expression would usually be expressing a message of protest. The circumstances surrounding the flag desecration had to be considered to ascertain the message which was sought to be communicated. The Respondents were protesting against the system of government in the Mainland;

(2) The prohibition of desecration of the national and regional flags by the statutory provisions in question was a limited restriction of freedom of expression. It banned one mode of expressing a message, the mode of desecrating the flags. It did not interfere with the person's freedom to express the same message by other modes. It might be that the scrawling of words of praise on the flags as opposed to words of protest would also constitute offences under s 7 of both Ordinances. But a law seeking to protect the dignity of the flag in question as a symbol, in order to be effective, must protect it against desecration generally;

(3) Freedom of expression was not an absolute. The Preamble to the ICCPR recognised that the individual had duties to other individuals and to the community to which he belonged. Article 19 (3) itself recognised that the exercise of the right to freedom of expression carried with it special duties and responsibilities and it might therefore be subject to certain restrictions. But these restrictions should only be such as were provided by law and were necessary (a) for the respect of the rights or reputation of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals. In considering the extent of a restriction, it was well settled that it must be narrowly interpreted: *Ming Pao Newspapers Ltd v AG of Hong Kong* [1996] AC 907. The burden rested on the prosecution to justify any restriction;

(4) The concept of public order (ordre public) was not limited to public order in terms of law and order: *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKLRD 293. The expression used was not merely '*public order*' but '*public order* (*ordre public*)'. The inclusion of the words '*ordre public*' made it clear that the relevant concept was wider than the common law notion of law and order. Both the magistrate and the Court of Appeal were incorrect in having dealt with the concept of public order (ordre public) as limited to public order in terms of law and order. The concept was an imprecise and elusive one, but

included what was necessary for the protection of the general welfare or for the interests of the collectivity as a whole. Examples included: prescription for peace and good order; safety; public health; aesthetic and moral considerations and economic order (consumer protection, etc.). The concept remained a function of time, place and circumstances;

(5) Hong Kong had a new constitutional order. The resumption of the exercise of sovereignty was recited in the Preamble of the Basic Law, as '*fulfilling the long-cherished common aspirations of the Chinese people for the recovery of Hong Kong*'. In those circumstances, the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag were interests which were within the concept of public order (ordre public). The national flag was the unique symbol of the one country, the People's Republic of China, and the regional flag was the unique symbol of the Hong Kong Special Administrative Region as an inalienable part of the PRC under the principle of '*one country, two systems*'. Those legitimate interests formed part of the general welfare and the interests of the collectivity as a whole;

(6) In considering the question of necessity, the court should give due weight to the view of the legislature of the HKSAR that the enactment of the National Flag Ordinance in these terms including section 7 was appropriate for the discharge of the Region's obligation to apply the national law arising from its addition to Annex III by the Standing Committee. Similarly, the court should accord due weight to the view of the HKSAR's legislature that it was appropriate to enact the Regional Flag Ordinance;

(7) In applying the test of necessity, the court must consider whether the restriction on the guaranteed right to freedom of expression was proportionate to the aims sought to be achieved thereby. The aims sought to be achieved were the protection of the national flag as a unique symbol of the Nation and the regional flag as a unique symbol of the HKSAR in accordance with what were unquestionably legitimate societal and community interests in their protection. Having regard to what was only a limited restriction on the right to freedom of expression, the test of necessity was satisfied. The limited restriction was proportionate to the aims sought to be achieved and did not go beyond what was proportionate;

(8) Hong Kong was at the early stage of the new order following resumption of the exercise of sovereignty by the PRC. The implementation of '*one country, two systems*' was a matter of fundamental importance, as was the reinforcement of national unity and territorial integrity. The protection of the national flag and the regional flag from desecration, having regard to their unique symbolism, would play an important part in the attainment of these goals. In these circumstances, there were strong grounds for concluding that the criminalisation of flag desecration was a justifiable restriction on the guaranteed right to the freedom of expression. Accordingly, section 7 of the National Flag Ordinance and section 7 of the Regional Flag Ordinance were necessary for the protection of public order (ordre public). They were justified restrictions on the right to the freedom of expression and were constitutional;

(9) As regards the new point raised by R2, it was devoid of any merit. The offence under s 7 of each Ordinance was the desecration of the flag in question by defiling it. The ordinary meaning of '*defiling*' plainly included dishonouring. By carrying and waving the defaced flags during the public procession and then tying them to some railings at the end of the procession, the Respondents were clearly dishonouring the flags. Those acts clearly amounted to desecration by defiling;

(10) The answers to the certified questions of law, were, therefore, that neither section 7 of the National Flag Ordinance, nor section 7 of the Regional Flag Ordinance, contravened the Basic Law.

Result - SJ's appeal allowed. Convictions and bind over orders restored.

Blackmail

CA 9/99

Nazareth
Stuart-Moore
VPP &
Leong JA

(3.9.99)

*D G Saw SC
&
P Madigan

#Walter Lau

FUNG Cheuk-sang

Blackmail/Nature of menaces considered/Words used to be considered in context
勒索 - 考慮恫嚇的性質 - 要聯繫環境來考慮所用語句

The Applicant was convicted of three offences. The first was one of blackmail, the second was one of theft, and the third was one of criminal intimidation. The particulars of the blackmail charge were that the Applicant, on a day unknown in October 1997, at the roadside of Bute Street, near Nathan Road, Mongkok, Kowloon, Hong Kong, with a view to gain for himself, made an unwarranted demand of $100 from one Leung Kwok-wing with menaces. The sum of $100 was subsequently handed over, and this grounded the second charge of theft.

In relation to the conviction of blackmail, it was submitted on appeal that the words said, as the judge found, by the Applicant, namely, '*if you do not pay, it would be better not to go there to queue up to wait for passengers any more*', did not, and were not, capable of amounting to a threat. The judge found that those words, which were uttered to a taxi-driver at a very popular unofficial taxi pickup point in Bute Street, Kowloon, in the context of attempts to control the route, implied a threat, and that such threat amounted to menaces and the fact of the menaces rendered the demand for money unwarranted.

Held :

(1) It was trite and well established that in considering whether such words amounted to a threat or menace, regard had to be had to the circumstances. The taxi-driver was perfectly entitled to stop or stand for hire at the particular place in question without having to pay any amount whatsoever. He was fully aware of that, as was the Applicant. Any sort of regard to reality in Hong Kong circumstances dictated the same conclusion. The judge could not have reached any conclusion but that there was a threat of interruption which, at the very least, amounted to a menace. There was no suggestion that the taxi-driver was of less than ordinary firmness in unwillingly acceding to the demand. When the words were addressed in the context of the circumstances the conclusion of the judge could not be faulted;

(2) The words of Lord Wright in *Thorne v Motor Trading Association* [1937] AC 797, bore on the situation and submission here. Lord Wright said the word '*menace*' was to be '*liberally construed and not as limited to threats of violence but as including threats of any action detrimental to or unpleasant to the person addressed*'.

Result - Application dismissed.

Bribery/Corruption/ICAC

CA 118/98 NG Siu-chau

Nazareth VP
Mayo &
Stuart-Moore
JJA

(10.3.99)

*J R Reading

#C Y Wong
SC & M Poll

Offering advantage to public servant/Whether apprentice jockey a public servant/Nature of employment considered
向公職人員提供利益 – 見習騎師是否公職人員 – 考慮僱用性質

The Applicant was convicted after trial of seven charges of offering advantages to public servants, contrary to s 4(1)(a) of the Prevention of Bribery Ordinance, and one charge of failing to comply with a notice to furnish information, contrary to s 14(4) of the Ordinance.

On appeal, it was submitted, *inter alia*, that the judge erred in making the finding that the apprentice jockeys, to whom the advantages were allegedly offered, were employees of the Jockey Club when they were not, and that therefore they could not have been '*public servants*' as required by the offence.

Held : (Nazareth VP dissenting)

(1) It was clear that the Jockey Club was closely involved in the activities of the apprentices. It determined the eligibility of potential apprentices and decided whether a trainer should be permitted to act as apprentice master for the apprentice. It provided accommodation for the apprentices and paid 75% of the allowance which was payable to the apprentice. In addition, if the apprentice was fortunate enough or sufficiently skilful to ride a horse which was placed the Jockey Club made the necessary arrangements for the prize money to which he was entitled to be held for him until the conclusion of his apprenticeship. In the *New Shorter Oxford Dictionary* the third meaning given to the word '*employ*' referred to using or retaining the services of a person especially in return for payment;

(2) In *Morgan v DPP* [1970] 3 All ER 1053, an employee of a company was also a trade union official. A sub-contractor of the company was '*blacked*' by the union. Subsequently the employee solicited a bribe from the sub-contractor. He said that if he received an appropriate payment the sub-contractor could be reinstated. The employee was convicted of the offence of corruptly obtaining a payment as an employee of his company notwithstanding his protestations that at the relevant time he had been representing his trade union. It was held that the relevant provisions should be widely construed and that the employee could be the agent of both the company and the trade union. From that it appeared that the fact that the apprentices might owe duties to the trainers as well as the Jockey Club was immaterial. The business of the Jockey Club embraced the activities of trainers as well as generally having the conduct of racing in Hong Kong;

(3) It was possible to be an employee without the necessity of serving under a Service Agreement. A good example of that was a solicitor and client relationship. The client employed the services of a solicitor although usually there was no contract of employment. It was also of significance that the four apprentices who were asked if they were employed by the Jockey Club replied in the affirmative. They all appeared to have been under the impression that they were employed by the Jockey Club, as was the stipendiary steward of the Jockey Club who gave evidence to a similar effect;

(4) When consideration was given to the various functions performed by the Jockey Club, including the control they exercised over trainers and apprentices,

the apprentices could properly be considered as being employees of the Jockey Club and thus coming within the purview of s 4 of the Ordinance. That was consistent with the stated purposes of the Ordinance, namely, '*to make further and better provisions for the prevention of bribery and for purposes necessary thereto or connected therewith*'.

Result - Appeal dismissed, by a majority.

CA 443/98

(1) LEUNG Yat-ming
(2) LEUNG Suk-fong

Nazareth VP
Mayo &
Stuart-Moore
JJA

(30.3.99)

*K Zervos

#Denis Chang SC,
L Lok SC &
Sterling Tsu

Agent using false document with intent to deceive/Ambit of s 9(3) POBO/Hong Kong and English Legislation contrasted/ Subsections in s 9 POBO not part of a whole/*Tweedie* not relevant aid to interpretation
代理人使用虛假文件意圖欺騙 – 《防止賄賂條例》第 9(3)條的範圍 – 香港與英國法例對比 – 《防止賄賂條例》第 9 條下的各款並非整體中的一部分 – *Tweedie* 一案不適用於釋義

The Applicants were husband and wife. A2 the wife was convicted of two offences contrary to s 9(3) of the Prevention of Bribery Ordinance, Cap 201, and A1 was convicted of one offence under that section.

All three charges were framed in a similar manner save for the details as to who was charged, the date of the alleged offence and the particulars of the institution concerned. The first charge read:

Statement of offence

'*Agent using false document with intent to deceive her principal, contrary to section 9(3) of the Prevention of Bribery Ordinance, Cap 201.*

Particulars of offence

Leung Suk-fong, on or about the 12th day of April 1986, in Hong Kong, being an agent of the Chinese University of Hong Kong, namely, a Lecturer of the said Chinese University of Hong Kong, with intent to deceive her principal, used a document, namely, the Application for Private Tenancy Allowance.

(a) in respect of which the said Chinese University of Hong Kong was interested;

(b) and which contained a statement which was false in a material particular, namely that the leased accommodation was not owned by herself, her spouse and/or a relation of either herself or her spouse and neither she, her spouse nor any of her spouse's relations had a financial interest in it; and

(c) which to her knowledge was intended to mislead the said Chinese University of Hong Kong.'

The evidence showed that at the relevant time, A1 was a lecturer at the University of Hong Kong and A2 was a lecturer at the Chinese University of Hong Kong.

The two Universities offered staff of a certain rank a Private Tenancy Allowance (PTA) which was a financial contribution paid monthly to the employee towards the payment of rent for leased accommodation. Entitlement to the allowance was based on certain conditions. In particular, an applicant had to declare that the proposed leased accommodation was not owned by the employee, his/her spouse and/or a relation of either himself/herself or his/her spouse and that neither the employee his/her spouse nor any of his/her or his/her spouse's relations had a financial interest in it. "*Relations*" included parents, brothers, sisters and their spouses and children and their spouses.

In February 1986 a shelf company, Marble Shine Limited, was purchased by A1 who owned and controlled it through nominee shareholders and nominee directors provided by Michael Secretarial Services which also provided secretarial services to the company. In March 1986 Marble Shine purchased a flat at Scenery Garden, Fo Tan, Shatin, which was later sold in October 1990. In November 1990 Marble Shine purchased a flat in Savanna Garden, Tai Po. A1 and A2 were the authorised signatories of the company's bank account and guarantors of the mortgage loan that had been secured over the Savanna Garden property.

A2 applied for PTA in relation to the Scenery Garden property on 12 April 1986 (Charge 1) and in relation to the Savanna Garden property on 6 November 1990 (Charge 2). A2 submitted in each instance a lease agreement signed by Marble Shine and A2 and subsequently rental receipts for reimbursements. She received PTA totalling $588,600 in relation to the Scenery Garden property and $669,400 in relation to the Savanna Garden property. The PTA for the Savanna Garden property ceased when she joined the Hospital Authority and was therefore no longer eligible for it.

A1 applied for PTA in relation to the Savanna Garden property on 21 June 1993 (Charge 3). A1 submitted a lease agreement signed by Marble Shine and A1 and subsequently rental receipts for reimbursements. He received PTA totalling $286,370 in relation to the Savanna Garden property.

The Judge found there was an irresistible inference that Marble Shine was bought by A1 as a "*vehicle to buy and rent these properties to himself and his wife*". She was satisfied for all the reasons she gave that she was entitled to lift the corporate veil of Marble Shine. Having done so the Judge accepted that there was sufficient evidence from which she was satisfied that A1 had a financial interest in the properties owned by the company and was aware of that fact. Also A2 knew of A1's interest in the properties. The Judge also accepted that both Applicants had the necessary intention to deceive their principals. On this basis the Judge convicted the Applicants of their respective charges.

On appeal, it was submitted, *inter alia*, that the judge erred in ruling that s 9(3) of the POBO covered the applications for PTA which were internal documents prepared by the Applicants, the employees, affecting the two universities, the employers, but not involving dealings with any third party, in that the section only covered situations where the agents had dealings with a third party.

Section 9 of the Ordinance provided:

9. Corrupt transactions with agents

(1) Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his -

(a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or

(b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business,

shall be guilty of an offence.

> *(2) Any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's -*
>
> *(a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or*
>
> *(b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business,*
>
> *shall be guilty of an offence.*
>
> *(3) Any agent who, with intent to deceive his principal, uses any receipt, account or other document -*
>
> *(a) in respect of which the principal is interested; and*
>
> *(b) which contains any statement which is false or erroneous or defective in any material particular; and*
>
> *(c) which to his knowledge is intended to mislead the principal,*
>
> *shall be guilty of an offence.*

For the purposes of s 9 an agent was defined as including an employee.

The Applicants submitted that it was clear from *R v Tweedie* [1984] 1 QB 729, that where reference was made in the Prevention of Corruption Act 1906 to the dishonest conduct of an employee with a third party affecting the employer, documents must pass *inter partes*. They went on to argue that as the applications for the rent allowances were entirely internal documents an offence could not have been committed under s 9(3) of the Ordinance.

The Applicants accepted that s 9(3) was not couched in the same form as the Prevention of Corruption Act 1906. In that Act the equivalent provision was introduced by the words '*If any person knowingly gives to any agent, or …*'. Those words were included in the Prevention of Corruption Ordinance, Cap 215, the predecessor of the POBO. It was submitted that the deletion of those words was immaterial, and that *Tweedie* was relevant for three reasons:

(1) The context remained the same;

(2) The references to '*receipts*' and '*accounts*' were similar, i.e. would appear to contemplate the existence of the third party;

(3) The overall mischief of extending the subsection unduly was equally applicable.

The Applicants contended that if s 9(3) could apply to internal documents there would be far reaching implications. In effect, whenever an employee attempted to mislead his employer by making a false statement in any of the company's documents in order to deceive the employer he was guilty of an offence under the Ordinance. That type of deception might be totally removed from a situation involving any bribery or corruption. The legislature must have contemplated a tripartite relationship and this of necessity involved a transaction with a third party.

Held :

(1) The relevant parts of the 1906 Act were as follows:

> *(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or*
>
> *If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or*
>
> *If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;*
>
> *he shall be guilty of a misdemeanour …*

When that was compared with s 9(1), (2) and (3) of the POBO, it was immediately apparent that there were two significant differences in the legislation. The first was that the words which were underlined were omitted from s 9(3) of the POBO. Although those words were included in s 4(3) of the Prevention of Corruption Ordinance, their ommission from the POBO would appear to have been deliberate and suggested that it was the intention of the legislature to provide for offences even in the absence of the *inter partes* relationship referred to in *Tweedie*. The second difference was even more significant and concerned the layout of the section. The POBO, in stark contrast to the 1906 Act, provided for separate offences for each of the three subsections. All the various possibilities were provided for and it was only after the equivalent provisions of s 9(3) were dealt with that the words '*he shall be guilty of a misdemeanour*' appeared. That was important. Although the Applicant placed great emphasis upon the necessity of construing s 9(3) in its proper context, and reading the subsection in conjunction with s 9(1) and (2) which appeared to envisage a tripartite *inter partes* relationship, each of the three subsections were separate and independent, and did not form part of a whole. The words and meaning of s 9(3) were clear and unambiguous, and there could be no warrant for reading into the section a requirement that there must be a tripartite relationship subsisting, and that the absence of *inter partes* documents on the facts of this case was fatal;

(2) The judgment in *Tweedie* had no application to s 9(3) of the POBO.

Result - Appeal dismissed.

FACC 3/99

Li CJ
Litton
Ching PJJ
Nazareth &
Hoffmann
NPJJ

(14.12.99)

*Michael Thomas SC, John Reading SC & Joseph To

#Gerard McCoy SC, Raymond Pierce & Vandana Rajwani

SJ v
LUI Kin-hong, Jerry

Conspiracy to accept advantages/Consideration of ss 22, 22A and 22B, Cap 8/Approach to admissibility of statements in documents/Effect of computer print-outs
串謀接受利益 - 考慮第 8 章第 22、22A 及 22B 條 - 有關把文件中的陳述事項接納為證據的方針 - 電腦印製的文件的效力

The Appellant was charged with conspiring with four named persons and other persons unknown to accept advantages in the form of fees and loans as a reward for ensuring that the companies (BAT) by whom he was employed supplied large quantities of cigarettes to companies (GIL and Pasto) controlled by other members of the conspiracy. It was alleged that the Appellant, in return for his services, received, *inter alia*, payments totalling HK$23 million from GIL. The defence was that the payments had nothing to do with the sale of cigarettes by BAT to GIL. They were private payments by Chen (a co-conspirator), for whom he had acted as a consultant in connection with the sale of Japanese cigarettes to Taiwan. In order to rebut the defence, the prosecution wanted to rely upon certain inferences which they said could be drawn from documents seized by the ICAC. In essence, the documents were said to confirm that Chen's name had been used as an alias by GIL and that the account out of which the payments to the Appellant had been made was used for the trade in BAT cigarettes and had nothing to do with Pasto's trade in Japanese cigarettes, let alone any such private trade by Chen. The defence objected to the admissibility of the documents on the ground that the conditions in s 22(1) of the Evidence Ordinance, Chapter 8 were not satisfied. The prosecution invited the judge to infer from the nature of the documents themselves that they were records compiled by persons acting in the course of their employment and that, so far as they stated any facts, the person who supplied the information about those facts could reasonably be supposed to have had personal knowledge of those facts. The defence contended that the judge was not entitled to rely upon the form and contents of the documents for the purpose of deciding whether the requirements of s 22(1) had been satisfied. The judge ruled that the court was entitled to consider the documents in deciding upon their admissibility and the conditions of s 22(1) had been satisfied. The Appellant was convicted.

The Appellant appealed to the Court of Appeal which allowed the appeal on the ground that the admission of those documents was a material irregularity. The Secretary for Justice appealed to the Court of Final Appeal. The following questions were certified:

> *(1) In determining the admissibility of statements contained in documents, tendered as prima facie evidence of the facts stated therein, in accordance with s 22 of the Evidence Ordinance, is the court entitled to draw inferences from the surrounding circumstances and the documents themselves?*
>
> *(2) Where statements contained in documents produced by a computer, which have been adopted as part of the business records of a company, are tendered as prima facie evidence of the facts stated therein, is the tenderer required to comply with the provisions of s 22 or s 22A of the Evidence Ordinance?*

Held :

(1) S 22 in no way restricted the evidence upon which the prosecution might rely to satisfy the judge that the conditions had been satisfied. The only limits

were those imposed by the common law. And the only relevant common law rule in this case was the rule against hearsay, which prevented a statement in the document being used as evidence that it was true. On the other hand, there was nothing to prevent the document itself, or any other document, from being relied upon for any evidential purpose which did not involve the assumption that a statement which it contained was true. The legislature was intending s 22B(2) to apply in the same way as the English legislation and used the words '*is admitted*' to mean '*is the subject of an application to be admitted*'. (*R v Foxley* [1995] 2 Cr App R 523 considered.) S 22B(2) did not prohibit the court from doing anything it would otherwise be able to do. The drawing of non-hearsay inferences from the form and contents of the document was something permissible at common law. S 22B(2) was otiose. The answer to the first certified question was '*yes*';

(2) The computer print-outs did not comply with s 22A. However, s 22A(11) said that nothing in the section was to affect the admissibility of a document produced by a computer where it was tendered '*otherwise than for the purpose of proving a fact stated in it*'. Since the computer print-outs were not being used for the purpose of proving any fact which they contained, s 22A did not affect their admissibility.

Result - Appeal allowed. Case remitted to the Court of Appeal to hear the remaining grounds of appeal.

CA 628/98

Stuart-Moore VP
Keith JA &
Pang J

(15.11.99)

*J R Reading SC & K P Zervos

#G Plowman SC
(1)
M Lunn SC
(2)
A Macrae SC
(3)
P Dykes SC &
Philip Wong
(4) & (5)

(1) LAW Hay-chung
(2) LAW Hay-sing
(3) LAM Ting-chung
(4) CHU Chi-wah
(5) KWAI Chun-wang

Conspiracy to offer advantages/Conspiracy to accept advantages/Corroboration of accomplice evidence/Acts and declarations made in furtherance of conspiracies
串謀提供利益 - 串謀接受利益 - 從犯證據的佐證問題 - 為了促成串謀之事而作出的作為和聲明

The offences concerned the involvement of the Applicants in one or more agreements with others whereby money was sought from and paid by a candidate for the 1997 examination for promotion to sergeant in the Hong Kong Police Force. The allegation was that money would exchange hands for the purpose of providing the candidate who was prepared to pay with improper assistance in order to secure his promotion. In effect, the candidate was provided with at least some of the questions it was likely he would be asked, and then told how to answer them.

A1, A2, A3 and A4 were convicted in the District Court of conspiracy to offer advantages relating to the candidature of A4 (charge 1). The first three Applicants and A5 were convicted of the same offence relating to the candidature of A5 (charge 2). A1 and A2 were convicted of conspiracy to accept advantages (charge 3). A1 and A2 also faced two others similar charges (charges 4 and 5) but were acquitted.

One of the grounds of appeal was that the judge erred by allowing the accomplices PW2 and PW6 to corroborate the evidence of each other. It was submitted that the judge had made it plain by his acquittal of A1 and A2 on charges 4 and 5 that he was not prepared either to convict unless there was '*independent supporting evidence*' or to rely on PW6's word where it stood by itself.

Another ground was that there was insufficient direct or inferential evidence to show that the Applicants were parties to the conspiracies and that the post-arrest activities, e.g., a meeting of A1, A2 and PW6 at Man Wan Pier, could never have amounted to '*acts or declarations made in furtherance of the conspiratorial arrangement*'.

Held :

(1) S 60 of the Criminal Procedure Ordinance, Chapter 221, abolished the requirement that a judge had to warn himself about convicting an accused on the uncorroborated evidence of a person merely because that person was an alleged accomplice of the accused. Attempts to re-impose the straitjacket of the old corroboration rule were strongly to be deprecated. Where the witness had been shown to be unreliable, the judge might consider it necessary to urge caution. In a more extreme case, if the witness was shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning might be thought appropriate and the judge might suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. But it was clear that to carry on giving '*discretionary*' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the Ordinance: *R v Thirlwell and Pang* CA 332/96 and *R v Chu Ip-pui* [1997] HKLRD 549 considered. It was abundantly plain that the judge was referring to his desire to find some other evidence '*wherever possible*' which gave circumstantial support from a different and independent source to the accomplice for whose testimony support was being sought. The judge had every reason to be on his guard. The accomplices had engaged in corruption of a grave kind and there were several other flaws to the characters of PW2 and PW6 on which they were justifiably attacked as to their credit. The judge had taken full cognisance of these matters and, in his discretion, he had fairly, and even wisely perhaps, decided that, wherever possible, it would be prudent to look for other supporting evidence before he could feel satisfied of guilt to the required standard. The judge was perhaps going further than he need to have done when, having found that the accomplices had all given credible evidence, he found it desirable to look for supporting evidence. It was not so much a disbelief of PW6's testimony as a general lack of other evidence where that might have been expected to be found which caused the judge to find that the high standard of proof required before a conviction on charges 4 and 5 could be entered had been attained;

(2) The judge did not confuse evidence about post-arrest activities with evidence that went to the acts and declarations in furtherance of those conspiracies. The evidence was only admissible against A1 and A2 to show knowledge of them and participation in them. The evidence against the Applicants was overwhelming.

Result - Applications dismissed.

C & E

MA 530/99 CHAN Ming-kuen

W Wong DJ

(5.8.99)

*Albert Wong

#Gekko Lan

Attempt to export unmanifested cargo/Personal property not cargo/Whether telephone set personal property reasonably required for personal use of crew or passenger

企圖輸出未列艙單貨物 - 屬私人物品而非貨物 - 電話機是否屬於工作人員或乘客為自用而合理需要的私人物品

The Appellant was convicted after trial of an offence of attempting to export unmanifested cargo, contrary to s 18(1)(b) of the Import and Export Ordinance, Cap 60.

The facts were not disputed. The Appellant was the driver of a lorry. He had a set of cordless phones with three handsets which he did not record in the manifest. He testified that the telephone set was bought on his request by his business partner and was to be installed in the company for the use of the company staff, including himself.

'*Cargo*' was defined in s 2 as any article which was imported or exported other than those items set out in sub-paras (a) to (f).

Sub-para (c) stated '*items of personal property reasonably required for the personal use of the crew or passengers of such vessel, aircraft or vehicle*.'

The phrase '*of the crew or passengers of such vehicle*' described the class of persons to be included in the definition section, but did not qualify the use of the items.

The only issue was whether that telephone set was personal property reasonably required for the personal use of the crew or passenger.

The magistrate made the finding that '*the said cordless telephone was to be installed in the Appellant's company staff quarters in Mainland China for the use of the occupants thereat. The installation of the said cordless telephone is for the use and convenience of all the occupants, namely the company's employees. I find that the cordless telephone was not reasonably required for the personal use of the Appellant whether in the capacity of the crew of the said vehicle or not*'. On appeal

Held :

(1) It seemed that the magistrate had adopted a very narrow meaning to the words '*personal use*' and construed that to mean the telephone set should only be used by the Appellant to the exclusion of other people. To adopt such a narrow construction could lead to absurdity. If, for instance, the Appellant were to take a television set and place it in the staff quarters so that he could use it while in China, other staff could also use it or share it with him. It could not be said that he did not have personal use. Again, if the Appellant were to have a clock and place it on the wall of the staff quarters so that he could read the time, other staff could use the clock to read the time as well. That did not mean that the Appellant did not have personal use of the clock. Such a narrow construction could not have been the intention of the legislature;

(2) Any personal property of the crew or passenger of any vessel, aircraft or vehicle, so long as it was not for disposal but retained for personal use whether to the exclusion of others or to be shared with others, came under sub-para (c).

Result - Appeal allowed.

Character

CA 451/98 LIU Ying-fai

Nazareth VP
Mayo &
Rogers JJA

(23.4.99)

*Cheung
Wai-sun

#Eric Kwok

Good character/District judge not directing himself upon clear record/Judge aware of good character/No requirement for detailed explanations of thought processes
良好品格 – 區域法院法官沒有提醒自己被告沒有犯罪記錄 – 法官已留意到被告品格良好 – 沒有規定須詳細解釋思考過程

The Applicant was convicted after trial in the District Court of two offences of evasion of liability by deception, contrary to s 18B(1)(b) Cap 210.

The sole ground of appeal was that the convictions were unsafe and unsatisfactory in that the judge had failed to direct himself concerning the clear record of the Applicant in his determination of the guilt or innocence of the Applicant.

The Applicant placed particular emphasis upon the fact that this was a case involving dishonesty where the crucial issue was the Applicant's character. Reliance was placed upon *R v Chan Wu-nam* [1994] 2 HKCLR 56.

Held :

(1) In *Chan Wu-nam* it was pointed out that a number of factors had made it necessary for the trial judge to evaluate and set out the effect of the good character of the accused upon his mind. Those factors turned upon the vital importance of credibility to the defence and the reliance placed upon it in the light of the point made that the accused might have been acting as an innocent dupe. That judgment made clear, however, that it was not necessary for the judge sitting alone to set out all the obvious matters;

(2) The indication that the judge might have overlooked the good character of the accused might be express or implied: *R v Fok Tin-yau* [1995] 1 HKCLR 351. Although the judge did not make reference to a *Berrada* direction in his Reasons for Verdict, it was manifest that he was mindful of the necessity to consider carefully whether the Applicant had acted dishonestly. It was also clear that he was aware of the Applicant's previous good character as he made reference to this when sentencing, and gave him three months credit for it. Although the clear record would have been mentioned as part of the mitigation, it had been said repeatedly that there was no requirement for a judge to give detailed explanations concerning his thought processes and the fact that he had taken cognisance of basic and fundamental principles of law.

Result - Application dismissed. [On 5 May 1999, the court declined to certify that a point of law of great and general importance was involved in its judgment: Ed]

CA 451/98 LIU Ying-fai

Nazareth VP
Mayo &
Rogers JJA

(5.5.99)

*Cheung Wai-
sun

Whether single judge should give and be seen to have given himself character direction in case involving dishonesty/No point of law of great and general importance involved for purposes of certification
由一名法官獨自審理涉及不誠實行為案件時，法官是否應就被告的品格提醒自己，並顯示他曾這樣做 – 沒有涉及重大而廣泛的重要性的法律論點須予證明

The court was asked to certify the following point of law as being of great and general importance:

#Eric Kwok

> *' Whether a judge sitting alone should give and be seen to have given himself a good character direction in the circumstances of this case where dishonesty is one of the elements of the offence charged.'*

Held :

The question raised was not of great and general importance. Each and every case was dependent upon its particular facts and it was not desirable to attempt to lay down any hard and fast rule.

Result – Application dismissed.

[The judgment was digested in the CAB for May, 1999: Ed.]

CA 575/98 (1) AU Wa-po
Chan CJHC (2) LO Chung-sang, Sunny
Wong & Keith JJA

(31.8.99)

*Harry Macleod

#J McNamara (1)
K B Egan (2)

Direction on good character/Court considering credibility of witness or accused/Nature of exercise commented upon
就良好品格所作的指引 - 法官考慮證人或被告的可信程度 - 對評估證據的性質作出評論

The two Applicants were convicted after trial of a joint charge of false accounting, contrary to s 19(1)(b) of the Theft Ordinance, Cap 210. A2 was also convicted of a second charge of false accounting, contrary to s 19 (1)(a), Cap 210. A1 was sentenced to 3½ years' imprisonment on the first charge, and A2 was sentenced to 9 months' imprisonment on each of the two charges, both sentences to run consecutively, making a total of 18 months. A2 applied for leave to appeal against conviction, while A1 sought leave to appeal against sentence. (q.v.)

A2 submitted, *inter alia*, that the judge had given the wrong direction with regard to his previous good character. In the Reasons for Verdict the judge said:

> *I was informed that D2 had a clear record. I reminded myself that D2's good character helps him in two ways. First it is to be taken into account in his favour when I assess what weight to give to what he had said in the witness-box. Second, his good character would make it more unlikely than otherwise that he would commit the crime alleged.*

It was submitted that what the judge said in the first part of that passage confused weight with credibility. It was argued, in reliance upon *Vye* [1993] 1 WLR 471, *Berrada* (1990) 91 Cr App R 131 and *Sweet-Escott* (1971) 55 Cr App R 316, that the judge had mistakenly thought that an accused's previous good character would be relevant to the weight to be attached to his evidence when according to previous English authorities, that went to the credibility of the accused when he gave evidence in court.

Held :

(1) The judge's handling of this issue followed almost verbatim that said by Bokhary JA in *R v Lee Kam-yuen* [1995] 1 HKCLR 264, 266. The issue of good character and how a judge should direct himself or a jury on this issue was considered by the Court of Final Appeal in *Tang Siu-man v HKSAR* [1998] 1 HKLRD 350. Litton PJ, with whom the majority of the other judges agreed, said at p 356:

> *The Vye principles are as follows (see Aziz at 51-D): '(1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements. (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements. (3) Where defendant A of good character is jointly tried with defendant B of bad character, (1) and (2) still apply.' A direction in accordance with para. (1) above is the 'credibility' direction, and that in accordance with para. (2) is the 'propensity' direction; and where appropriate these directions would generally be along the following lines (see the judgment of the Court of Appeal in R v Lee Kam-yuen).*

(2) It could be seen that the Court of Final Appeal approved the direction which was formulated in *R v Lee Kam-yuen*. Even if this direction were different from what the English authorities said, the trial judge was bound to follow *R v Lee Kam-yuen* and *Tang Siu-man v HKSAR*. But they were not different. When the court was considering the credibility of a particular witness or the accused, it was in effect trying to assess whether to believe or disbelieve his evidence, either in whole or in part. That was another way of saying that the court was considering whether to give any weight to the evidence given by the witness or accused and if so how much weight was to be given. This exercise was nothing other than an assessment or evaluation of the evidence of the witness or accused. Whether this exercise was described as relating to the weight of the evidence or the credibility of the witness or accused amounted to the same thing. The relevant direction was merely suggesting to the court or jury how to make use of the evidence of the witness or accused. As Litton PJ in the *Tang Siu-man* case said at p 357 J:

> *[The Vye directions] are not directions of law which a jury is bound to follow… However entrenched these rules might be… they can amount to nothing more than an indication of the way the jury might properly make use of the evidence.*

(3) The judge did not err by following a direction given by the Court of Appeal which was approved by the Court of Finial Appeal.

Result – Application dismissed.

Charges/Indictment/Summons/Amendments/Joinder/Severance

CA 627/99

Chan CJHC
Wong JA &
Yeung J

(21.10.99)

*Cheung
Wai-sun &
V Chan

#WONG
Po-wing

KWOK
Kau-kan

Indecent assault/Evidence of multiple acts/Drafting of charge/ Corroboration/Comments on ability of single judge to ignore effects of prejudicial material
猥褻侵犯 - 涉及多項行為的證據 - 擬定控罪 - 佐證 - 就法官單獨審理案件時是否有能力不理會有不利影響的資料一事作出評論

The Appellant was convicted after trial in the District Court of five charges of indecent assault. The victim was a 12 year old girl. The prosecution's case was that during the summer vacation in July, 1997, on a day unknown, shortly after 6:00 p.m., the Appellant rang up the victim and asked her to come out. When they met, the Appellant led her to a staircase and touched her breasts over her clothes. After that, the Appellant gave her $50. About two to three days later, the indecent assault was repeated. Those two incidents formed the first two charges. The incidents in respect of the 3rd and 4th charges happened between November, 1997 and January, 1998 in a similar manner. On 30th March, 1998, the Appellant committed an indecent assault again. It was witnessed by a resident and a police officer. That was the subject matter of the 5th charge.

Each of the first four charges charged the Appellant with one act of indecent assault during a period of time. The fifth charge alleged that the offence was committed on 30th March, 1998. The first charge read, '*…. on a day unknown between the 1st day of July and the 31st day of August, 1997 ….*' The second charge read, '*…. on a day unknown between the 1st day of July and the 31st day of August, 1997, being an occasion other than the one set out in the first charge ….*' The third and the fourth charges were similarly worded.

On appeal, it was submitted, first, that the trial judge was wrong to allow the prosecution to proceed, with a view to prove the commission of the offence in relation to each of the counts, by adducing evidence of multiple acts during the respective specified periods. It was said that the victim's evidence suggested that the same act of indecent assault took place on a number of occasions and that she was unable or unwilling to give specific evidence of the two occasions mentioned in the 1st and 2nd charges. Similarly, in respect of the 3rd and 4th charges, the victim was not in a position to give specific evidence of the two occasions referred to in those charges: *Chim Hon-man v HKSAR* [1999] 1 HKLRD 764. Second, it was submitted that nowhere in the Reasons for Verdict did the trial judge make any mention of the danger of convicting upon the uncorroborated evidence of the victim.

Held :

(1) If the principle in *Chim Hon-man* was strictly applied, it would amount to a charter for sexual offenders and might even encourage multiple offences. There had to be a fair balance between the rights of an accused and the interest of the community in bringing offenders to justice;

(2) The problems facing the prosecution could be avoided in a number of ways: (a) an appropriate formulation of the charge; (b) the giving of particulars which sufficiently identified the particular act charged in a way that would distinguish it from any other acts of which the prosecution intended to lead evidence; and (c) by election to proceed on a particular act alone;

(3) A professional judge was capable of handling evidence of multiple acts and ignoring any prejudicial effect which it might have. He was able to focus his mind on the evidence which was relevant to the charge before him. There

was also no question of a risk of lack of unanimity in a verdict in the case of a trial by a single judge. A professional judge would be able to put evidence of multiple acts aside when considering the guilt or innocence of the accused. In the case of a jury trial, the judge might, depending on the circumstances of the case, have to direct the jury in his summing-up to ignore evidence of acts other than those particularized in the counts;

(4) In respect of the 3rd and 4th charges, the evidence led from the victim referred to more than two incidents during the period between December, 1997 and January, 1998. There was nothing in the evidence to differentiate between the 3rd incident and the 4th incident and between those two incidents and the other incidents. The Appellant might have been unfairly embarrassed or prejudiced in respect of those two charges;

(5) The absence in the Reasons for Verdict of any reference to the usual corroborative warning was not fatal. A professional judge was expected to have applied the correct law and procedure, unless it was clearly shown that he had not. The important thing was whether he had indeed exercised caution in approaching the uncorroborated evidence of the victim. Even though the trial judge had not expressly mentioned that she had given herself the usual warning, she did exercise great care when considering the victim's evidence. She had indeed exercised extra caution before reaching her verdict. In respect of the 5th charge, if the evidence of the police officer was believed, there was corroboration.

Result - Appeals on 1st, 2nd and 5th charges dismissed. Appeals on 3rd and 4th charges allowed.

CA 254/99

Stuart-Moore VP Wong JA & Woo J

(27.10.99)

*Cheung Wai-sun

#C Grossman SC & E Kwok

ZHENG Wan-tai

Handling stolen goods and importing unmanifested cargo/ Severence of charges/Application of doctrine of recent possession to '*assisting*' in '*2nd limb*' handling
處理贓物和輸入未列艙單貨物 - 把不同控罪分開審理 - 新近管有原則適用於處理贓物控罪"*第二環節*"所指的"*協助*"罪行

The Applicant was convicted of handling stolen goods and importing an unmanifested cargo. The first charge alleged that he, on or about 16 October 1997, dishonestly undertook or assisted in the retention, removal, disposal or realization of 136 motorcycles belonging to owners in Taiwan, by or for the benefit of another or dishonestly arranged so to do, knowing or believing the same to be stolen goods, contrary to s 24(1) and (2) of the Theft Ordinance, Cap 210. The second charge alleged that on the same day, he had imported an unmanifested cargo of 136 motorcycles, contrary to s 18(1)(a) of the Import and Export Ordinance, Cap 60. The Applicant elected not to give evidence but called two witnesses.

The first ground of appeal was that the judge failed to order severence of two charges. The basis for this submission was that the Applicant was prejudiced in his defence by effectively having been deprived, by not testifying on the first charge, of any chance of success in his defence on the second charge. This was because the second charge was an offence of strict liability and he would be hampered in his defence under s 18(2) if he did not give evidence.

The second ground of appeal was that the judge erred in applying the doctrine of recent possession when it was alleged that the Applicant handled for another person's benefit. It was contended that the doctrine of recent possession did not apply to second limb handling, i.e., assisting in one way or another.

Held :

(1) The two offences were properly joined and closely linked. The judge was fully aware of his discretionary powers and properly and sensibly exercised his discretion in refusing to sever the charges;

(2) There was no reason in logic or in justice why it should be permissible to draw the inference where the defendant had received recently stolen goods into his possession, but impermissible to draw it when he was merely assisting somebody else to deal with such goods. The distinction between the two types of handling lay in the relationship between the defendant and the goods. In each his state of mind was the same, and it was in relation to his state of mind that the jury might think it right to draw the inference. *R v Ball and Winning* (1983) 77 Cr App R 131 applied.

Result – Application dismissed.

Conspiracy

CA 402/98

Power &
Mortimer VPP
Stuart-Moore
JA

(8.12.98)

*M Lunn SC
&
K Zervos

#J Griffiths SC
Richard Wong
&
Richard Leung

CHIM Pui-chung

Conspiring with '*persons unknown*'/Whether conspiracy established/Extent of duty to particularise co-conspirators/Comments on directions to be given upon defence raised
與「*身分不詳的人*」串謀 - 串謀罪是否成立 - 說明共同串謀者的責任限度 - 對法官就辯方所提出的抗辯給予陪審團指引作出評論

The Applicant was convicted after trial of the offence of conspiring with other persons unknown to make false instruments with the intention that the documents be used to induce others to accept them as genuine.

On appeal, it was submitted, *inter alia*, that the trial judge erred in leaving it open to the jury to convict on the basis that the Applicant had conspired with '*other persons unknown*'. The thrust of the submission was directed at there being no evidence at any stage, and in particular when it was submitted there was no case to answer, that there was any other person with whom the Applicant could have conspired apart from a Nelson Chan; if the conspiracy failed against Nelson Chan, it failed against them both. Although there were '*mechanics*' who may have physically carried out the work involved in typing and signing the false instruments of transfer, there was nothing to suggest that what was done was part of any criminal conspiracy, in the sense that there was any evidence that the '*mechanics*' had the necessary dual intent required to make what they were doing the forgery of documents.

In reply, the Respondent submitted that while evidence existed of a conspiracy between the Applicant and persons unknown, there was nothing at the end of the prosecution case which enabled the prosecution to identify those persons with any confidence. It was said that the position was more or less exactly that which was conveniently set out in the 1998 edition of *Archbold* at paragraphs 33-42 :-

> *Where the evidence discloses that the accused conspired with other persons who are not before the court, this should be averred in the indictment. Their names should be inserted, unless they cannot be identified, when it is sufficient to describe*

them as 'persons unknown'. Sometimes, although the Crown contends that the evidence discloses the conspiracy to have been with persons not before the court, the evidence may be unclear as to which identifiable persons were involved. In such circumstances, there can be no objection either to 'other persons unknown', or to 'other persons'. However, where during the course of the trial the uncertainty is resolved by evidence which is capable of founding the assertion that an identifiable person not before the court was a conspirator with the accused, then the indictment should be amended accordingly.

Held :

On any view there was evidence fit for the jury to consider at the end of the prosecution case of a conspiracy between the Applicant, with or without Nelson Chan, and '*other persons unknown*'. By the time the Applicant finished giving evidence, the existence of others involved in a conspiracy to forge documents was abundantly clear and there was ample evidence from which the jury could irresistibly conclude that the Applicant was a party to it even though no evidence of substance had been produced to show who the others were.

Result - Application dismissed.

Per cur - Whereas the judge must leave each defence raised to the jury so that they consider it, this did not involve the obligation to remind the jury of each facet or detail of the defence. The judge's duty was to direct the jury to fully consider the defence raised.

CA 628/98

Stuart-Moore VP
Keith JA &
Pang J

(15.11.99)

*J R Reading SC & K P Zervos

#G Plowman SC
(1)
M Lunn SC
(2)
A Macrae SC
(3)
P Dykes SC &
Philip Wong
(4) & (5)

(1) LAW Hay-chung
(2) LAW Hay-sing
(3) LAM Ting-chung
(4) CHU Chi-wah
(5) KWAI Chun-wang

Conspiracy to offer advantages/Conspiracy to accept advantages/Corroboration of accomplice evidence/Acts and declarations made in furtherance of conspiracies
串謀提供利益 - 串謀接受利益 - 從犯證據的佐證問題 - 為了促成串謀之事而作出的作為和聲明

The offences concerned the involvement of the Applicants in one or more agreements with others whereby money was sought from and paid by a candidate for the 1997 examination for promotion to sergeant in the Hong Kong Police Force. The allegation was that money would exchange hands for the purpose of providing the candidate who was prepared to pay with improper assistance in order to secure his promotion. In effect, the candidate was provided with at least some of the questions it was likely he would be asked, and then told how to answer them.

A1, A2, A3 and A4 were convicted in the District Court of conspiracy to offer advantages relating to the candidature of A4 (charge 1). The first three Applicants and A5 were convicted of the same offence relating to the candidature of A5 (charge 2). A1 and A2 were convicted of conspiracy to accept advantages (charge 3). A1 and A2 also faced two others similar charges (charges 4 and 5) but were acquitted.

One of the grounds of appeal was that the judge erred by allowing the accomplices PW2 and PW6 to corroborate the evidence of each other. It was submitted that the judge had made it plain by his acquittal of A1 and A2 on charges 4 and 5 that he was not prepared either to convict unless there was '*independent supporting evidence*' or to rely on PW6's word where it stood by itself.

Another ground was that there was insufficient direct or inferential evidence to show that the Applicants were parties to the conspiracies and that the post-arrest activities, e.g., a meeting of A1, A2 and PW6 at Man Wan Pier, could never have amounted to '*acts or declarations made in furtherance of the conspiratorial arrangement*'.

Held :

(1) S 60 of the Criminal Procedure Ordinance, Chapter 221, abolished the requirement that a judge had to warn himself about convicting an accused on the uncorroborated evidence of a person merely because that person was an alleged accomplice of the accused. Attempts to re-impose the straitjacket of the old corroboration rule were strongly to be deprecated. Where the witness had been shown to be unreliable, the judge might consider it necessary to urge caution. In a more extreme case, if the witness was shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning might be thought appropriate and the judge might suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. But it was clear that to carry on giving '*discretionary*' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the Ordinance: *R v Thirlwell and Pang* CA 332/96 and *R v Chu Ip-pui* [1997] HKLRD 549 considered. It was abundantly plain that the judge was referring to his desire to find some other evidence '*wherever possible*' which gave circumstantial support from a different and independent source to the accomplice for whose testimony support was being sought. The judge had every reason to be on his guard. The accomplices had engaged in corruption of a grave kind and there were several other flaws to the characters of PW2 and PW6 on which they were justifiably attacked as to their credit. The judge had taken full cognisance of these matters and, in his discretion, he had fairly, and even wisely perhaps, decided that, wherever possible, it would be prudent to look for other supporting evidence before he could feel satisfied of guilt to the required standard. The judge was perhaps going further than he need to have done when, having found that the accomplices had all given credible evidence, he found it desirable to look for supporting evidence. It was not so much a disbelief of PW6's testimony as a general lack of other evidence where that might have been expected to be found which caused the judge to find that the high standard of proof required before a conviction on charges 4 and 5 could be entered had been attained;

(2) The judge did not confuse evidence about post-arrest activities with evidence that went to the acts and declarations in furtherance of those conspiracies. The evidence was only admissible against A1 and A2 to show knowledge of them and participation in them. The evidence against the Applicants was overwhelming.

Result - Applications dismissed.

Contempt of Court

CACC 1/98 YAU Petrus
Power &
Mortimer VPP
Keith J

(29.4.99)

*D S Saw SC
&
R Ma

#John Marray

Contempt of court/Power to deal with contempt to be exercised sparingly/Outburst in court/Rebuke invariably sufficient/ Appeal as of right under Cap 4

藐視法庭 – 法庭須經慎重考慮後才當庭行使處理藐視法庭的權力 – 在法庭上的衝動行為 – 對藐視行為當庭予以訓斥在一般情況下已足夠 – 第 4 章賦與被告人對此提出上訴的權利

After an outburst in the course of his trial in the District Court, the Appellant was summarily fined $1,000. In allowing his appeal, it was

Held :

(1) The statutory power in section 20 of the District Court Ordinance to deal summarily with contempt of court was a necessary and important weapon in the District Court's armoury to keep control of its own proceedings. But the power should be exercised sparingly and with great caution: It '*is a power to be used reluctantly but fearlessly when, and only when, it is necessary to prevent justice being obstructed or undermined ... . That is not because judges, jurors, witnesses and officers of the court take themselves seriously: it is because justice, whose servants they are, must be taken seriously in a civilised society if the rule of law is to be maintained*' : *Balogh v St Albans Crown Court* [1975] 1 QB 73, 91;

(2) The power should only be exercised as a last resort, when other less drastic remedies were thought to be inappropriate, such as where the contempt was clearly proved and could not wait to be punished. Judges should therefore guard against the overuse of the power to try someone summarily for contempt: '*its usefulness depends upon the wisdom and restraint with which it is exercised*' : *Parashuram Detaram Shamdasani v King-Emperor* [1945] AC 264;

(3) Outbursts of the kind which the Appellant made happened from time to time. Legal proceedings could be extremely stressful for people involved in them. That was why judges were usually tolerant when people misbehaved. They understood the pressures which people were under. A rebuke or a short adjournment followed by a reprimand, with an opportunity to the person to apologise, was invariably all that was required. It was therefore only in exceptional circumstances for the court to consider contempt proceedings, and even then it might be more suitable to let the contempt proceedings be handled by the proper prosecuting authorities and be determined by a different tribunal.

Obiter - The Appellant did not need leave to appeal against his conviction for contempt of court. He did not need leave to do so as his '*trial*' for the offence of contempt of court was not a trial '*on indictment*' within the meaning of section 82(1) of the Criminal Procedure Ordinance: he could appeal as of right under section 50(1) of the High Court Ordinance.

FAMC 8/99

WONG Yeung-ng v SJ

Litton Ching & Bokhary PJJ

(23.6.99)

*Sir Sydney Kentridge QC, Cheng Huan SC & Jason Pow

#Ronny Tong SC & Johannes Chan

Contempt of court/Scandalising the court by scurrilous abuse/ Right to free speech not absolute/Civilised community requires protection from conduct aimed at undermining administration of justice/Sentence for grave contempts of court

藐視法庭－以粗鄙辱罵惡意中傷法庭－言論自由的權利並非絕對－文明社會必須防止目的在於破壞司法的行為－嚴重藐視法庭的判刑

The Applicant, editor of the *Oriental Daily News*, was convicted on 23 June 1998 of two contempts of court and sentenced by the High Court to a total 4 months' imprisonment. His appeal against conviction and sentence was dismissed by the Court of Appeal on 9 February 1999.

On 26 March 1999, the Court of Appeal granted a certificate that a point of law of great and general importance was involved in the case in these terms:

> *In the light that Article 16(2) of the Bill of Rights Ordinance, read together with Article 27 of the Basic Law, require that the freedom of expression shall only be subject to restrictions that are necessary for the maintenance of public order (ordre public), whether the offence of 'scandalising the court' by scurrilous abuse can only survive in Hong Kong if the offence requires proof that the acts complained of constituted a clear, present and imminent danger to the administration of justice.*

At the same time the Court of Appeal declined to certify other questions of law as sought by the Applicant.

The Applicant applied under s 32(3), Cap 484, for a reformulation of the questions of law for certification and leave to take the matter to the Court of Final Appeal. At the same time he sought leave to appeal against the Court of Appeal's dismissal of his sentence of 4 months' imprisonment, on the ground that by such a sentence a substantial and grave injustice had been done.

The charges of which the Applicant stood convicted fell into two types. The first was that he '*sought to threaten, harass and/or intimidate Godfrey JA during 13, 14 and 15 January 1998 (by having him pursued by employees and/or agents and/or others) by reason of a judgment which he had previously delivered, thereby wrongfully interfering with the administration of justice.*' The second charge was that he '*published articles between 11 December 1997 and 13 January 1998 which contained passages of crude and vicious abuse of the judiciary … with little if any reasoned argument and which alleged systematic bias and wilful abuse of power (those allegations being without any justification whatsoever). The articles also contained threats to the judiciary. The articles, considered separately and cumulatively, were calculated to undermine public confidence in the administration of justice in Hong Kong.*'

Charge 2 came first in time, and it related to a campaign of vilification and intimidation aimed at members of the Obscene Articles Tribunal and the judiciary, conducted by the Applicant in the pages of the *Oriental Daily News* over a period of time, which the High Court in sentencing the Applicant described as '*without parallel in modern times*'. The features of the campaign which made it so unique included '*the venom of the language used, the outrageousness of the motives ascribed to the targets and the impact the campaign has on confidence in the ability of the judges to dispense justice conscientiously and impartially*'.

As regards charge 2, the Applicant accepted that the articles were published maliciously, in bad faith, and were '*scurrilous, abusive, shocking and reprehensible*'. The Applicant also accepted that there was a *real risk* of the articles diminishing the authority of the court and impairing public confidence in the administration of justice. In other words, the articles were '*calculated to undermine public confidence in the administration of justice in Hong Kong*', in terms of charge 2. It was submitted, nonetheless, that arguably Article 16(2) of the Hong Kong Bill of Rights and Article 27 of the Basic Law which guaranteed to the Applicant freedom of expression, rendered the conviction for contempt unlawful.

As to charge 1, this related to a campaign to threaten, harass and intimidate Godfrey JA, by having him pursued night and day by employees of the *Oriental Daily News*, following an appeal in the Court of Appeal in which Godfrey JA had given the leading judgment adverse to the Oriental Press Group. The avowed purpose of the campaign was to '*educate*' the judge, but the real purpose, as the High Court found, was to take revenge for the Court of Appeal's judgment and to punish the judge for his part in it. That was, as the High Court said in sentencing the Applicant, unprecedented in the common law world.

Held :

(1) The constitutional right of free speech as contained in the Basic Law, adopting the norms set out in the ICCPR, was not an absolute right. Every civilised community was entitled to protect itself from malicious conduct aimed at undermining the due administration of justice. It was an important aspect of the preservation of the rule of law. Where the contemnor went beyond reasoned criticism of the judicial system and acted in bad faith, as the Applicant had done in this case, the guarantee of free speech could not protect him from punishment;

(2) There was no prospect of the Court of Final Appeal differing from the conclusion of the Court of Appeal. Despite the Court of Appeal's certification, leave to appeal against conviction would be refused;

(3) As to sentence, having regard to the gravity of the contempts, the Applicant's role as editor and his admitted bad faith, the sentence of 4 months' imprisonment appeared extremely lenient. The notion that a substantial and grave injustice had been done was absurd. Leave to appeal against sentence would be refused.

Result – Application dismissed with costs.

Corroboration

MA 551/98 LI Wai-man

Nguyen J

(19.8.98)

*Edmond Lee

#Eric Kwok

Good character/Whether direction on credibility required/ Failure in oral reasons to mention danger of convicting on uncorroborated evidence of complainant in sexual case/ Situation not remedied by reference *ex post facto* in statement of findings

良好品格 – 是否需要就可信性作出指引 – 在口頭裁決理由內沒有提及在性罪行案件中根據事主欠缺佐證的證據定罪的危險性 – 裁斷陳述書中的事後提述不能夠使情況得到補救

The Appellant was convicted after trial of indecent assault.

In his oral reasons for verdict, the magistrate mentioned that the Appellant had a clear record.

On appeal, it was submitted that the magistrate did not warn himself of the danger of acting on the uncorroborated evidence of the complainant in a case such as this. The second ground was that even though the magistrate mentioned that the Appellant had a clear record, he did not deal with credibility. In other words, it was said that when the magistrate gave himself the *Berrada* direction, what he said centred on propensity and not on credibility.

Held :

(1) A judge or magistrate is not required to state in his reasons for verdict that he has given himself a *Berrada* or a *Vye* direction: *R v Cheng King-ho* Cr App 255/93. A *Berrada* direction is not always necessary: *R v Chan Wu-nam* [1994] 2 HKCLR 56. That which the magistrate had done as regards the *Berrada* direction was sufficient and it was not incumbent upon him to have gone into details of how both limbs of that direction might have affected his assessment of the evidence;

(2) The magistrate never alluded to the danger of acting on the uncorroborated evidence of the complainant in a sexual case. It was incumbent upon the magistrate to have made clear in his oral reasons that he was aware of such a danger: *R v Wong Shing-fai* MA 1482/90. It would not have required much for the magistrate to have said in one sentence that he was aware of such a danger, but, in the absence of corroboration, was nevertheless accepting the evidence of the complainant;

(3) Although when the magistrate prepared his written statement of findings he gave himself the appropriate warning, this had not been included in the earlier oral reasons, and by that time it was too late in the day to cure the defect.

Result – Appeal allowed.

MA 962/98 CHENG Tin-wai

Pang J

(24.3.99)

*Robert K Y Lee

#A C Macrae

Indecent assault/Need for magistrate to consider issue of corroboration/Usual practice to invite submissions on issue of corroboration/One alleged indecent act cannot corroborate another

猥褻侵犯 – 裁判官須考慮佐證的問題 – 慣常的做法是請律師就佐證的問題陳詞 – 一項被指為猥褻侵犯的行為不能作為另一項猥褻侵犯行為的佐證

After trial, the Appellant was convicted of two charges of indecent assault, contrary to s 122(1) of the Crimes Ordinance.

The alleged incident occurred on board an MTR train which was crowded. It was the case for the prosecution that two female passengers were indecently assaulted by the Appellant as they travelled from the MTR station at Admiralty to Jordan.

The victim of the first charge gave evidence that as the train was travelling between Admiralty and Tsim Sha Tsui, she felt that she had been touched on her buttocks by the private part of the Appellant on three separate occasions. It was her impression that the Appellant had an erection.

The victim of the second charge testified that while the train was travelling between Tsim Sha Tsui and Jordan, she felt that a male came into intimate contact with her buttocks. She turned round and hit the Appellant with her handbag.

The incidents were witnessed by two police constables, one of whom gave evidence.

The Appellant denied both charges and said that there might have been accidental bodily contacts as the train was very crowded at the time. He had no previous convictions and he called two witnesses to vouch for his good character.

In both her oral reasons and her Statement of Findings, the magistrate stated that she accepted the evidence of the two victims and that of the police officer who observed the incident. She rejected the evidence of the Appellant and ruled out the possibility of accidental contact. She was satisfied that the Appellant's actions were deliberate and amounted to indecent assaults. There was no reference to the issue of corroboration.

On appeal, it was submitted that it was incumbent on the magistrate to remind herself and to be seen to remind herself of the need for corroboration in cases of this nature.

Held :

(1) In practice it was not unusual for a trial judge, at the end of the evidence in a trial involving sexual complaints, to invite counsel to address him on the issue of corroboration and to identify the evidence, if any, which could amount to corroboration. That course was not adopted by the magistrate, and the issue of corroboration somehow escaped her attention completely. Numerous authorities indicated that appellate courts would almost certainly intervene in the light of such fundamental errors: *Fok Chak-chun and Another v R* Cr App 284/79;

(2) Where a judge or magistrate sat alone he was required to properly direct himself on the issue of corroboration: *HKSAR v Lee Kam-wing* Cr App 353/98;

(3) The two separate incidents could not in law corroborate each other. There might well have been corroborative evidence in the testimony of the police officer, but the fact remained that the magistrate had fallen into error in not addressing herself to the issue of corroboration at all. That failure rendered the convictions unsafe and unsatisfactory.

Result – Appeal allowed.

香港特別行政區 訴 李錦榮
HKSAR v LI Kam-wing

***梁兆基**
及陳廣池
Samuel LEUNG and Stanley CHAN

香港特別行政區
高等法院上訴案件 1998 年第 353 號

#陳銚明
CHAN Siu-ming

高等法院首席法官陳兆愷
高等法院上訴法庭法官廖子明
高等法院上訴法庭法官梁紹中
一九九九年一月七日

COURT OF APPEAL OF THE HIGH COURT –
CRIMINAL APPEAL NO. 353 OF 1998
CHAN, CJHC, LIU, JJA. AND LEONG JJA
7 JANUARY, 1999

<u>法官在性罪行案件中沒有提醒自己在缺乏佐證下作出定罪的危險 – 沒有提醒自己並非嚴重錯誤 – 須考慮整體案情 – 法官有否加倍小心</u>

上訴申請人被控一項與年齡在 13 歲以下的女童非法性交罪，違反香港法例第 200 章第 123 條。

代表申請人的大律師於上訴時提出一些理由，其中包括原審法官在判案時未有警告自己在缺乏佐證下定罪的危險性，而沒有如此做會使定罪不穩妥：*R v Chan Siu-wong* [1970] HKLR 61 及裁判法院上訴案 1985 年第 1009 號的 *R v Chan Yuet-shing*。他又指出女事主曾承認對申請人作出嚴重的虛假指控，因此尋求佐證便更為重要。

<u>裁定</u>：

(1) **法庭不會單單因法官沒有在判決書中提及曾經向自己提出警告，便一成不變地把定罪撤銷。最重要的是法官在作出判決前有沒有向自己提出警告，在衡量案情時有沒有加倍小心以免作出不穩妥和不令人滿意的判決。如果法官只在後來才在判決書上提及曾經警告自己，但整個判詞卻顯示出他並沒有加倍小心處理投訴人的證供，那麼空言曾經向自己提出警告並沒有意義；**

(2) **上訴法庭不應因法官或裁判官沒有提及曾經向自己提出警告便把定罪撤銷，而應該考慮整體案情及其他因素。該些因素包括法官或裁判官於考慮控方證據（尤其是投訴人的證供）時有否加倍小心。如果已加倍小心，而又有充分證據，上訴庭不應假定如果法官或裁判官沒有在判決書中記錄對自己的警告，便必定沒有向自己提出警告。換言之，在判決書上有沒有提及曾向自己作出警告並非是決定性的；**

(3) **如果法官或裁判官沒有提及輔助證據的重要性和警告自己缺乏佐證而定罪的危險性，很可能顯示出他忽略了這個基本問題。如果沒有提及，除非有特別理由或在特殊情況**

下，否則上訴庭很容易便推論出這個法官或裁判官沒有緊記這個問題；

(4) **雖然原審法官已小心分析投訴人的證供，但是不知道她有否小心考慮該個問題。**

上訴得直。

[English digest of CA 353/98, above] LI Kam-wing

Judge not warning herself of danger of convicting without corroboration in sexual case/Absence of warning not of itself fatal/Case to be examined in its entirety/Whether judge exercised special care

The Applicant was convicted after trial in the District Court of the offence of unlawful sexual intercourse with a girl under the age of 13, contrary to s 123, Cap 200.

On appeal, it was submitted, *inter alia*, that the trial judge failed to warn herself of the dangers of convicting without corroboration. A failure to do so rendered the conviction unsafe: *R v Chan Siu-wong* [1970] HKLR 61, *R v Chan Yuet-shing* MA 1009/85. It was contended that as the complainant had admitted making serious false allegations against the Applicant, corroboration was all the more important.

Held :

(1) The court would not rigidly quash the conviction simply because a judge had not made any reference in his judgment to having warned himself. The most important thing was whether the judge had warned himself before he gave his decision, and whether he, having regard to the facts of the case, had taken extra care to avoid an unsafe conviction. If a judge only made reference in his judgment at a late stage to having warned himself when the whole of his findings showed that he had not dealt with the evidence of the complainant with extra care, then his claim to have warned himself would be meaningless;

(2) Whilst the appellate court should not quash the conviction simply because the judge or magistrate had not referred to having warned himself, the facts of the whole case and other factors had to be considered. Such factors included the question of whether the judge or magistrate had exercised special care when he considered the evidence of the prosecution, in particular that of the complainant. If such care was exercised, and there was sufficient evidence, the appellate court should not presume that the judge or magistrate must have failed to warn himself on the basis that he had not recorded the warning in his judgment. In other words, any reference in a judgment to the effect that a judge had or had not warned himself was not necessarily a determining factor;

(3) If a judge or magistrate failed to refer to the importance of supporting evidence and to warn himself of the dangers of convicting the accused in the absence of corroboration, this might well indicate that he had overlooked that basic issue. The absence of any such reference would, unless there were special reasons or exceptional circumstances to conclude otherwise, lead the court readily to infer that the judge or magistrate had failed to bear that issue in mind;

(4) Although the trial judge had carefully analysed the evidence of the complainant, it was not known whether she had exercised special care.

Result – Appeal allowed.

CA 628/98

Stuart-Moore VP
Keith JA &
Pang J

(15.11.99)

*J R Reading SC & K P Zervos

#G Plowman SC
(1)
M Lunn SC
(2)
A Macrae SC
(3)
P Dykes SC &
Philip Wong
(4) & (5)

(1) LAW Hay-chung
(2) LAW Hay-sing
(3) LAM Ting-chung
(4) CHU Chi-wah
(5) KWAI Chun-wang

Conspiracy to offer advantages/Conspiracy to accept advantages/Corroboration of accomplice evidence/Acts and declarations made in furtherance of conspiracies
串謀提供利益 - 串謀接受利益 - 從犯證據的佐證問題 - 為了促成串謀之事而作出的作為和聲明

The offences concerned the involvement of the Applicants in one or more agreements with others whereby money was sought from and paid by a candidate for the 1997 examination for promotion to sergeant in the Hong Kong Police Force. The allegation was that money would exchange hands for the purpose of providing the candidate who was prepared to pay with improper assistance in order to secure his promotion. In effect, the candidate was provided with at least some of the questions it was likely he would be asked, and then told how to answer them.

A1, A2, A3 and A4 were convicted in the District Court of conspiracy to offer advantages relating to the candidature of A4 (charge 1). The first three Applicants and A5 were convicted of the same offence relating to the candidature of A5 (charge 2). A1 and A2 were convicted of conspiracy to accept advantages (charge 3). A1 and A2 also faced two others similar charges (charges 4 and 5) but were acquitted.

One of the grounds of appeal was that the judge erred by allowing the accomplices PW2 and PW6 to corroborate the evidence of each other. It was submitted that the judge had made it plain by his acquittal of A1 and A2 on charges 4 and 5 that he was not prepared either to convict unless there was '*independent supporting evidence*' or to rely on PW6's word where it stood by itself.

Another ground was that there was insufficient direct or inferential evidence to show that the Applicants were parties to the conspiracies and that the post-arrest activities, e.g., a meeting of A1, A2 and PW6 at Man Wan Pier, could never have amounted to '*acts or declarations made in furtherance of the conspiratorial arrangement*'.

Held :

(1) S 60 of the Criminal Procedure Ordinance, Chapter 221, abolished the requirement that a judge had to warn himself about convicting an accused on the uncorroborated evidence of a person merely because that person was an alleged accomplice of the accused. Attempts to re-impose the straitjacket of the old corroboration rule were strongly to be deprecated. Where the witness had been shown to be unreliable, the judge might consider it necessary to urge caution. In a more extreme case, if the witness was shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning might be thought appropriate and the judge might suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. But it was clear that to carry on giving '*discretionary*' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the Ordinance: *R v Thirlwell and Pang* CA 332/96 and *R v Chu Ip-pui* [1997] HKLRD 549 considered. It was abundantly plain that the judge was referring to his desire to find some other evidence '*wherever possible*' which gave circumstantial support from a different and independent source to the accomplice for whose testimony support was being sought. The judge had every reason to be on his guard. The accomplices had engaged in corruption of a grave kind and there were several other flaws to the characters of PW2 and PW6 on which they were justifiably attacked as to their credit. The judge had taken full cognisance of these matters and, in his discretion, he had fairly, and even wisely perhaps, decided

that, wherever possible, it would be prudent to look for other supporting evidence before he could feel satisfied of guilt to the required standard. The judge was perhaps going further than he need to have done when, having found that the accomplices had all given credible evidence, he found it desirable to look for supporting evidence. It was not so much a disbelief of PW6's testimony as a general lack of other evidence where that might have been expected to be found which caused the judge to find that the high standard of proof required before a conviction on charges 4 and 5 could be entered had been attained;

(2) The judge did not confuse evidence about post-arrest activities with evidence that went to the acts and declarations in furtherance of those conspiracies. The evidence was only admissible against A1 and A2 to show knowledge of them and participation in them. The evidence against the Applicants was overwhelming.

Result - Applications dismissed.

Costs

香港特別行政區訴李愷俠
HKSAR v LI Koi-hop, Philip

香港特別行政區
裁判法院上訴案件 1998 年第 631 號

高等法院原訟法庭法官楊振權
一九九八年十一月二十一日

COURT OF FIRST INSTANCE OF THE HIGH COURT – MAGISTRCY APPEAL NO. 631 OF 1998
YEUNG J
21 NOVEMBER 1998

***張永良**
CHEUNG Wing-leung

#上訴人自辯
Appellant in person

向獲判無罪的人支付訟費 - 判令的基礎 - 案件上訴時不可輕易干預裁判官拒予訟費的酌情權

上訴人原被控一項不小心駕駛罪，經審訊後獲判無罪。原審裁判官指出，雖然控方證供有矛盾，未能在無合理疑點下證明此案，但檢控上訴人的決定是正確的。上訴人向原審裁判官申請訟費，指出多次出庭造成重大經濟損失，數額超過 2 萬元。上訴人的職業是的士司機，但他又指稱他亦是遊艇教練及作家，因為多次出庭導致重大的收入損失，其中包括租船損失。但上訴人訟費的申請，被原審裁判官拒絕。他現就該項否決提出上訴。

裁決：

(1) **雖然《刑事案件訟費條例》第 3 條授權裁判官可以命令控方向獲判無罪的人支付訟費，數額不超過 3 萬元，但訟費一般只是指被告人因聘用律師答辯而導致的法律費用。如被告人無律師代表，法庭一般只會要求控方支付被告人因為出庭要支付的交通費或正常收入的損失。**

(2) 控方是否要向獲判無罪的人支付訟費，是由原審裁判官根據案情而行使酌情權作出裁決。除非原審裁判官犯了法律上或原則性的錯誤，否則上訴法庭一般都不會更改該項決定。

(3) 原審裁判官已經詳細考慮過本案案情，並指出提出檢控是正確的決定，而判處上訴人罪名不成立，只是基於疑點利益歸於被告人的原則。原審裁判官在作出裁決時，已考慮到上訴人指稱他收入損失的數額及性質。上訴法庭並無理據可確定原審裁判官是錯誤地行使他的酌情權。

[English digest of MA 631/98, above]

上訴駁回。

Costs for acquitted accused/Basis for order/Discretion of magistrate to refuse costs not to be lightly interfered with on appeal

The Appellant was acquitted after trial of a charge of careless driving. The magistrate ruled that although there were inconsistencies in the prosecution case which meant that the case could not be proved beyond reasonable doubt, the decision to prosecute the Appellant was correct. The Appellant applied to the magistrate for costs, claiming that his numerous attendances at court had caused him substantial financial losses amounting to over $20,000. The Appellant was a taxi driver by occupation, and he claimed also to be a boating instructor and a writer. His attendances at court, he said, had occasioned a heavy loss in income, including the fees for the hiring of boats. His application for costs was refused. He appealed against that refusal.

Held:

(1) Although section 3 of the Costs in Criminal Cases Ordinance enabled a magistrate to order that costs not exceeding $30,000 be awarded to an accused who was acquitted, costs generally referred to the legal costs incurred by an accused for engaging counsel. If an accused was not represented, the court would normally order the prosecution to pay costs confined to travelling expenses or to loss of income;

(2) The issue of whether to award costs to an acquitted person fell to be ruled upon by the magistrate who would exercise his discretion in the light of the facts. Absent an error in law or in principle, an appellate court would not generally vary any such decision;

(3) The magistrate had given detailed consideration to the facts of the case. He had noted that the decision to prosecute was correct, and only acquitted in order to give the Appellant the benefit of the doubt. When he ruled as he did the magistrate had taken into account the amount and the nature of the loss of income claimed by the Appellant. There was no justification for holding that the magistrate had wrongly exercised his discretion.

Result – Appeal dismissed.

CA 174/97

LEUNG Kai-ming

Power VP
Mayo &
Stuart-Moore
JJA

(9.12.98)

*DG Saw SC
& Chan Fung-shan

#G Mackay

Costs order/If money available no public policy reason not to make such an order
訟費命令 – 在有涉案款項可供處置的情況下頒布訟費命令是合乎公共政策的

The Applicant pleaded guilty to two charges of trafficking in a dangerous drug. The judge took 6 years' imprisonment as his starting point, and gave a one-third discount.

The judge then ordered that the exhibits be disposed of with the exception of $20,200, out of which he ordered the Applicant to pay $15,000 towards the costs of the prosecution. This was money seized from the premises of the Applicant at the same time as other drug-related paraphernalia.

On appeal, it was submitted that the judge wrongly exercised his discretion because he based his order of costs not upon the legal costs involved but upon the costs of the police operation. It was further contended that it would be against public policy to make an order for costs after plea in such a case: if there was a real possibility of costs being awarded there would be no incentive to plead guilty.

Held：

If money was available, there was no reason in public policy or otherwise why a costs order should not be made. The judge had power to make that order and as long as he acted correctly within his discretion, that he could do. The costs involved would have been well in excess of the amount ordered. The order of the judge would stand.

Result - Appeal dismissed.

MA 439/99

SJ v TANG Bun

Woo J

(22.6.99)

*David Leung

#Peter Duncan

Costs in Criminal Cases Ordinance/No inherent power to award costs in criminal proceedings/No power to award costs against prosecution after dismissal of application to magistrate to review
《刑事案件訟費條例》 – 法庭在刑事訴訟程序中並無固有權力可判給訟費 – 裁判官在駁回控方向其提出覆核申請後無權判處要控方承擔訟費

This appeal by way of case stated was brought by the Secretary for Justice against an order for costs made by a magistrate on 28 January 1999. The order was for the costs of the review to be paid by the prosecution to the accused. The review was instituted by the prosecution and the order for costs was made by the magistrate upon his dismissal of the application.

The Respondent was the accused facing four charges, namely, soliciting an advantage as an agent, accepting an advantage as an agent, false accounting, and doing an act tending and intended to pervert the course of justice.

The Respondent was acquitted at trial, but refused costs. The prosecution applied, pursuant to s 104 of the Magistrates Ordinance, to the magistrate for a review of the decision to acquit. After the hearing of the application for review, the magistrate dismissed the application and awarded

costs of the review proceedings to the Respondent, to be taxed if not agreed within 14 days. In the case stated, three questions were posed:

(1) Whether the magistrate was correct in holding that he had power under s 3(1)(d) of the Costs in Criminal Cases Ordinance, Cap 492, to award costs to the defence on dismissing an application for review instituted by the prosecution;

(2) Whether the magistrate was correct in holding that he had the power under s 3(1)(c), Cap 492, to award costs to the defence on dismissing an application for review by the prosecution where one of the grounds concerned the original acquittal of the accused;

(3) Whether the magistrate was correct in awarding costs of the review proceedings to the Respondent in this case.

Section 3 entitled '*Defence Costs in summary proceedings*' provided:

(i) Where--

(a) an information or complaint laid before a magistrate is not proceeded with;

(b) a magistrate inquiring into an indictable offence determines not to commit the defendant for trial;

(c) a magistrate dealing with a summary offence or any offence summarily dismisses the information or complaint or acquit the defendant; or

(d) a magistrate, under section 104 of the Magistrates Ordinance (Cap 227), on the application of the defendant or on his own initiative reviews his decision, and on that review, reverses or varies his decision,

the magistrate may order that costs be awarded to the Defendant.

Held :

(1) It was well established that a court had no inherent power to award costs in criminal proceedings, and the power to award costs derived from legislation: *R v MAK Yuet-hang* [1990] 1 HKLR 121. A magistrate's power to award costs to the defence was based on the Costs in Criminal Cases Ordinance, Cap 492 ('the Ordinance');

(2) Neither s 3(1) nor s 11(1) of the Ordinance mentioned any situation where an application for review under s 104 of the Magistrates Ordinance was made by the prosecution. In s 3(1)(d) provisions were made in respect of a review on application of the defendant or a review on the magistrate's own initiative, whereas in s 11(1)(b) only the application of the defendant for review was mentioned. That difference demonstrated that if a magistrate upon his own initiative reviewed his decision of acquittal, reversed such a decision and convicted the defendant, he might not award costs of the review to the prosecution by virtue of s 11(1)(b), for such a method of instituting the review was not within the ambit of that paragraph. Similarly, there was no provision in either s 3 or s 11 or in the entirety of the Ordinance to cater for the situation where an application for review was made by the prosecution. Neither of the

two specific sections was ambiguous. Section 3(1)(d) did not confer power or jurisdiction on the magistrate to award costs for the review proceedings to the Respondent upon the dismissal of the application for review instituted by the prosecution. The answer to question (1) in the case stated was '*No*';

(3) It appeared that the magistrate was of the view that he had power to award costs to the defence on dismissing the application for review made by the prosecution where one of the grounds of the review was an acquittal of the defendant. However, s 3(1)(c) was not a general provisions empowering the magistrate to award costs to the defendant insofar as the defendant succeeded in any matter before him. The provisions of s 3(1)(d), to cater for the situation of reviews, were specific, and so were the provisions of s 3(1)(a), (b) and (c) to cover the situation of trials. There was no general provision in the Ordinance that could be utilised to override the application of these specific provisions. There was no general provision that upon an acquittal, at whatever stage of the proceedings before a magistrate, the magistrate might award costs to the defendant. The provisions of s 3(1)(d) and s 11(1)(b) were so specifically designed to cover reviews that they overrode any other provisions in the Ordinance in all situations in respect of reviews. It followed that neither s 3(1)(c) or s 11(1)(a) could be prayed in aid to deal with costs in respect of any matter in or in consequence of review proceedings. The wording of s 3(1)(c) was clearly, only to cover the situation where the defendant was acquitted after trial, and its meaning could not be extended to cover a situation where the acquittal was confirmed on rejecting a review brought by the prosecution; it did not confer any power on the magistrate in such an event to award costs of the review proceedings to the defendant. The answer to question (2) in the case stated was '*No*';

(4) The magistrate had no power or jurisdiction under the Ordinance or in any other enactment to award costs of the review when he dismissed the application for review instituted by the prosecution. The answer to question (3) was also '*No*'.

Result – SJ's appeal allowed.

CA 315/97

Mortimer VP, Mayo & Stuart-Moore JJA

(17.7.98)

*Vincent WONG

#Thomas Iu

NG Chun-hin

TONG Chi-wai

Appeal without merit/Considerations relevant to costs award to prosecution
缺乏充分理據的上訴 – 與判給控方訟費有關的考慮因素

After the applications for leave to appeal against conviction were dismissed, the prosecution applied for costs under s 13 of the Costs in Criminal Cases Ordinance, Cap 492. Section 13 provided that where a defendant unsuccessfully applied to the Court of Appeal for leave to appeal against his conviction, and the court was satisfied that the application was without merit, the court might order that costs be awarded to the prosecutor. Section 14 provided that costs were recoverable if awarded as a civil debt.

As the court concluded that the application was unmeritorious, it ruled that '*the prosecution are entitled to an award. Although we would have sympathy in making an award against a person who is impoverished, that is not a matter which it is relevant to take into account, especially as costs are recoverable not by any penal sanction but only as a civil debt*'.

Result – Costs awarded.

MA 74/99 BOUTTLE Philip

Woo J

(7.5.99)

*KP Zervos

#L Lok SC

Costs on appeal/Pre-Cap 492 situation/Costs issue to be determined separately at each court level
上訴的訟費 – 第 492 章條例生效前的情況 – 訟費問題應由各級法院分開決定

The Appellant, whose convictions for the offences of soliciting and accepting an advantage, contrary to s 3 of the Prevention of Bribery Ordinance, Cap 201, were quashed on appeal, sought costs of the appeal.

The appeal against conviction was allowed primarily on the grounds that the magistrate had placed undue weight on the evidence-in-chief of the main witness without assessing contradictions or inconsistencies which emerged in cross-examination, and that the magistrate's understanding of the term '*business dealings*' in the evidence of that witness was incorrect. [*See* CAB for June 1999:Ed]

In seeking costs, reliance was placed upon s 8 of the Costs in Criminal Cases Ordinance, Cap 492, which provided:

> *Where a judge*
>
> *(a) allows the appeal to which s 105 or s 113 of the Magistrates Ordinance, Cap 227 applies in the exercise of its power under s 120 of that Ordinance, or;*
> *(b) ……*
>
> *the judge may order that costs be awarded to the defendant.*

However, section 25 of that Ordinance provided that it did not apply to criminal proceedings in respect of offences committed before the coming into operation of the Ordinance. Since the offences allegedly occurred on 13 January 1997, and the Ordinance came into effect on 17 January 1997, the Ordinance could not avail the Appellant, who was thrown back on his pre-Cap 492 remedies.

The prosecution opposed the application in reliance on the two criteria in *R v Kwok Moon-yan* & *Another* [1989] 2 HKLR 396, 401, namely,

(1) the Appellant by his own conduct had brought suspicion on himself; and/or

(2) he had misled the prosecution into thinking that the case against him was stronger than it was.

Held :

(1) Although the Appellant had brought suspicion upon himself, his conduct did not, as the prosecution submitted, affect the whole chain of proceedings right up to the Court of Final Appeal. As made plain in *Kwok Moon-yan,* the principle, applying *R v Agritraders Ltd* [1983] 1 QB 464, was that the court must exercise separately a discretion in respect of the costs at each level, having regard to the circumstances obtaining in each court;

(2) Whilst the Appellant was correct not to apply for costs for the trial, as he had brought suspicion upon himself which had led to the prosecution, he would be awarded the costs of the appeal.

Result – Costs awarded.

CA 615/98

Stuart-Moore VP
Mayo JA &
Woo J

(16.7.99)

*A A Bruce SC & J To

#A Macrae SC(1)
J P Chandler &
M Richmond (2)

(1) LAM Tat-ming
(2) NG Sai-hing

Appeal by way of case stated/Dismissal of appeal/Costs regulated by Costs in Criminal Cases Ordinance/No power to award costs to Respondent
以案件呈述方式上訴 - 駁回上訴 - 訟費受《刑事案件訟費條例》規管 - 法庭無權判答辯人獲得訟費

After an appeal by way of case stated had been dismissed, a respondent sought a costs order.

Held :

(1) The situations where costs could be awarded, following appeal proceedings, were set out in the Costs in Criminal Cases Ordinance. Proceedings which came to the Court of Appeal under section 84 of the District Court Ordinance were not included. The Court had no power to make any order for costs;

(2) This issue had previously been considered in *Attorney General v Lam Sau-ki* [1993] 2 HKC 330, which was decided before the Costs in Criminal Cases Ordinance. It was apparent that, in 1993, there was again no power for an order to be made.

Result - Application dismissed.

MA 1004/98

Gall J

(29.9.99)

*Ho May Yu

#I/P

COGHLAN Christopher David Francis

Appeal against refusal of costs in magistracy/Refusal of award constitutes an order from which appeal lies/Basis for exercise of discretion to award costs
因裁判法院拒絕判給堂費而上訴 - 拒絕判給堂費屬於命令，因而可據此提出上訴 - 行使酌情權判給堂費的基礎

On 13 November 1997, the Appellant parked his motorcycle at Cotton Tree Drive, opposite the Lippo Centre. He was summoned for the offence of not displaying in a conspicuous place on that motorcycle a valid vehicle licence so that it was clearly visible on the left hand side of the vehicle.

The Appellant was acquitted of the charge after trial and applied for costs. This the magistrate declined. The magistrate declined to alter that refusal after hearing submissions at a subsequent review. The Appellant appealed against the refusal to award costs.

The Respondent submitted, first, that as no order for costs had been made by the magistrate, there was no order in respect of which an appeal lay. Second, it was said that s 19(1) of the Costs in Criminal Cases Ordinance, Cap 492, provided for an appeal only where an order had been made awarding costs to a party but made no provision for an appeal where no costs were awarded and therefore there was no statutory provision for an appeal against an order refusing costs.

Held:

(1) The real situation was that the Appellant made an application for costs, that application called for an exercise of the judicial discretion of the magistrate, and a determination by him as to whether or not to grant the application. His decision was not to grant the application and he therefore made an order refusing the application. The practical effect was that the Appellant had no award as to costs, but the magistrate did make an order. In *R v Recorder of Oxford, ex p Brasenose College* [1969] 3 All ER 428, 431, Bridge J said.

> *The word 'order' in relation to legal proceedings in itself is ambiguous a linguistic purist would say that its most accurate connotation was to indicate an order requiring an affirmative cause of action to be taken in pursuance of the order, but it is equally clear that the word may have a much wider meaning covering in effect all decision of courts.*

The decision not to award costs to the Appellant was an order of the magistrate;

(2) It was true that there was no inherent jurisdiction in the High Court to hear an appeal from the Magistrates Court, and that any right of appeal had to be founded upon statute. Unless statutory provision existed to enable a successful defendant who was refused his costs in the Magistrates Court to appeal, no appeal would lie and the Appellant would be without remedy. Although s 19 of the Costs in Criminal Cases Ordinance, Cap 492, made clear that an order by a magistrate to award costs was appealable to the Court of First Instance, the Ordinance was silent as to whether an appeal lay in respect of an order not to award costs to a party;

(3) S 113(1) of the Magistrates Ordinance, Cap 227, provided:

> *Any person aggrieved by any conviction, order or determination of a magistrate in respect of or in connection with any offence, who did not plead guilty or admit the truth of the information or complaint, may appeal from the conviction, order or determination, in manner hereinafter provided to a judge.*

In *Chan Chor v R* Cr App 217/68, it was held that an order awarding costs fell within s 113(1). An order not awarding costs also fell within that section. As the right to appeal the order pursuant to s 113(1) was not expressly or impliedly repealed by the Costs in Criminal Cases Ordinance, the right to appeal that order still subsisted;

(4) S 3(1)(c) of the Costs in Criminal Cases Ordinance gave the magistrate the discretion to allow costs for an acquitted defendant. In *R v Kwok Moon-yan & Another* [1989]2 HKLR 396, the court said that costs should normally be awarded to an acquitted defendant unless there were positive reasons for making a different order and set out what those positive reasons could be. Those reasons did not apply here and the refusal by the magistrate was based upon his disapproval of the nature of the costs claimed by the Appellant. That was not a proper test for the award or otherwise of costs.

Result - Appeal allowed. Costs awarded to Appellant for appeal and trial, to be taxed if not agreed.

FACC 1/99 TONG Cun-lin

Li CJ
Litton
Ching PJJ
Nazareth &
Hoffmann
NPJJ

(14.12.99)

*M Wilson
QC, A Schapel
& L Lai

Appellant acquitted after trial/Power of the judge to award costs and the governing principle/Court's jurisdiction to hear the appeal
上訴人於審訊後獲無罪釋放 - 法官判給訟費的權力和相關的原則 - 終審法院審理本上訴案的權力

The Appellant was the 1st defendant in an indictment containing six counts. He was implicated in counts 1 and 4. Count 1 alleged that the Appellant and his co-defendants had conspired to defraud the Securities and Futures Commission ('SFC') in relation to the takeover of Bond Corporation International Ltd. by Tomson Pacific Ltd. Count 4 charged the Appellant with offering a bribe of $26.4 million to an employee of a brokerage company, contrary to s 9(2)(a) of the Prevention of Bribery Ordinance, relating to the takeover.

#V Robinson QC & K Yeung

After a trial lasting over five months, the Appellant and his co-defendants were acquitted on all counts. The Appellant applied pursuant to s 73A(1) of the Criminal Procedure Ordinance, Cap 221 (now repealed), for an order that his costs be paid out of the public fund. The judge dismissed the application and, with the leave of the Appeal Committee, the Appellant appealed against that refusal.

Held :

(1) Section 73A(1) of Cap 221 was modelled on the provisions of s 4(1)(b) of the Costs in Criminal Cases Act 1973. It did not define the circumstances under which a judge should make an order in favour of an acquitted defendant. The applications for costs by successful defendants should be decided in accordance with the prevailing practice directions in England: *Practice Direction (Costs Successful Defendants)*[1973] 1 WLR 718, *R v Ng Yui-kin* [1983] HKLR 356 considered;

(2) When a defendant had been brought to trial upon particular charges and was then found not guilty, it was clearly right that he should normally be compensated out of the public revenue for the costs incurred in defending the charges. In considering whether, despite this general rule, he should be deprived of all or part of his costs, the judge exercising the discretion must obviously look to his conduct generally. The conduct most relevant to the matters under consideration must be the defendant's conduct during the investigation and at the trial: How he first responded to the investigators, the answers he gave when confronted with the accusations, the consistency of those answers with his subsequent defence, etc. Wrapped up with this was the strength of the case against the defendant and the circumstances under which he came to be acquitted;

(3) In relation to count 1, the Appellant had brought suspicion upon himself in the course of the investigation conducted by the inspector appointed by the Financial Secretary to investigate the circumstances of the takeover. When interviewed, the Appellant had '*all but admitted that he had been a party to buy-back and indemnity arrangements relating to the shares*'. There was ample justification, both from the admissions and from other evidence, for the prosecution to suspect that he had in fact done so and was guilty of deceiving the SFC. None of the judge's findings that the Appellant had indeed by his conduct brought suspicion upon himself, thereby bringing the Appellant within the exceptions to the general rule regarding the awards of costs to an acquitted defendant, had been challenged by his counsel;

(4) The section gave a wide discretion to the trial judge who was in the best position to assess the large number of factors relevant to the exercise of that discretion. It was not intended that, in the discharge of his function under s 73A, the judge should *add* substantially to the costs by entertaining lengthy submissions. His reasons for exercising his discretion must necessarily be brief. It was only where it could be shown that the judge had clearly gone outside the ambits of his powers that an appellate court's function became engaged;

(5) There was no appeal to the Court of Appeal from a judge's refusal of costs in a criminal case. This matter came within the scope of s 31(b) of the Hong Kong Court of Final Appeal Ordinance, Cap 484.

Result - Appeal dismissed.

Counsel

CA 402/98

Power &
Mortimer VPP
Stuart-Moore
JA

(8.12.98)

*M Lunn SC
&
K Zervos

#J Griffiths SC
Richard Wong
&
Richard Leung

CHIM Pui-chung

Counsel citing names of reported judgments to jury when dealing with principles of law/Counsel reading out passage from law report/Comments on undesirability of such conduct
律師在論及法律原則時向陪審團援引法律彙編中的案例名稱 - 律師朗讀法律彙編中的原文 - 法庭就這個不可取的做法作出評論

When addressing the jury at trial, leading counsel not merely cited the names of decisions from several law reports when dealing with principles of law, but also quoted an isolated passage from a specific authority. On appeal the court expressed its '*dismay*' at such conduct, and took the opportunity to remind counsel of that said by Lawton LJ in *R v Chandler* (1976) 63 Cr App R1, 3 :

> *Reading passages from Law Reports to juries is becoming a forensic practice which would have been stopped by an earlier generation of judges. It is likely to confuse rather than help; and if, as in this case, the reading does not go as far as the judge thinks it should, he then has to read some more with a likelihood of making the confusion greater. The practice should stop.*

CA 500/98

Power VP
Mayo &
Stuart-Moore
JJA

(24.3.99)

*D G Saw SC
&
Sharman Lam

#Cheng Huan
SC & C S Fu

LAU Kit-fai

Duty of counsel/Grounds of appeal must be reasonable and arguable/Loss of time
律師的責任 – 上訴的理由必須合理及有理據支持 – 在上訴裁決前所服刑期作廢

In dismissing an application for leave to appeal against conviction for 13 charges of indecent assault, the court observed:

> '*Regrettably it is necessary to make reference to counsel's duty to only advance grounds which are reasonable and arguable. These grounds cannot in any manner be so described.*'

The court ordered that 3 months of the time the Applicant had spent in custody would not count towards his sentence.

MA 108/99

Woo J

(7.5.99)

*Cheung
Wai-sun

#Ken Ng

CHEUNG Ho-ying

Competence of counsel/Scope of authority/Whether necessary to establish doctor as expert/Scientific criteria not required to establish fracture/Evaluation of discrepancies
律師是否稱職的問題 – 權力範圍 – 是否有必要證明醫生是專家 – 毋須用科學準則來證實骨折 – 衡量證詞中差異之處

The Appellant was convicted of unlawful wounding, contrary to s 19 of the Offences Against the Person Ordinance, Cap 212.

On appeal, it was submitted that counsel at trial was incompetent. Then it was said that the doctor who gave evidence at trial as to the nature of the injury suffered by the victim had not been shown to be an expert in respect of such an injury, namely, a fracture to the base of the little finger bone. Finally, it was contended that the magistrate failed to have sufficient regard to the material discrepancies in the testimony of the victim and the contents of her witness statement to police.

Held :

(1) Trial counsel had unlimited authority to do whatever he considered best for the interests of his client, and that extended to all matters relating to the action, including the calling and cross-examination of witnesses, challenging a juror, deciding what points to take, choosing which of two inconsistent defences to put forward, and even agreeing to a compromise of the action or to a verdict, order or judgment. It was not a ground for setting aside a conviction that decisions made by counsel were made without or contrary to instructions, or involved errors of judgment or even negligence: *HKSAR v Wong Chi-keung* Cr App 585/96, *R v Doherty and McGregor* [1997] 2 Cr App R 218;

(2) The existence, or otherwise, of a fracture of the left little finger of the victim did not need an expert to prove. Even if it did, the doctor had stated his qualifications in evidence, which was Bachelor of Medicine and Bachelor of Surgery, and he had been stationed at the Yan Chai Hospital since he qualified as a Medical Officer in 1997. His qualifications and experience were not raised as an issue before the magistrate. Although the magistrate did not state that he had treated the doctor as an expert able to give medical opinion on the fracture of a bone and on the symptoms of such a fracture, the witness was well qualified to do so. A doctor would normally be understood to be able to give evidence on such matters;

(3) As regards the submission that the doctor had not provided scientific criteria for testing the accuracy of the finding of a fracture, such as an X-ray film, in view of the lack of challenge and the existence of the fracture to the little finger, the non-production of the X-ray film was a matter of no consequence whatsoever. The finding of a fracture was a fact, as opposed to a conclusion, that did not need scientific criteria for testing its accuracy;

(4) The magistrate explained the discrepancies between the victim's evidence and her written statement, and they were immaterial. He found that the witness was telling the truth, despite the discrepancies. He concluded that the testimony did not permit any interpretation other than that alleged in the charge: *R v Hui Kee-fung* MA 196/94, *R v Yip Kam-lam* MA 731/96.

Result - Appeal dismissed.

CA 287/95 WONG Wai-yip

Mayo & Stuart-Moore JJA
Gall J

(12.5.99)

*AA Bruce SC & A Cheang

#P Loughran

Competency of counsel/Whether decision of counsel not to challenge admissibility of confession flagrantly incompetent advocacy/Extent of judge's duty to make ruling on admissibility when not requested to do so
律師是否失職－律師決定不質疑供認的可接納性是否明顯的不稱職訟辯－法官在沒有要求下就供認的可接納性作出裁決的責任限度

The Applicant was convicted after trial of trafficking in a mixture weighing 345 grammes and containing 97.78 grammes of salts of esters of morphine (heroin). He was sentenced to 9 years' imprisonment.

On appeal, it was submitted, first, that the judge erred in failing to rule on the voluntariness of oral and/or written admissions alleged to have been made by the Applicant. Second, it was said that '*the trial was unfair due to Defence Counsel's errors of law, fact and approach, by his failing to act upon his client's instructions, by failing to argue for and seek a ruling as to the voluntariness of the statement in a situation where his instructions were to the effect that such circumstances surrounding the alleged oral and/or written statements were those of assault, threat and inducement.*'

Trial counsel testified that he was given instructions which revealed that the Applicant was saying that he was subjected to a number of threats and had

been assaulted when he signed a post-record, which contained the words '*All the white powder are mine*', to acknowledge thereby that it was a correct record of what had been said and done. Although counsel accepted that the statement contained highly damaging admissions, he said there was no realistic prospect of mounting a successful application to have the statement excluded on the ground that it had been made involuntarily in light of various reasons. There was, said trial counsel, having called all the evidence for the Defence, simply no point in making the application to the judge to have the statement excluded on the ground of involuntariness. Trial counsel, who had been called to the Bar in 1972 and had practised in criminal law continuously in Hong Kong since 1975, explained that, tactically, he had hoped that the jury would believe that the case against his client was a frame-up so that everything else would fall away. He said that he thought it was not a decision that he would have taken without consultation with the client and the representative of the Legal Aid Department.

Held :

(1) Counsel appeared to have made a curious decision. He could have applied to the judge to rule upon the post-record, on the ground that it had been made involuntarily, at the conclusion of all the evidence, however hopeless he might have perceived that application to be. There was nothing to be lost by making the application on an outside chance that it might succeed;

(2) The judge was aware of the possibility that the issue might call for a ruling from him, and if the Applicant had been unrepresented then the judge should have made a ruling, whether called upon to do so or not, since the Applicant would not have been deemed to know his right in law to have a statement excluded on the ground that it was involuntary. Even here, with the Applicant represented, it might have been a wiser course for the judge to have given a formal ruling, even though not called upon to do so, to the effect that he would have admitted the statement as voluntary if he had been asked to rule upon it;

(3) The trial judge was alive to the issues and it was safe to conclude that if he had not been satisfied about the voluntariness of the statement he would have ruled it to be inadmissible of his own motion. It was quite inconceivable in Hong Kong, where the issue was commonly raised in v*oire dire* proceedings, and occasionally where it was raised before the jury, that the judge was not aware of his duty in this respect;

(4) Trial counsel had a wide discretion as to how he conducted his case on behalf of his lay client: *HKSAR v Wong Chi-keung and Others* Cr App 585/96. It could not in this case be said that counsel's conduct was incompetent in any degree. He was at liberty to decide for himself whether or not to object to the admissibility of the statement or rather to seek to persuade the jury that no weight should be attached to it in deciding the issues before them. That was a tactical decision that had to be left to him to decide, and the courts would be very slow to interfere with the approach taken by counsel in the conduct of their case, unless it could be demonstrated that this amounted to flagrant incompetence;

(5) There was no reason for the judge to have made a ruling when he was specifically told that this was not required at the end of the prosecution's case and where it was inconceivable that he would not have ruled of his own motion if he had come to the conclusion that the evidence of the statement was inadmissible.

Result - Application dismissed.

香港特別行政區 訴 李信安及張志陽
HKSAR v LEE Shun-on & CHEUNG Chi-yeung

高等法院上訴法庭 –高等刑事上訴案 1998 年第 643 號

高等法院上訴法庭法官梁紹中
高等法院原訟法庭法官胡國興
高等法院原訟法庭法官彭鍵基
一九九九年六月二十二日

COURT OF APPEAL – CRIMINAL APPEAL NO. 643 OF 1998
LEONG JA, WOO J AND PANG J
22 JUNE, 1999

申請上訴許可 - 申請人欲以英語聆訊 - 原審時以本地話聆訊 - 代表律師只懂一種語言 - 有關申請牽涉開支和資源

上訴人的審訊在區域法院以本地話進行。

法庭聆訊上訴許可的申請時，第二申請人的代表律師向法庭申請以英語聆訊，理由是當事人欲延聘只懂英語的大律師，而這是他的選擇。然而，代表律師並無指出第二申請人作此選擇的理由。

裁定：

(1) **在區域法院審訊中，第二申請人有大律師代表，而該審訊全以本地話進行。在審訊中所有證物亦以中文書寫。如在本庭之申請以英語進行，則該等文件及裁判理由書及判刑理由書，亦一併要譯成英文。為此，必須動用額外人力物力，費用不少。而亦因此對本申請的聆訊，引致不必要的延遲。對公帑及第二申請人而言，均有不利的影響。**

(2) **第二申請人對判罪及判刑的上訴申請，性質和理由與第一申請人大致相同，理應一併審理。若本庭准許第二申請人的申請以英語進行聆訊，這會延遲兩人申請聆訊，對第一申請人會造成不公。**

(3) **第二申請人對該案件的審訊沒有任何不明瞭的地方，對他全無不利的影響。他在本庭要求申請的聆訊以英語進行，完全為了方便他欲聘用只懂英語的大律師。為此，法庭需要動用大量人力物力及公帑，本庭認為是不合理的。**

拒絕申請。

***陸貽信及鄭紀航**

Arthur Luk & Anthony Cheang

#第一申請人 - 自辯(不服判罪申請上訴)
黃熙曜(不服判刑申請上訴)
第二申請人 -

William G Allan
1st Applicant, unrepresented (application for appeal against conviction)
Wong Hay-yiu (application for appeal against sentence)
2nd Applicant, William G. Allan

[English digest of CA 643/98, above]

(1) LEE Shun-on
(2) CHEUNG Chi-yeung

Application for leave to appeal/Applicant wanting proceedings conducted in English/Trial conducted in Punti/Advocate monolingual/Expense and resource implications involved

The trial of the Applicants in the District Court was conducted in Punti.

At the hearing of the application for leave to appeal, counsel for A2 applied for the hearing to be conducted in English as he intended to instruct a barrister who only spoke English, and that was his choice. He did not, however, elaborate upon why he had made that choice.

Held :

(1) At trial, A2 was represented by a barrister and the trial was conducted in Punti. All the exhibits produced at trial were written in Chinese. If the application was to be heard in English, those documents, the Reasons for Verdict and the Reasons for Sentence would all need to be translated into English. That would necessitate extra manpower and material resources at a great cost, and the hearing would be unnecessarily delayed. There would be a negative effect both upon public money and on A2;

(2) The nature of the grounds of A2's application for leave to appeal against conviction and sentence were more or less similar to those of A1. Hence their applications should be heard together. If the court were to allow A2's application to be heard in English, that would delay both applications and that would be unfair to A1;

(3) There were no instances of A2 not understanding the trial, and he suffered no prejudice. It was not reasonable to expend a huge amount of manpower, material resources and public money just to facilitate his wish to instruct a barrister who only spoke English.

Result – Application refused.

CA 672/97

Stuart-Moore VP
Mayo JA
Pang J

(5.10.99)

*D G Saw SC
&
Richard Ma

#Michael Lunn SC & T Jenkyn-Jones

LIU Kwong-fai

Counsel advising client not to testify/Strong circumstantial case/Whether counsel flagrantly incompetent/Comments on relationship between counsel and client/Basis of reluctance of appellate court to interfere
律師建議當事人不作供 - 案件具有力的環境證供 - 律師是否明顯失職 - 就律師與當事人的關係作出評論 - 基於何種情況上訴庭不願作出干預

The Applicant was convicted after trial of trafficking in a large quantity of dangerous drugs. The Applicant did not testify at trial.

On appeal, it was submitted that the conduct of trial counsel had been flagrantly incompetent, and that in consequence the Applicant '*did not receive a fair trial since he was deprived of full reasoned and proper advice upon which to make a valid or meaningful election in his own best interests whether to exercise his right to give evidence or not*'. In particular, it was said:

(i) Counsel did not properly advise the Applicant on the weight and significance of the evidence adduced against him;

(ii) Counsel did not stress the impact of the prosecution's evidence as it stood unrebutted;

(iii) Counsel did not impress upon the Applicant that the only realistic prospect of securing an acquittal and/or the only

> basis upon which the jury could properly consider the Applicant's defence lay in him giving evidence before the jury and that in the absence of such evidence a conviction was virtually inevitable.

In light of the advice received the Applicant contended that he was misled as to the strength of the case against him, the significance of his own evidence, the likely outcome of the trial and as to whether he would be better off not to give evidence.

Counsel who represented the Applicant at trial swore an affidavit in which he commented upon the allegation of his client that he failed to impress upon him the importance of his going into the witness box and giving evidence to provide an explanation for the presence of the heroin found in the trunk of his car failing which a conviction would almost inevitably ensue.

Held :

(1) Whilst the prosecution case was a strong one, it was based on circumstantial evidence. It required the jury to draw an inference that the Applicant had knowledge of the dangerous drugs in the trunk of his car. It was by no means inevitable that the jury would have been prepared to draw the inference that the Applicant had knowledge of the existence of the dangerous drugs;

(2) Had the Applicant testified he would undoubtedly have been subjected to vigorous cross-examination. The explanation which would have been furnished by the Applicant would have been highly implausible. It was clear that what was required was a balancing exercise as to whether the disadvantage of exposing himself to cross-examination outweighed the advantage of placing before the jury his explanation for the presence of the dangerous drugs. From counsel's affidavit it would have been wrong for counsel to have urged the Applicant to go into the witness box. It was a decision which had to be made by the Applicant and there was no reason whatever to conclude that counsel was in any way derelict in his duty, much less that it could be suggested that he was flagrantly incompetent in terms of *R v Clinton* [1993] 1 WLR 1181;

(3) The court supported the validity of the observations of P Chan J in *R v Li Wan-keung* MA 580/96:

> *Some degree of trust or confidence must be placed by defendants in their own counsel and lawyers. Otherwise the system simply cannot work. If this type of complaint were to be readily accepted on appeal, lawyers would be constantly worried of complaints on their conduct of the case and may not be able to freely and fearlessly do their best for their clients.*

(4) The court should be reluctant to interfere where (i) there were alternatives open to counsel when rendering his advice and one was chosen over another, even if counsel on appeal, with the benefit of hindsight, advocated the other, and (ii) the advice not to give evidence did not result in a specific defence being omitted.

Result - Application dismissed.

Dangerous Drugs

CA 418/98 NG Ning-fu

Mayo & Stuart-Moore JJA Keith J

(18.5.99)

*D G Saw SC & Wong Sze-lai

#Chan Siu-ming

Trafficking in dangerous drugs/Possession considered
販運危險藥物 – 考慮管有的涵義

After trial, the Applicant was convicted of trafficking in a high purity mixture containing just over 1.14 kgs of heroin hydrochloride. On appeal

Held :

'*For the purposes of trafficking in any quantity of drugs, a defendant must be proved to have been in possession of the drugs, that is to have knowingly had them in his possession for the purposes of trafficking either by having them in his physical or actual custody or, which is relevant to this case, by having the drugs within his physical control and intending to have custody of them or exercise control over them as and when the occasion requires. A person has physical control of an object if he knowingly has the ability, as and where the occasion requires, to use the object to the exclusion of other people or to keep it safe or away from other people, and intends so to use or keep it.*'

Result - Application dismissed.

CA 338/98 (1) CHUI Chi-wai (2) YIP Kwan-on

Nazareth VP Mayo & Stuart-Moore JJA

(28.4.99)

*A A Bruce SC & Sharman Lam

#Duncan Percy

Trafficking in MDMA/Opportunity to discover contents of bag not sufficient to establish knowledge of contents/Mistaken belief defence must be left to jury/Erroneous direction not cured by other correct statement of law
販運 MDMA – 被告有機會查驗袋內所盛載的物件不足以證明他們知道袋內是甚麼物件 – 以錯誤相信作為辯護理由須交由陪審團裁決 – 指引錯誤即使其他法律陳述正確也無補於事

The Applicants were convicted after trial by jury of the offence of trafficking in 18,797 tablets containing approximately 2.1 kgs of MDMA or '*ecstasy*'. A2 was further convicted of a similar count, where the quantity of '*ecstasy*' was approximately 2.3 kgs. Each Applicant went into the witness box and gave a detailed (and innocent) explanation for what they believed to be the contents of the bags with which they were associated.

The judge when directing the jury said:

'*I emphasise to you that the necessary criminal intention of possession would not be satisfied if it was shown that the defendant was genuinely mistaken as to its actual contents and that of their illicit nature and received them innocently, provided he had no opportunity since receiving the containers to acquaint himself with their contents.*'

He later added:

'*The term possession is satisfied by a knowledge only of the existence of the thing itself and not of its qualities and that ignorance or mistake as to its qualities would not excuse. This would comply with the general understanding of the word* '*possess*'*, for example, though I reasonably believe the tablets*

> *which I possess to be aspirin, yet if they turn out to be heroin, I am in possession of heroin tablets. This would be so, even if I believed them to be sweets.*'

On appeal, it was submitted that these directions would likely have led the jury to think that it was open to them, even if they accepted the account given by each defendant, to convict on the account given by each of them.

Held :

(1) As stated in *R v Law Wai-choi and Another* [1997] HKLRD 555, in relation to a direction almost identical to the first of which complaint was made, '*the jury might have concluded that an opportunity to acquaint themselves with the contents of the containers was in itself sufficient to establish knowledge of the contents. This is wrong and may have had the effect of withdrawing from the jury each defendant's defence of innocent possession of the packet without knowledge of its contents*' ;

(2) The effect of the second direction given by the judge was virtually to withdraw from the jury the defence of mistaken belief as to the contents of the various bags. The impression the jury might have gained was that a mistaken belief as to the contents of the bags could not be a defence as provided by s 47(2), Cap 134, which stated:

> '*Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug*' ;

(3) These were material misdirections on the part of the trial judge on the one important issue upon which the jury required clear and accurate directions. The jury, in other words, needed to be told in clear terms the practical effect of s 47(2), Cap 134. Whether or not either Applicant knew the name of '*ecstasy*' or MDMA, or knew the drug by some other term, was beside the point so long as the jury were satisfied the Applicants had knowledge that they possessed something in the nature of dangerous drugs;

(4) The judge was in error to have directed the jury that the Applicants were guilty '*even if (they) believed them to be sweets*', or, in his earlier illustration, '*aspirin*' ;

(5) Although the judge had correctly stated the law elsewhere in the summing up, he never corrected the error he had made on the one crucial issue in the case and counsel did not attempt to correct him either. The direction at the end of the summing up that if the jury accepted the defence version they must be acquitted was not enough to dislodge the mistaken impression they would have received as to the law of possession as it related to drugs. Nor could the proviso be applied.

Result – Appeals allowed. Retrial ordered.

FAMC 21/99 (1) SHING Siu-ming
(2) KWONG Po-yin

Litton ACJ
Ching &
Bokhary PJJ

(7.9.99)

*M C Blanchflower & Alex Lee

#J Matthews

Observations on provision of copies of sections in Ordinance to jury/Whether failure to identify ingredients of offence fatal when object of conspiracy clear

就向陪審團提供法例條文副本一事作出評論 - 如串謀販毒這個目的清楚明晰，法官未有指出犯罪要件是否屬嚴重錯誤

The Applicants sought leave to appeal out of time to the Court of Final Appeal. They complained that:

1. The Court of Appeal erred in ruling that the supplying to the jury of various sections of an Ordinance, namely, the Drug Trafficking (Recovery of Proceeds) Ordinance Cap 405, and the failure to direct them of the use that they might make of the same, did not amount to a material irregularity;

2. The Court of Appeal erred in ruling that as it was generally accepted that there was an overwhelming case that there had been a conspiracy along the lines charged that the trial judge's direction to the jury was sufficient in the circumstances of the case, notwithstanding that there had been a failure to direct the jury on trafficking in dangerous drugs, the substantive offence which was the object of the alleged conspiracy.

The Applicants sought a certificate that those complaints raised points of law of great and general importance.

Held :

(1) If the Court of Appeal had ruled as alleged, the correctness or otherwise of such a ruling could well have formed the basis of a question of law of great and general importance. But the Court of Appeal did not suggest that it was acceptable to supply a jury with various sections of a relevant statute without directing them on what use they might make of such sections. Having explained the sections to the jury, the judge provided them with copies as an aide memoire. Whether his explanations and directions were sufficient was primarily a matter for assessment by the Court of Appeal as an intermediate appellate court. The Court of Appeal assessed those explanations and directions as sufficient, and there was no proper basis for challenging that assessment by way of a final appeal;

(2) As to future cases, there might be circumstances in which there were advantages in supplying jurors with copies of relevant statutory provisions. But there were also attendant risks in that course. Trial judges had always to bear carefully in mind the need to ensure that jurors received adequate directions and that, if copies of statutory provisions were supplied to them, they were not allowed to become more than a means of refreshing memory;

(3) Although it would perhaps have been better had the judge told the jury what were the ingredients of the offence of trafficking in a dangerous drug, his failure to do so was not fatal in all the circumstances. The conspiracy could not have been for any purpose other than to traffick in dangerous drugs by exporting them from Hong Kong, importing them into Australia, and selling them there.

Result – Application dismissed.

Disclosure

MA 21/99 WONG Tin-lung

McMahon DJ

(26.3.99)

*Simon Tam

#C Grounds

Disclosure to defence/Material must be disclosed if relevant/No duty on defence to make enquiries/Burden on prosecution
向辯方披露資料 – 相關資料必須披露 – 辯方沒有責任去查詢 – 責任在於控方

The Appellant was convicted after trial of an offence of possession of offensive weapons in a public place, contrary to s 33(1) of the Public Order Ordinance, Cap 245.

On appeal, it was submitted, *inter alia*, that the failure of the prosecution to disclose to the Appellant that the fingerprints of his friend, Ko Kit, were found on one of the knives within the bag and on the inside of one of the bags holding the knives, amounted to a breach of the duty of disclosure of the prosecution.

Held :

(1) In prosecuting an individual for possession of items such as offensive weapons, the prosecution, if they knew, should disclose whose fingerprints were found on the objects. The presence of the fingerprints of Ko Kit on the knives was material. In *R v Keane* [1994] 1 WLR 746, Lord Taylor CJ said :

> *As to what documents are material we would adopt a test suggested by Jowett, J in R v Northan (unreported) 12 December 1993. The judge in that case said: 'I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution (1) to be relevant or possibly relevant to an issue in the case (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use (3) to hold out a real as opposed to a fanciful prospect of providing a lead on evidence which goes to (1) or (2).*'

In the present case the fingerprints of Ko on the items, one of them inside a bag and another on one of the knives that the Appellant was carrying, was material at least to the simple issue as to whether Ko had prior dealings with those objects and had given those objects to the Appellant. The Appellant's case was that Ko had provided him with the objects carried in the plastic bags. This aspect of the evidence would perhaps have been relevant to the defence mounted in respect of the Appellant's possession of the items, and should have been disclosed to the defence at trial;

(2) There was no duty on the defence to make their own enquiries. In *R v Ward* [1993] 1 WLR 619, the Court of Appeal expressly held that the duty to disclose was a positive duty placed upon the prosecution. The prosecution must make its own enquiries in each case as to whether there was material requiring disclosure. If they failed to do so and made no disclosure then, even if that failure was innocent and not malicious, it might result in a conviction being held to be unsafe in the event that the undisclosed material became relevant at trial.

Result - Appeal allowed.

District Court

HCAL 77/98 SJ v YUEN Lit-ping

Keith J

(15.12.98)

*A Luk & F Lo

#I/P Johannes Chan as *amicus curiae*

When District Judge *functus officio*/Judge setting aside convictions and sentences after sentence/Acceptance of guilty plea does not require formal acknowledgement

區域法院法官何時職分已完 – 法官於判刑後撤銷定罪和刑罰 – 法庭接納被告認罪無須正式通知

The Respondent pleaded guilty to two offences of burglary, and one of remaining in Hong Kong without the lawful authority of the Director of Immigration. He admitted the correctness of the Summary of Facts. The judge then convicted the Respondent of the three charges. After the Respondent's solicitor had addressed the judge in mitigation, the judge stood the case down for a short while to consider sentence.

When the judge returned to court he pointed out that there was a discrepancy over the date of one of the burglaries. Whereas the charge sheet had alleged that the burglary to which charge 2 related had been on 21 February, the Summary of Facts recorded it as having been committed on 21 January. The prosecution accepted that the date in the Summary of Facts was an error and the Respondent's solicitor told the judge that both the burglaries occurred on 21 February. The judge decided that the safest course was to set aside his conviction on the burglary charge. The Respondent again pleaded guilty to the charge, and agreed the Summary of Facts showing the date of offence as 21 February. This time, though, the judge did not say that he convicted the Respondent on the charge, and proceeded instead to sentence on 8 June 1998.

Although a judge in the District Court has no power to review in criminal cases, four days later he re-listed the case for hearing as he was worried that he had not again announced that he had convicted the Respondent on the burglary charge. Having discussed the case with counsel he set aside the sentence. When the Respondent was asked to confirm that he had pleaded guilty to the burglary charge, he refused saying that he had been assaulted by a police officer who had told him to plead guilty. After a discussion, the judge said he was not able to accept *any* of the pleas tendered by the Respondent as he was not satisfied they were voluntary. He had already set aside the sentence on the burglary charge, and he proceeded to set aside the convictions and sentences on the other two charges.

The case was listed for trial before another judge on another date. At that time, the prosecution asked for the trial not to proceed, on the basis that the original judge had no jurisdiction to make any order in respect of the case once sentence had been passed. The judge agreed with that submission, and suggested that the case be remitted to the previous judge so that he could revoke his orders. However, the prosecution pointed out that the original judge could not do that either.

The prosecution sought judicial review.

Held :

(1) There must come a time when the court was *functus officio*: it had completed its task. The District Court was a court of record. The only provision about records in criminal cases in Hong Kong was s 79(1) of the Criminal Procedure Ordinance, which provided that a record should be kept in accordance with rules made under section 9, of the proceedings at the trial. No rules had been made under section 9 relating to the keeping of a record of proceedings. Since the proceedings in this case were taped, it was the tape which constituted the record, and since the tape came into existence contemporaneously, it followed that, in the absence of any other statutory

provision, that was when the proceedings were finally recorded. Accordingly, the judge was *functus officio* once he had pronounced the sentences: *HKSAR v Ho Tung-man* [1997] 3 HKC 375;

(2) The judge was in error in thinking that his failure to announce that he had convicted the Respondent on the burglary charge meant that there had not been an acceptance of a plea of guilty. The acceptance of a plea of guilty did not require a formal acknowledgement by the court to that effect: *S v The Recorder of Manchester* [1971] AC 481. Even if the judge had been correct to conclude that he had not accepted the Respondent's plea to the burglary charge, and was therefore not *functus officio* in respect of that charge, there was no basis on which he could have concluded that he was not *functus officio* on the other two charges. Having sentenced the Respondent on all three charges, the judge did not have the power to make any substantive orders in the case thereafter. He had no power to set aside the sentences on the three charges, or to set aside the convictions on the other two charges;

(3) As the Respondent had been properly convicted and sentenced on 8 June 1998 on all charges, a declaration would be issued to that effect.

Result - Judicial review allowed.

CACC 1/98 YAU Petrus

Power &
Mortimer VPP
Keith J

(29.4.99)

*D S Saw SC
&
R Ma

#John Marray

Contempt of court/Power to deal with contempt to be exercised sparingly/Outburst in court/Rebuke invariably sufficient/ Appeal as of right under Cap 4

藐視法庭 – 法庭須經慎重考慮後才當庭行使處理藐視法庭的權力 – 在法庭上的衝動行為 – 對藐視行為當庭予以訓斥在一般情況下已足夠 – 第4章賦與被告人對此提出上訴的權利

After an outburst in the course of his trial in the District Court, the Appellant was summarily fined $1,000. In allowing his appeal, it was

Held :

(1) The statutory power in section 20 of the District Court Ordinance to deal summarily with contempt of court was a necessary and important weapon in the District Court's armoury to keep control of its own proceedings. But the power should be exercised sparingly and with great caution: It '*is a power to be used reluctantly but fearlessly when, and only when, it is necessary to prevent justice being obstructed or undermined ... . That is not because judges, jurors, witnesses and officers of the court take themselves seriously: it is because justice, whose servants they are, must be taken seriously in a civilised society if the rule of law is to be maintained*' : *Balogh v St Albans Crown Court* [1975] 1 QB 73, 91;

(2) The power should only be exercised as a last resort, when other less drastic remedies were thought to be inappropriate, such as where the contempt was clearly proved and could not wait to be punished. Judges should therefore guard against the overuse of the power to try someone summarily for contempt: '*its usefulness depends upon the wisdom and restraint with which it is exercised*' : *Parashuram Detaram Shamdasani v King-Emperor* [1945] AC 264;

(3) Outbursts of the kind which the Appellant made happened from time to time. Legal proceedings could be extremely stressful for people involved in them. That was why judges were usually tolerant when people misbehaved. They understood the pressures which people were under. A rebuke or a short adjournment followed by a reprimand, with an opportunity to the person to apologise, was invariably all that was required. It was therefore only in exceptional circumstances for the court to consider contempt proceedings, and

even then it might be more suitable to let the contempt proceedings be handled by the proper prosecuting authorities and be determined by a different tribunal.

Obiter - The Appellant did not need leave to appeal against his conviction for contempt of court. He did not need leave to do so as his '*trial*' for the offence of contempt of court was not a trial '*on indictment*' within the meaning of section 82(1) of the Criminal Procedure Ordinance: he could appeal as of right under section 50(1) of the High Court Ordinance.

CA 156/99

Nazareth VP Leong & Stuart-Moore JJA

(4.6.99)

*Simon Tam

I/P

WONG Yuk-cheung

Reasons for sentence/Materials available to Court of Appeal/Observations on need for judge when sentencing to indicate what occurred below
判刑理由 – 上訴法庭所獲提供的資料 – 就法官在判刑時有需要述說審理情況一事提出意見

In dismissing an appeal from the District Court against sentence, the court observed:

> *We would also comment that the Reasons for Sentence did not give much indication of the pleas entered. There is reference to 'the trial' from which it could be inferred that the robbery and the offence of resisting arrest had been contested, as indeed it turns out they were. There is nothing to indicate that the Applicant pleaded guilty to the other offence and we were left having to inquire of the Applicant himself to find out how he had pleaded. It may be that judges in the District Court have the impression that we are supplied with the transcript of proceedings but, in straightforward applications such as this one, we are usually only provided with the Reasons for Sentence, the Summary of Facts, the Charge Sheet and the record of interview. This court otherwise heavily depends upon what the judge has said in his Reasons for Sentence as to what has actually happened so as to understand the full basis on which sentencing has been carried out.*

Evidence

FACC 3/98

Li CJ Litton Ching & Bokhary PJJ Mason NPJ

(29.1.99)

*GJX McCoy SC

#A E Schapel & Chan Fung-shan

CHIM Hon-man

Admissibility of unsworn video-taped interview of child complainant/Use of live television link by 17 year old complainant/Principle of law precludes proof of more than one offence as basis for conviction of single offence charged/Video recordings not inadmissible due to leading questions/ Directions to jury where charges occurred long ago
接納兒童投訴人在未經宣誓下錄影的會面錄影帶作為證據 – 17 歲的投訴人使用電視直播聯繫系統作供 – 法律原則不許以證明曾犯多於一項罪行來裁定單一項控罪罪名成立 – 錄影帶不會因誘導性問題而不獲接納為證據 – 如控罪在很久以前發生則須向陪審團作出的指引

The Appellant was convicted of two counts of rape. The first count alleged that the Appellant '*on a date unknown between the 14th day of July 1989 and the 31st day of July 1989*' at his home raped his step-daughter. The second count was in identical terms save that the date in the particulars of the offence charged was expressed as '*on a date unknown between the 1st day of August 1989 and the 15th day of August 1989*'.

The complainant was born on 1 March 1980 and was 9½ years old when the alleged offences were committed. The prosecution's case, based on video-recorded interviews of the complainant which were admitted into evidence, was that when the mother was pregnant with the complainant's younger sister, and while the complainant was at home on school summer vacation and the mother was at work, the Appellant repeatedly raped her between 14 July 1989 and 15 August 1989.

The complainant was unable to differentiate in any significant way between any of the particular acts of rape. It seemed that in aggregate there were about ten occasions in that time span when the Appellant sexually molested her and that on the first few occasions rape did not take place because the Appellant was unable to effect penetration. According to the complainant, sometimes these acts took place on consecutive days and sometimes only on every other day. The complainant's recollection of these events was not precise.

The complainant made no complaint until she told a school friend in 1994, some five years later. The failure to mention the matter to anyone before was said to be due to a combination of ignorance of the significance of the Appellant's conduct, her unwillingness to share her problems with other members of the family, her apprehension and her desire not to break up the family. It seemed she wanted to forget about the events.

At trial, the complainant's evidence was not corroborated. The Appellant's case was that there was a '*frame-up*'. Notwithstanding the fact that the indictment contained two counts only of rape, the prosecution presented evidence of the various acts of sexual molestation without consent, including evidence that penetration took place except on the first few occasions when penetration was not effected. The evidence was led on the footing that the jury was asked to find that in each of the two periods one act of rape occurred, without being asked to identify the particular occasion when it occurred. The judge told the jury: '*if you are satisfied that there was at least one rape during each period, you should convict the defendant of the two charges but these two charges are, of course, separate charges and you should consider them separately*'.

The complainant's evidence-in-chief consisted of four video-taped interviews recorded between January and August 1996 when she was 15 and later 16 years old. The video-tapes were received in evidence pursuant to s 79C of the Criminal Procedure Ordinance, Cap 221.

The complainant was cross-examined at the trial from a room outside the court room via a live television link. The cross-examination by way of live television link took place in consequence of an order made on 22 November 1996, pursuant to s 79B Cap 221, when the complainant was 16. By the time she gave evidence at the trial in March 1997 she was 17.

On appeal

Held :

(1) Although it was submitted that before the unsworn video-taped interviews were received in evidence, the complainant should have been sworn and asked to adopt the truth of her statements in the interviews, s 79C made the video recording admissible and gave evidential effect to the statements which it recorded as if those statements had been given in direct oral testimony, without the need for the witness to be sworn or to give oral evidence adopting the

statements. Section 79C provided an exception to the general rule that only oral testimony on oath or affirmation might be admitted in a criminal trial: *R v Day* [1997] 1 Cr App R 181; *R v Sharman* [1998] 1 Cr App R 406. A more accurate view of s 79C was that it made the video recording admissible and then provided that a statement made by the child in the recording should have the same effect as if given in direct oral testimony;

(2) While the Appellant submitted that when s 79B(2) was read with the definition in s 79A of '*child*', the sub-section did not permit a child who was 17 to give evidence or be examined by way of a live television link. The Court of Appeal answered the argument by stating that as the complainant was under 18, she fell within paragraph (a)(ii) of the definition of '*child*'. There was no error;

(3) An accused might be subjected to unfairness and embarrassment if he was called upon to meet a charge of one offence based upon evidence of the commission of multiple offences, more particularly if the evidence was such that it did not enable each such offence to be clearly differentiated from the others. If the prosecution's case was based on evidence of many offences in an extended period of time the unfairness might be considerable. The principle also played a part in preserving the notion of a separate trial for a separate offence. It enabled the jury to focus on the single offence proved as the basis for a conviction of the offence charged and it encouraged the jury to apply the criminal standard of proof to the evidence of that offence. If, as here, the jury was invited to find the commission of at least one offence from evidence of multiple offences there was either a risk of want of unanimity as to the same offence or a willingness to find guilt from the very frequency of the offences suggested by the evidence. The risk arose because the focus of the jury might be directed from the particularity of a single offence to the generality of the evidence of multiple offences. The general principle precluded proof of more than one offence as the basis for the conviction of the single offence charged. There was no qualification or exception which permitted a prosecution for sexual abuse of a child to be presented on the basis of a specimen count when the complainant was unable to be precise as to the date, time and place of the particular offences of which complaint was made, was unable to distinguish between them, and the offences extended over a long period of time: *S v The Queen* (1989) 168 CLR 266. In allowing the trial to proceed without confining each count to a single act of rape, there was an error of law;

(4) The submission that the recordings should have been edited to omit answers to leading questions and suggestions could not be accepted. As the recordings were of interviews, it would not be right to insist that leading questions should not be asked, though recordings of interviews which revealed leading questions might be subject to adverse comment when received in evidence at trial;

(5) The judge did not direct the jury that in order to convict the accused on both counts, they must be satisfied that he committed the one particular act of rape in each of the two periods specified in the indictment. Nor did he instruct the jury to the effect that the absence of particularity with respect to the individual incidents alleged to have occurred so long ago made it difficult for the accused to meet the charges; such a direction was an important element in ensuring fairness to the accused in cases involving old charges, especially when there was little particularity. Had either direction been given, it might well have had an impact on the jury's consideration of the issue.

Result - Appeal allowed.

CA 378/98

Power ACJHC
Mayo &
Stuart-Moore
JJA

(5.2.99)

*JR Reading
& J To

#GJX McCoy
SC & R Pierce

LUI Kin-hong, Jerry

Admissibility of documentary evidence/Limits to use of s 22 of Evidence Ordinance/English scheme much wider/Decision in *Foxley* not relevant to admissibility of documents under s 22 Cap 8/General principles give way to specific statutory provision

文件證據的可接納性 - 引用《證據條例》第 22 條的限制 - 英國的規劃較為廣泛 - *Foxley* 一案的裁決與第 8 章第 22 條下的文件的可接納性無關 - 特定的法例條文凌駕一般準則

The Appellant was convicted after trial of conspiracy to accept advantages, contrary to s 9(1)(c) of the Prevention of Bribery Ordinance, Cap 201, and Common Law. The case for the prosecution was that as an officer of two companies which were wholly owned subsidiaries of British American Tobacco Industries (BAT) Public Limited Company, the Appellant accepted payments and loans to ensure the sale and supply of cigarettes from BAT to others.

Although at trial the prosecution was put to proof on a number of issues, by the time the Appellant had decided to testify the only real issues were:

(a) who were the true payers of the $23 million to the Appellant?

(b) what was the purpose for which the loans and payments were made to and accepted by the Appellant?

The payments themselves were not an issue, as the Appellant in his evidence admitted that he had received them.

The prosecution relied on an expert accountant to examine documents seized by the ICAC with a view to undermining or destroying the suggestion that the payments received by the Appellant were related to the sale and supply of Japanese cigarettes. The expert used the documents seized to '*negative*' the Appellant's version of events firstly given in the USA, and later confirmed when he gave evidence in the trial, that the payments were for assisting in the Japanese cigarette business. Those documents were crucial in the sense that they enabled the jury to infer that the payments were connected to the purchase of BAT cigarettes, and were not in relation to the Japanese venture as the Appellant asserted.

On appeal it was submitted that there was a material irregularity in the trial in that the judge erred in law in admitting into evidence documentary hearsay, as the provisions of s 22 of the Evidence Ordinance, Cap 8, which governed the preconditions for admissibility of documentary hearsay, had not been complied with and this deprived the Appellant of a fair trial according to law.

The Appellant contended, firstly, that none of the documents in question were made by the Appellant, and their provenance was by no means clear and none were adopted by him. As such, the only proper basis for their admissibility was that they amounted to documentary records which, although hearsay in relation to the Appellant, became admissible because of the special provisions in the Ordinance. Second, it was said that the prosecution made a fundamental error, adopted by the trial judge when he ruled in their favour, by arguing that the English Court of Appeal decision in *R v Foxley* (1995) 2 Cr App R 523, had opened the way for documents in Hong Kong to speak for themselves without first satisfying the criteria for admissibility in s 22, Cap 8.

Third, it was submitted that only *after* admissibility had been established could documents be considered as to their form and content for the purpose of drawing any reasonable inferences from them.

Held :

(1) Section 24 of the Criminal Justice Act 1988 (CJA 1988) expanded the admissibility parameters by permitting the admission of documents created or received in the course of a trade, business, occupation, profession or a paid or unpaid office; there was now no requirement that such documents be, or be part of, a record; there was no requirement that the creator or receiver of the document be shown to have acted under a duty; and there was no general requirement that the person who supplied the information should be effectively unable to give oral evidence. In Hong Kong there had been no modernisation along such lines and no further amendments to the Evidence Ordinance such as would permit the evidence of documentary records to be received in criminal proceedings to reflect the provisions of the CJA 1988;

(2) The real significance of s 24 CJA 1988 was that *Foxley*, upon which the trial judge relied as authority for admitting the documents which were the subject of the appeal, was a decision which related to the legislation in England which, although superficially similar, was, when closely examined, quite different to that which endured in Hong Kong under s 22 Cap 8. Sections 23 to 26 of CJA 1988 were designed to widen the power of the court to admit documentary hearsay evidence while ensuring the accused received a fair trial. *Foxley* itself made plain that the legislative intent behind sections 24 and 25 of CJA 1988 was to enable the court to draw inferences from the documents themselves and from the method or route by which the documents had been produced before the court;

(3) The conclusions in *Foxley* were not relevant to any determination of admissibility under s 22 Cap 8. General principles gave way to a specific, unambiguous statutory provision which in this case precluded the court from drawing inferences from the documents in the process of deciding their admissibility.

Result - Appeal allowed.

Per cur - The authorities might wish to review the legislation. It seemed that legislation modelled upon s 24(1) CJA 1988 was long overdue and was now required with the utmost speed if the difficulties encountered in this case were not to recur.

[On 5 March 1999 the court certified two questions for the Court of Final Appeal. The first was whether, in determining the admissibility of statements contained in documents and tendered as *prima facie* evidence of the facts stated therein, in accordance with s 22 of the Evidence Ordinance, the court was entitled to draw inferences from the surrounding circumstances and the documents themselves. The second was whether, when statements contained in documents produced by a computer had been adopted as part of the business records of a company and were tendered as *prima facie* evidence of the facts stated therein, the tenderer was required to comply with the provisions of s 22 or s 22A of the Evidence Ordinance: Ed]

FAMC 31/98 LEUNG Sun-keung

Litton Ching & Bokhary PJJ

(25.1.99)

*J R Reading

#A A Hoosen

Directed acquittal on one count/Acquittal does not mean evidence on that count can never be used on a different count/Reliance on such evidence not inconsistent with acquittal
其中一項罪名獲法官引導裁定無罪 – 獲裁定無罪不表示這項罪名的證據不可以用於另一項不同的罪名 – 依賴這些證據並非與獲裁定無罪不一致

The Applicant faced two counts of rape. The first, upon which he was convicted, was one of rape. The second, upon which he was acquitted upon a directed verdict after a submission of no case to answer, was one of administering drugs to obtain or facilitate an unlawful sexual act. He applied to the Court of Appeal for leave to appeal against the conviction on the first count but that application was dismissed. Subsequently, the Court of Appeal certified a point of law of great and general importance. That point was:

> *Where an accused has been found not guilty of an offence (following a ruling of no case) on technical grounds is the evidence showing that he committed the acts alleged in that offence (and is therefore in fact guilty of that offence) admissible against him in respect of another offence?*

The Applicant gave no evidence at trial. From the prosecution case it was clear that the girl had been drugged to the extent that she was unable to give her consent to an act of sexual intercourse. Nonetheless, she was involved in such an act at the time and place alleged. It was the Applicant who had intercourse with her in circumstances in which the jury were well entitled to find that he knew she was not capable of giving consent. There was evidence that it was the Applicant who had brought the drugs with him, that it was he who had put a large amount of it into a bottle of orange juice, shaken the bottle to dissolve the drug and then passed it to her to drink. That evidence was given by two accomplice witnesses.

The second count was laid under s 121(1) Cap 200:

> *A person who applies or administers to, or causes to be taken by, another person any drug, matter or thing with intent to stupefy or overpower that other person so as thereby to enable anyone to do an unlawful sexual act with that other person shall be guilty of an offence.*

By subsection (2) it is provided:

> *A person shall not be convicted of an offence under this section on the evidence of one witness alone, unless the evidence is corroborated in some material particular by evidence implicating the accused.*

The trial judge acceded to the submission of no case to answer on the basis that the only witnesses on this count were accomplices and could not corroborate each other. The count was therefore withdrawn from the jury's consideration.

Notwithstanding the acquittal on the second count, when he summed up to the jury on the rape count the judge directed them fully on the evidence as to the Applicant's part in drugging the girl. The Applicant submitted that he should not have done so (1) because it was an attempt by the prosecution to go behind the acquittal, (2) because the evidence had been adduced as the very essence of the second count and (3) because the evidence of guilt was overwhelming on that count. Therefore, it was said, the judge wrongly asked the jury to rely on evidence which showed that the Applicant was guilty on that count despite the acquittal.

Held :

Notwithstanding that the Court of Appeal had certified the point of law, leave had to be refused as the point was clear. As a result of the acquittal on the second count the Applicant could not be tried on it again and the acquittal was final and binding. That was not to say that the evidence in respect of that count could never be used against him on a different count. The Court of Appeal held rightly that reliance upon the evidence in question was not inconsistent with the acquittal. A finding of guilt by a jury on that count would mean positive findings on each of the elements in section 121. An acquittal by the jury would mean only that at least one of those elements had not been proved to their satisfaction, such as that the accused had none of the necessary intentions when he caused the drug to be taken. The count of rape was very different from the count under section 121 and there was no law prohibiting evidence relating to or the crux of the latter being used in relation to the count of rape where it was relevant or material. The evidence on the second count was clearly relevant to the rape count.

Result – Application dismissed.

CA 409/98 LI Kin-ho

Chan CJHC
Power VP
Stuart-Moore JA

(3.5.99)

*D G Saw SC,
D Crebbin &
Wong Sze-lai

#P Ross

Incest on various occasions/Effect of judgment in *Chim Hon-man*/ Whether exception when jury must have accepted all of the evidence of the victim as to all of the sexual acts/Comments on effects of *Chim*'s judgment
多次亂倫 – *詹漢民*一案判決的影響 – 當陪審團必定接納了受害人就各次性行為所作的全部證供時這是否屬例外情況 – 就*詹漢民*一案的判決作出評論

The Applicant faced six counts of incest. In each case the victim was his daughter. The offences were alleged to have taken place on dates unknown in about March 1990, in about April 1990, in about 1991, in about 1992, in about 1996 and on 27 September 1997. The Applicant was acquitted on the first three counts but convicted on the other counts, four, five and six.

In relation to counts 4 and 5, the judge directed the jury:

> '*Given the way that the prosecution puts its case (in other words, that the counts on the indictment are specimen counts, and that the defendant had sexual intercourse with his daughter several times a week over many years), what you need to be sure about in relation to each count on the indictment, considered separately, before you could convict the defendant on that count, is that during the period set out in the particulars to that count, there was at least one act of sexual intercourse*.'

On appeal, it was submitted, *inter alia*, that the judge failed to direct the jury that they might only convict if each of them or a proper majority were satisfied beyond reasonable doubt that the same act of sexual intercourse occurred during the period specified in each count. Alternatively, it was said that the judge erred in failing to require the prosecution to elect upon which alleged act of sexual intercourse in the period specified in each count the trial should proceed.

The principal argument of the Applicant was that the prosecution led inadmissible evidence as the law prohibited the leading of evidence of more than one act of sexual intercourse on each count: *Chim Hon-man v HKSAR* [1999] 1 HKC 428.

Held :

(1) The Court of Final Appeal in *Chim's* case had seemingly held that it was a principle of the common law that where a count in an indictment alleged one specific offence, it was not open to the prosecution to lead evidence of a number of acts of the same kind as the act charged and to invite the jury to convict if they accepted any one or more of them to be established. The judgment had, however, acknowledged the possibility that there might be an exception to the general principle;

(2) The prosecution contended that such an exception might occur in circumstances where it was clear that the jury must have accepted all of the evidence of the victim as to all of the acts of intercourse before returning its verdict on the act charged in the count, and that seemed to be a sensible and persuasive argument which would avoid the danger to which the court adverted in *Chim's* case when it referred to the possibility that the principle might '*provide a charter of immunity to offenders where* a *complainant is unable to differentiate between the offences*' . It appeared, however, to be implicit in the judgment in *Chim's* case that such circumstances did not constitute an exception. It seemed that if they had, the court would have said so as the jury clearly must have accepted the complainant's evidence, which was that she would not differentiate in any significant way between the particular acts of rape which took place over the period referred to in the charge. In prosecutions for sexual offences, the evidence of the child was, quite often, that the accused some years before the trial committed indecent acts on a number of unspecified occasions. It was a cause of considerable concern that in such cases the general principle of the common law enunciated in *Chim's* case would provide '*a charter of immunity*' for such offenders;

(3) Although, in common sense terms, there was force in the argument that as regards count 4 there was clear corroborative evidence of two acts of incest, and that the jury must have accepted that those acts occurred when convicting, and that being so, that conviction was safe and satisfactory, the argument seemed to fly in the face of the decision in *Chim's* case which held that a single act could not be proved in that way. Count 4 could have been properly pursued had one of the two acts of incest in relation to each of which there was evidence capable of being corroboration been particularised as the act the subject of the count;

(4) In light of *Chim's* judgment, the convictions on counts 4 and 5 had to be quashed.

Result - Appeal allowed, in part.

[The court certified the following points of law of great and general importance arising out of its judgment allowing the appeal and quashing the convictions on counts 4 and 5:

> '*(i) whether our decision, applying the judgment of the Court of Final Appeal in Chim Hon-man v HKSAR [1999] 1 HKC 428, to allow the Appellant's appeal and quash his convictions was correct in law;*
>
> *(ii) in proceedings where it is alleged in an indictment that an accused has committed an act of incest within a specified period and there is evidence led of a number of such acts over this period, it is, applying Chim Hon-man v HKSAR [1999] 1 HKC 428, not open to the jury to convict the accused of the offence in the indictment.*']

CA 615/98

Stuart-Moore VP
Mayo JA
Woo J

(24.6.99)

*A A Bruce SC & I C McWalters

#A C Macrae SC(1)
JP Chandler & M Richmond (2)

SJ v
(1) LAM Tat-ming
(2) NG Sai-hing

Judge excluding evidence/Use of trickery to obtain confession to an earlier crime/Limited discretionary power to exclude based on unfairness/No burden on accused to show unfairly obtained confession would prevent a fair trial
法官剔除證據 - 佈局使被告招認早前所犯的罪行 - 法官基於不公平理由把證據剔除的酌情權是有限制的 - 被告無責任證明以不公平手法取得的招認供詞會妨礙公平審訊

This was an appeal against verdicts of acquittal which were entered in the District Court after the judge had ruled that the evidence of confessions, allegedly made by the Defendants, were inadmissible on the ground that they were involuntary. The confessions represented a substantial part of the prosecution's case at trial, so that when they were ruled out the prosecution offered no further evidence and the verdicts were then entered.

R1 faced four charges and R2 faced one charge brought under s 4(2)(a) of the Prevention of Bribery Ordinance, Cap 201. The offences related to dates between December 1992 and March 1993. The Respondents were serving police officers at the material time. The prosecution alleged in charge 1 that R1 had solicited an advantage from a person nicknamed '*Ngau Wing*' of $450,000, '*as an inducement to or reward for or otherwise on account of (R1) performing an act in his capacity as a public servant, namely to use his position as a police officer to facilitate members of the Fuk Yee Hing triad society to carry out decoration works at housing units of Phase II of Fullview Garden at Siu Sai Wan, Chai Wan*'.

In charges 2, 3 and 4, R1 was alleged in each case to have accepted an advantage in the sum of $150,000. Charge 5 similarly alleged that R2 had accepted an advantage in the sum of $75,000.

Following his arrest in June 1996, the ICAC decided to use Ngau Wing in an undercover operation with the primary object of obtaining supporting evidence against the Respondents of the allegations that had been made. Ngau Wing was eventually given an immunity from prosecution.

Between November 1996 to April 1997, Ngau Wing was in conversation with both Respondents by telephone. Those calls were recorded. From time to time, meetings with the Respondents were arranged. Ngau Wing adopted the part of a senior triad society member and an undercover operative, known as '*Heung Kai*', played the role of his follower and minder. Both of them were wired with tape-recorders. In particular, Ngau Wing was instructed to talk to the Respondents about the events relating to the charges and to attempt to draw out admissions from them as to these events.

It was during those meetings that R2 was implicated for the first time. It emerged that he had been with R1 when one of the three payments of $150,000 was made and that R2 took half. By the time when the Respondents were arrested and charged in April 1997, there were 39 tapes recording the conversations.

At trial, it was submitted for R2 that while the use of undercover operatives to obtain evidence of on-going criminal offences was permissible, it was an illegitimate use of such tactics to attempt to gain evidence of confessions to past offences. It was argued that as the challenged evidence had been

obtained as the direct result of trickery and deception, it was involuntary and therefore inadmissible.

Those submissions found favour with the judge who found that the Respondents had incriminated themselves as the result of the deception practised upon them and that, but for the trick which had been practised on them, they would in all likelihood not have incriminated themselves. In these circumstances he ruled that the evidence of the conversations of both Respondents with Ngau Wing and Heung Kai was inadmissible because the confessions which had been made were involuntary. The judge took account of *R v Lam Yip-ying* [1984] HKLR 419, which provided authority for saying that a judge must ask himself, at the conclusion of a *voire dire* to determine the admissibility of a confession statement, if the prosecution had established beyond reasonable doubt that the statement was voluntary in the sense that it was not obtained by threats, promises, oppression or deception.

On appeal by way of case stated, the substantial issue was one of whether it was open to the judge to exclude the challenged evidence in the exercise of his discretion, based on unfairness, after he had found that manifest unfairness had been practised upon the Respondents by the undercover operatives such as to render the evidence involuntary.

Held :

(1) The discretion to exclude evidence other than the evidence of an admission, was considered in *R v Sang* [1980] AC 402. The House of Lords there ruled that there was a discretion to exclude evidence which the accused had been induced to produce voluntarily if the method of inducement was unfair, and, further, that the function of a judge at a criminal trial as respects the admission of evidence was to ensure that the accused had a fair trial according to law;

(2) The courts had recognised the use of informants and the employment of deceit and trickery as necessary weapons for law enforcement: *R v Lee Yi-choi* [1985] 1 HKC 578. However, in most cases it was the evidence of the crime itself which had been gathered by such means, not evidence of a confession to the crime earlier committed;

(3) When the courts had to decide upon the admissibility of a confession where trickery or deceit of some kind had been employed, each case would depend upon its own unique circumstances. In the present case the undercover operatives deliberately sought out the Respondents with a view to obtaining admissions from them;

(4) Unlike the position with other forms of evidence where the court was considering the very limited discretionary power to exclude, there was no requirement for a defendant to show that the use of a confession which had been obtained '*unfairly or by trickery*' would prevent him from obtaining a fair trial before the confession would be ruled inadmissible on the ground of unfairness; and

(5) On the facts found to have been proved, it was open to the judge to exclude the challenged evidence in the exercise of discretion based upon unfairness.

Result - Appeal dismissed. [On the application of the Appellant, pursuant to s 32(2) of the Hong Kong Court of Final Appeal Ordinance, the court certified the following question of law as being of great and general importance:

' Whether, as a matter of law, and if so to what extent, a judge in criminal proceedings, in determining whether to admit into evidence an admission made by an accused person, is entitled, in the exercise of the discretion vested in him to exclude an admission, where:

(1) either the judge is satisfied that the admission was voluntarily made or there is no issue as to the voluntariness of the admission; and

(2) either the judge is satisfied that the reception into evidence of the admission:

(a) is not more prejudicial than probative; or

(b) will not affect the fairness of the trial of the accused;

where the admission was made in circumstances in which:

(1) the accused was not under arrest or otherwise in the custody of a law enforcement officer at the time of making the admission;

(2) the admission was made to a law enforcement officer or an agent of a law enforcement officer; and

(3) the accused was unaware at the time of making the admission that the person who heard or otherwise received the admission was a law enforcement officer or an agent of a law enforcement officer but, had he been aware of the true identity and status of the officer or the agent of the officer he may not have made the admission?']

CA 586/98

Nazareth ACJHC
Stuart-Moore VP
Mayo JA

(17.6.99)

*A A Bruce SC & Grace Chan

#P Ross (2)

(1) WONG Ching-yin
(2) HO Kai-cheong

Fingerprint evidence admitted under s 65C Cap 221/No need to establish expertise when no issue taken/Court not required to find witness an expert before accepting evidence
根據香港法例第221章第65C條承認的指模證據 – 證人的專家身分無爭議時，無需證實證人具有專業知識 – 法庭在接納證據前，無須證實證人的專家身分

The Applicants were convicted in the District Court of two offences of wounding with intent.

The evidence showed that two friends, PW4 and PW5, in June 1997, went to a village in Shau Kei Wan, to meet '*Kwok Chai*' who owed them money. Soon after arriving, they were set upon by about ten armed men. Kwok Chai led the attack with a machete-like knife. PW4 recognised some of the others, including A1 and A2, both of whom carried weapons. After the attack, A1 and A2 fled the scene.

A2 was arrested in November 1997, and his fingerprints were taken. They were compared to a fingerprint found on a kukri-style knife recovered from the scene of crime, and a fingerprint from the right little finger of A2 was found to match the print left on the knife. It was an admitted fact at trial that D/Sgt Lam conducted the fingerprint comparison, and concluded that the fingerprint impression was identical to the right little finger recorded on the form of A2.

On appeal, it was submitted, *inter alia*, on behalf of A2 that the judge erred in convicting the Applicant of both charges by finding that his fingerprint was on the knife when the evidence to support that finding was inadmissible because:

(1) the evidence was opinion evidence;

(2) there was no evidence or finding that the witness giving the evidence was an expert;

(3) there was no evidence as to how the witness reached his conclusion as to enable the trial judge to independently judge the accuracy of the conclusion.

Held :

(1) *R v Yeung Kwok-fai* [1996] 2 HKCLR 32, upon which reliance was placed, was wrongly decided and should not in future be relied upon to support the proposition that, where an agreed statement under s 65B Cap 221 was placed before the court, the prosecution had to establish the expertise of the witness when no issue had been taken of that fact. It would have been quite different if the status of the witness as an expert had been an issue in the case in which event the criteria for establishing his status would have had to be strictly proved. For the same reasons, *HKSAR v Sin Chi-yin* [1999] 2 HKC 403, was wrongly decided;

(2) In acting upon the admitted facts which demonstrated that the fingerprint had been left on the kukri, there was no need for the judge to make a finding that the witness who provided that evidence was an expert. There would be no point and no sense in having these facts admitted under s 65C Cap 221 if it was still necessary to prove the expertise of the fingerprint expert;

(3) The overwhelming inference to be drawn from the fingerprint was one of guilt and it lent powerful support to weak, but not insignificant identification evidence.

Result – Application dismissed.

MA 325/99 WONG Lap-chi

Gall J

(8.6.99)

*Chan Fung-shan

#I/P

Magistrate's findings/Disbelief of defence evidence where not inherently contradictory/Need to indicate basis of disbelief
裁判官的裁斷 - 裁判官不相信辯方證供而這些證供本身沒有矛盾之處 - 裁判官有需要提出證供不足信的理據

The Appellant was convicted of illegal parking at a trial in which the Appellant and his witness each gave evidence.

The issue to be decided by the magistrate was whether the evidence of the traffic warden was believable to a degree that, taking into account the evidence of the Appellant and his witness, he could be sure that the offence had been committed. In his Statement of Findings, the magistrate said:

> *No burden of proof rested upon the appellant but nevertheless having heard and seen him giving evidence I did not believe him. I did not believe the witness he called.*

On appeal

Held :

Where the evidence of an appellant in a court below and that of a witness or witnesses he called were attacked but remained intact, and where there were no inherent contradictions or inconsistencies either within that evidence or between the witnesses, it was incumbent to some degree upon a magistrate in his findings to give some reason why that evidence did not cast a doubt upon the evidence of the prosecution. That was so notwithstanding it was very difficult for a magistrate at times to point to why he disbelieved a particular witness.

Result - Appeal allowed.

MA 373/99 SHAM Wai-man, Walker

Nguyen J

(7.7.99)

*Simon Tam

#Osmond Lam

Driving at excess speed/Effect of certificate under s 28 of Evidence Ordinance/Comments on margin of error of speedometer/No evidence from defence to rebut contents of certificate
超速駕駛 - 根據《證據條例》第 28 條發出的證明書的效用 - 就速度錶的誤差幅度作出評論 - 辯方沒有提出證據反駁證明書的內容

The Appellant was convicted after trial of the offence of driving a motor car on a road at a speed exceeding 50 kilometres per hour, which was the speed limit in force on that road, namely at the speed of 66 kilometres per hour.

The main ground of appeal was that a Lau Kwai-mang, who was called by the prosecution as the expert witness, did not establish himself as an expert, and in giving his evidence had relied upon hearsay evidence which the magistrate was wrong to have accepted.

Mr Lau was a director of a Hong Kong company which imported and serviced the particular model of laser gun used by the police. The company was owned by Mr Lau and his family, and the Appellant submitted that Mr Lau was not an impartial witness and was obviously biased in favour of the product in which he dealt.

The Appellant further contended that inasmuch as the witness himself had not conducted tests to check the reliability of the laser gun, he was relying on the manufacturer's specifications that the margin of error of the laser gun in question was only plus or minus two kilometres per hour.

The prosecution submitted that the offence was committed once a person drove in excess of 50 kilometres per hour and that it did not matter what exact speed he was doing, and that even though it was averred that the Appellant was driving at 66 kilometres per hour, it was not incumbent upon the prosecution to have to prove that precise speed.

The prosecution relied primarily on s 28 of the Evidence Ordinance which stated that a person who was authorised to sign a certificate, which was the certificate produced in evidence as Exhibit P 3, should be presumed under the section to have been a person authorised by the appropriate public officer to sign the certificate and that it was signed at the time and place specified. In addition, under s 28(2), it should be presumed that the facts stated in the document relating to the testing of the accuracy, inspection and servicing of the speedometer of the vehicle specified therein, or the radar or weighing device or any other apparatus specified therein, were true. And in s 28(2)(b), it was stated that the document - the certificate - should be *prima facie* evidence of all matters contained therein.

Exhibit P 3, the certificate, was signed by Mr Lau, and he purported to be a person authorised by the Commissioner of Police to certify as to the testing of the accuracy, inspection and servicing of the radar device or apparatus designed and used for the purpose of ascertaining the speed of a motor vehicle. It further stated that on 25 July 1998, at the given address, Mr Lau checked the unit LTI20-20 with the Serial No. 8816, and found the equipment to be functioning properly and that the test result was accurate within the manufacturer's specifications. It also stated that on 23 January 1999, at the same address, Mr Lau checked the same unit and again found the equipment to be functioning properly and the test result was accurate within the manufacturer's specifications. It also said that the said model, LTI20-20, was a device or apparatus designed and used for the purpose of ascertaining the speed of a motor vehicle.

Mr Lau, in accordance with the certificate that he signed, gave evidence and also produced two maintenance reports which were marked as P 1 and P 2, which showed that on the two days mentioned in the certificate, he had conducted six tests of the laser gun in question and found that the laser gun passed all the six tests on both occasions. The tests included a zero velocity test, as a result of which he found the unit to be functioning properly and the test result was '*accurate within the manufacturer's specifications*'.

The police officer who manned the laser gun on the day in question gave evidence that before he used the laser gun, he tested it in accordance with the instructions in the manual issued by the manufacturer. His test produced the figure '8888' which, according to the manual, showed that the laser gun was functioning normally.

Held :

(1) The phrase '*within the manufacturer's specifications*' must have included the specification that the margin of error was plus or minus two kilometres per hour. Therefore the expert's evidence was that after the test, he was satisfied that the margin of error was plus or minus two kilometres per hour;

(2) The gravamen of the offence was that the speed at which the car was driven exceeded 50 kilometres per hour. If the offence had not been committed, then it would have meant that the error margin must have been at least 19 kilometres because what the reading on that day showed was that the car had been going at 70 kilometres per hour, and if it had gone even at 51 kilometres per hour, the offence would have been committed;

(3) In *Penny v Nicholas* [1950] 2 All ER 89, it was held that even if there was no admissible evidence that the speedometer in that case had been tested and found to be working properly by other officers, the court was still entitled to act upon the evidence of the police officer who testified that the reading on the speedometer of the car showed a speed in excess of the permitted speed. If the difference was very great between the permitted speed and the speed shown on the speedometer, it would be a very considerable error if the speedometer was out so much. If evidence was given that a particular speed was recorded by a mechanical device, that recording was *prima facie* evidence on which the court could act. In the present case, for the offence not to have been committed, the margin of error would have had to have been at least 19 kilometres. In *Burton v Gilbert* [1984] RTR 162, it was said that '*in the absence of any evidence which indicated that the particular speed metre was not of sufficient quality or necessarily conflicted with the evidence afforded by the meter, the Justices erred in law in concluding that evidence of a reading shown by the meter was insufficient corroboration of the speed of the defendant's vehicle for them to be sure of the defendant's guilt*';

(4) Section 28 of the Evidence Ordinance stated that the contents of the certificate should be presumed to be true until the contrary was proved. The Appellant gave and called no evidence. In the absence of evidence by him that he was not travelling at the speed alleged, and in the absence of evidence that the laser gun in question was not functioning properly, the magistrate was entitled to rely upon the certificate and the contents therein to convict the Appellant of the offence. The expert was called not to try to prove the offence but to explain to the court how the laser gun worked.

Result – Appeal dismissed.

CA 198/98

Chan CJHC
Nazareth VP
Wong JA

(13.8.99)

*P Madigan

NG Chung-ping

Evidence of other offence before jury by agreement/No cause for complaint if evidence proves unhelpful/Advisable for judge to give direction to minimise possible detriment
同意讓陪審團聽取其他罪行的證據 - 如證據對上訴人沒有幫助，上訴人也沒有理由投訴 - 法官宜引導陪審團以便把可能對被告造成的損害減至最少

The Applicant was convicted after a trial by jury of one count of trafficking in dangerous drugs, contrary to s 4(1) of the Dangerous Drugs Ordinance, Cap 134.

#Jerome Mathews

The Applicant was originally charged with two counts of trafficking in dangerous drugs. Before the jury were empanelled, he pleaded guilty to count 1 but denied count 2. The prosecution amended the indictment by deleting count 1. An amended indictment with count 2 as the only count was placed before the jury. However, the evidence relating to the original count 1 was by agreement adduced before the court. The Applicant gave evidence and the jury became aware of the circumstances of that offence and his plea on the original count 1.

On appeal, it was submitted *inter alia*, that the evidence relating to the Applicant's earlier crime should not have been adduced in evidence and that even if it had been adduced by agreement, the judge should have directed the jury to ignore it. It was said that the rule in *Makin v Attorney General for New South Wales* [1894] AC 57, had been contravened. In that case, Lord Herschell, at P 65, explained '*it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.*' Reliance was also placed upon *R v Kilbourne* [1973] AC 729, where Lord Simon said that such evidence was not only irrelevant, but was also more prejudicial than probative and therefore should not be admitted.

Held :

The cases cited were not applicable. It was an agreed fact that the Applicant was found to have some dangerous drugs in Mongkok six hours before the drugs, the subject matter of the instant offence, were found. It was also the Applicant's own evidence that he was then trafficking in those drugs and that he had pleaded guilty to such an offence. He could not complain that such evidence was before the jury. Occasionally, there might be reasons for an accused to agree to include certain evidence which was not otherwise admissible or which the prosecution might be reluctant to adduce or have difficulty in adducing before the court. If such evidence was indeed admitted at the request of or by the consent of an accused, probably for the purpose of turning it to his advantage, then if such evidence turned out to be unhelpful or even detrimental to his case, he had no cause for complaint. While he hoped that such evidence might be useful to him, he took the risk that the jury might draw an adverse inference against him. In such a situation, it would be advisable for the judge, to be fair to the accused, to give a direction which would minimise any possible detrimental effects to the accused. That was what happened in this case. The evidence in question was before the jury by agreement, and they were entitled to take it into consideration; how they did so was a matter for them.

Result - Application dismissed.

Experts

MA 1187/98 CHOW Wun-shing

Woo J

(1.4.99)

*J To

#L Lok SC & William Ng

Expert evidence/Whether witness expert in soccer gambling/ Experience to be broadly examined/Trial Counsel not objecting to expert status
專家證供 – 證人是否對賭法有豐富的認識 – 證人的經驗會遭受多方面的審驗 – 原審時的律師並無質疑證人的專家身分

The Appellant was convicted of the offence of engaging in bookmaking, contrary to s 7(1)(a) of the Gambling Ordinance.

On appeal, it was submitted, *inter alia*, that there was insufficient evidence to prove that the police expert witness was qualified to be accepted as an expert in soccer betting activities. Reliance was placed upon *Bonython* (1984) 15 A Crim R 364, in which it was said that in considering the admissibility of expert opinion evidence, the judge must consider first, whether the subject matter of the opinion fell within the class of subjects within which expert evidence was admissible, and, second, whether the witness had acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court. It was said that the second limb of that formulation had not been satisfied.

Held :

The issue of whether the witness was correctly treated as an expert was not only dependant on the number of occasions on which he had given evidence in court relating to soccer gambling activities, but his other gambling experiences should also be taken into account. The witness had given evidence as a gambling expert on a large number of occasions, he had studied and researched in gambling activities, and he had on at least three previous occasions given evidence on soccer betting. In any event, counsel at trial made no objection to the acceptance of the witness as an expert.

Result - Appeal dismissed.

MA 108/99 CHEUNG Ho-ying

Woo J

(7.5.99)

*Cheung Wai-sun

#Ken Ng

Competence of counsel/Scope of authority/Whether necessary to establish doctor as expert/Scientific criteria not required to establish fracture/Evaluation of discrepancies
律師是否稱職的問題 – 權力範圍 – 是否有必要證明醫生是專家 – 毋須用科學準則來證實骨折 – 衡量證詞中差異之處

The Appellant was convicted of unlawful wounding, contrary to s 19 of the Offences Against the Person Ordinance, Cap 212.

On appeal, it was submitted that counsel at trial was incompetent. Then it was said that the doctor who gave evidence at trial as to the nature of the injury suffered by the victim had not been shown to be an expert in respect of such an injury, namely, a fracture to the base of the little finger bone. Finally, it was contended that the magistrate failed to have sufficient regard to the material discrepancies in the testimony of the victim and the contents of her witness statement to police.

Held :

(1) Trial counsel had unlimited authority to do whatever he considered best for the interests of his client, and that extended to all matters relating to the

action, including the calling and cross-examination of witnesses, challenging a juror, deciding what points to take, choosing which of two inconsistent defences to put forward, and even agreeing to a compromise of the action or to a verdict, order or judgment. It was not a ground for setting aside a conviction that decisions made by counsel were made without or contrary to instructions, or involved errors of judgment or even negligence: *HKSAR v Wong Chi-keung* Cr App 585/96, *R v Doherty and McGregor* [1997] 2 Cr App R 218;

(2) The existence, or otherwise, of a fracture of the left little finger of the victim did not need an expert to prove. Even if it did, the doctor had stated his qualifications in evidence, which was Bachelor of Medicine and Bachelor of Surgery, and he had been stationed at the Yan Chai Hospital since he qualified as a Medical Officer in 1997. His qualifications and experience were not raised as an issue before the magistrate. Although the magistrate did not state that he had treated the doctor as an expert able to give medical opinion on the fracture of a bone and on the symptoms of such a fracture, the witness was well qualified to do so. A doctor would normally be understood to be able to give evidence on such matters;

(3) As regards the submission that the doctor had not provided scientific criteria for testing the accuracy of the finding of a fracture, such as an X-ray film, in view of the lack of challenge and the existence of the fracture to the little finger, the non-production of the X-ray film was a matter of no consequence whatsoever. The finding of a fracture was a fact, as opposed to a conclusion, that did not need scientific criteria for testing its accuracy;

(4) The magistrate explained the discrepancies between the victim's evidence and her written statement, and they were immaterial. He found that the witness was telling the truth, despite the discrepancies. He concluded that the testimony did not permit any interpretation other than that alleged in the charge: *R v Hui Kee-fung* MA 196/94, *R v Yip Kam-lam* MA 731/96.

Result - Appeal dismissed.

CA 586/98

Nazareth ACJHC Stuart-Moore VP Mayo JA

(17.6.99)

*A A Bruce SC & Grace Chan

#P Ross (2)

(1) WONG Ching-yin

(2) HO Kai-cheong

Fingerprint evidence admitted under s 65C Cap 221/No need to establish expertise when no issue taken/Court not required to find witness an expert before accepting evidence

根據香港法例第221章第65C條承認的指模證據 – 證人的專家身分無爭議時，無需證實證人具有專業知識 – 法庭在接納證據前，無須證實證人的專家身分

The Applicants were convicted in the District Court of two offences of wounding with intent.

The evidence showed that two friends, PW4 and PW5, in June 1997, went to a village in Shau Kei Wan, to meet '*Kwok Chai*' who owed them money. Soon after arriving, they were set upon by about ten armed men. Kwok Chai led the attack with a machete-like knife. PW4 recognised some of the others, including A1 and A2, both of whom carried weapons. After the attack, A1 and A2 fled the scene.

A2 was arrested in November 1997, and his fingerprints were taken. They were compared to a fingerprint found on a kukri-style knife recovered from the scene of crime, and a fingerprint from the right little finger of A2 was found to match the print left on the knife. It was an admitted fact at trial that

D/Sgt Lam conducted the fingerprint comparison, and concluded that the fingerprint impression was identical to the right little finger recorded on the form of A2.

On appeal, it was submitted, *inter alia*, on behalf of A2 that the judge erred in convicting the Applicant of both charges by finding that his fingerprint was on the knife when the evidence to support that finding was inadmissible because:

(1) the evidence was opinion evidence;

(2) there was no evidence or finding that the witness giving the evidence was an expert;

(3) there was no evidence as to how the witness reached his conclusion as to enable the trial judge to independently judge the accuracy of the conclusion.

Held :

(1) *R v Yeung Kwok-fai* [1996] 2 HKCLR 32, upon which reliance was placed, was wrongly decided and should not in future be relied upon to support the proposition that, where an agreed statement under s 65B Cap 221 was placed before the court, the prosecution had to establish the expertise of the witness when no issue had been taken of that fact. It would have been quite different if the status of the witness as an expert had been an issue in the case in which event the criteria for establishing his status would have had to be strictly proved. For the same reasons, *HKSAR v Sin Chi-yin* [1999] 2 HKC 403, was wrongly decided;

(2) In acting upon the admitted facts which demonstrated that the fingerprint had been left on the kukri, there was no need for the judge to make a finding that the witness who provided that evidence was an expert. There would be no point and no sense in having these facts admitted under s 65C Cap 221 if it was still necessary to prove the expertise of the fingerprint expert;

(3) The overwhelming inference to be drawn from the fingerprint was one of guilt and it lent powerful support to weak, but not insignificant identification evidence.

Result – Application dismissed.

Homicide

HCC 259/98

Gall J

(1.6.99)

*GJ X McCoy SC & A Bell

#P Dykes SC & W Stirling (1) P Dinan (2) N Adams (3)

(1) PUN Ganga Chandra
(2) GURUNG Santosh
(3) GURUNG Rajendra Bikram

Murder/Effect of Basic Law and Bill of Rights on requirement for intent/Mandatory life imprisonment where intent to cause really serious harm not arbitrary and unlawful/Specific intents of common law/Intent of secondary party
謀殺 – 基本法及人權法案條例對犯罪意圖規定方面的影響 – 對有意圖導致十分嚴重傷害的犯罪行為處予強制性終身監禁並非武斷或不合法 – 普通法的明確意圖 – 協從一方的意圖

In the course of a trial for murder, the Court of First Instance was invited to rule that the only intent available if an accused was to be convicted of murder was that he had either the intention to kill the victim or the intention to do an act endangering life - the subjective rest.

The submissions of counsel raised the issue of whether the enactment of the Bill of Rights and the promulgation and adoption of the Basic Law by the change of sovereignty had, by statutory and constitutional force, changed the common law intent for murder.

Article 28 of the *Basic Law* stated :

The freedom of the person of Hong Kong residents shall be inviolable.

No Hong Kong resident shall be subject to arbitrary or unlawful arrest detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.

Article 7 of the Basic Law stated :

In criminal and civil proceedings in the Hong Kong SAR the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained.

Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.

Article 5 of the *Bill of Rights* stated :

(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

At common law, a person would be guilty of murder if he killed and at that time intended either to kill or to cause really serious bodily harm and the victim died. In respect of secondary parties, it was sufficient for the secondary party to realise that the principal might kill with intent to do so, or with intent to do really serious harm and yet continued to act in a joint enterprise with the principal when the act of the principal took place.

In reliance upon Canadian authority, which held that the principles of fundamental justice forbade the conviction of a person for murder on the basis of an absolute liability arising from the commission of another offence, it was submitted that the detention for life on a conviction for murder of a person who did not intend to kill and who did not intend an act endangering life was an arbitrary and unlawful detention within Article 5 of the Bill of Rights. It was also argued that the moral culpabilities of a person who intended to kill was higher than that of a person who had a lesser intent but who nevertheless was found guilty of murder under the present law and yet they suffered the same mandatory penalty of imprisonment for life.

It was further submitted that the intent for murder under the common law was unlawful under Article 5 of the Bill of Rights because a common law rule that permitted conviction in the absence of a specific *mens rea*, which it was said here was an intention to kill or do an act endangering life, offended the presumption of innocence.

Held :

(1) The fact that a person if convicted of murder was imprisoned for life when his intent was less than an intention to kill could not be arbitrary or unlawful. Imprisonment would seem to be an appropriate remedy or punishment for what he had done. Nor could the fact that he was sentenced to life imprisonment be arbitrary or unlawful. Imprisonment was obviously a necessary sanction for serious crimes and the maximum penalty of life imprisonment was available for a wide range of offences and moral culpabilities;

(2) It could not be said that the common law, having developed its present position as to intent in respect of murder, modified as it had been over the years by the legislation, could be held to be arbitrary or unlawful because the mandatory sentence covered a range of culpability rather than being limited to one point of culpability;

(3) In our law, the intent to kill and the intent to cause really serious harm and the intent necessary for secondary parties were all specific intents. A lack of specific intent might offend the presumption of innocence, but the fact that the common law specific intent did not meet with approval in Canada did not avoid the fact that there was a defined category of specific intents as there were for other offences and the enactment of the Bill of Rights and the promulgation of the Basic Law did not make those intents or any part of them unlawful;

(4) It could not be said that in respect of a count of murder a person could be convicted of a more serious crime than he foresaw or anticipated. For example, any person who participated in a joint venture knowing that another participant had a weapon and might use it, should know that he was at risk of conviction of murder if a killing took place. The specific intent was the decision to continue to participate in the joint enterprise in those circumstances where a killing took place;

(5) The comparison of the intention required to attempt murder with the intent for the completed offence afforded no assistance. It was not that the intent for attempted murder was set at a higher level than that of the completed offence, but that there were a number of different intents which would make a person guilty of murder. There was only one intent in respect of the attempted murder. That was due to the nature of each offence and not the degree of culpability.

Result - Application dismissed.

HCCC 427/98

V Bokhary J

(29.7.99)

*Ian Lloyd

#R Forrest (1)
W Stirling (2)
J McNamara
(3)

(1) MOK Tsan-ping
(2) SEE Cheung-shun
(3) CHENG Po

Murder/Effect of Basic Law and Bill of Rights on requirement for intent/Definition of mental element of murder as an intention to kill or cause really serious injury consistent with Basic Law and Bill of Rights/Intent of secondary party

謀殺 - 《基本法》及《人權法》對犯罪意圖規定方面的影響 - 把謀殺罪的心理狀態因素定為意圖殺人或導致確實極嚴重的傷害是符合《基本法》和《人權法》的 - 協從一方的意圖

The three accused were jointly charged with one count of murder. The case for the prosecution was that they, acting in pursuit of a joint enterprise, murdered a man by stabbing him to death.

The accused submitted that the Bill of Rights (which came into force on 8 June 1991) and/or the Basic Law (which came into force on 1 July 1997) had changed the common law so that the mental element for murder was no longer an intention either to kill or to cause grievous bodily harm, i.e. really serious injury, but had become instead an intention either to kill or to endanger life. In other words, it was submitted that the alternative to an intention to kill had been raised from an intention to cause really serious injury to an intention to endanger life. Reliance for the submission was placed upon two decisions of the Superme Court of Canada, namely, *Vaillancourt v R* (1988) 47 DLR (4th) 399, and *R v Martineau* (1990) 58 CCC 353, which applied the Canadian Charter of Rights and Freedom.

The provisions upon which the accused relied were article 5 of the Bill of Rights, which provided that '*everyone has the right to liberty and security of person*', article 10, which guaranteed a fair trial, and article 11(1), which provided that '*everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law*'.

In the Basic Law, reliance was placed upon article 28, which provided that '*the freedom of the person of Hong Kong residents shall be inviolable*', and article 87, which provided that accused persons '*shall be presumed innocent until convicted*'.

Held :

(1) If the defence submission was right, it followed that not only had the law of murder been changed but so had the law of manslaughter: either there had been created a new category of manslaughter for which the mental element was an intention to cause really serious injury, or else the mental element for the category known as '*unlawful act*' manslaughter had been expanded to include that intention;

(2) Reliance could not be placed upon the two Canadian authorities. What those cases did was to strike down constructive murder, i.e. murder which did not involve intention to kill or cause really serious injury but was committed, even without any such intention, where death was caused in the course of committing a violent felony or while escaping after having committed such a felony. Constructive murder had long since ceased to be part of the law of Hong Kong;

(3) The law of murder as presently understood did not involve cutting down the presumption of innocence. It did not take a lesser intent or degree of participation to presume a greater intent or degree of participation. What it did was to say that the lesser intent or degree of participation was enough for

murder;

(4) The liberty and security of the person were not taken away by a rule that an accused was liable to a mandatory life sentence for unlawfully killing someone even though he did not intend death provided that he intended really serious injury;

(5) Although the accused sought to reinforce their argument by reference to the position of secondary parties, by submitting that it was particularly objectionable that a secondary party to a joint enterprise might be convicted of murder on the basis of foreseeability of death or serious bodily harm even though nothing less than an intention to kill or to cause serious bodily harm would suffice for the conviction of the principal offender, it had to be remembered that, as it was put in *Archbold* 1999, at p.1566, para 19-30:

> *mere foresight is not enough: the secondary party, in order to be guilty, must have foreseen the relevant act of the principal as a possible incident of the common unlawful enterprise and must, with such foresight, have participated in the enterprise: Hui Chi-ming v R [1992] 1 AC 34, PC.*

Lord Steyn had said that a '*precise and sensible solution*' would be '*that killing should be classified as murder if there is an intention to kill or an intention to cause really serious bodily harm coupled with awareness of the risk of death*' : *R v Powell* [1999] 1 AC 1, 15. Questions of reform, however, were the sort on which people who valued the liberty and security of the person, the presumption of innocence, the right to a fair trial, etc., could reasonably hold different views, all of which the Basic Law and the Bill of Rights would accommodate. That was a matter for the legislature;

(6) It was not the duty of a judge to say whether, or how, the definition of the mental element of murder as an intention to kill or cause really serious injury could be improved by law reform. The question to be decided was simply whether that definition was incompatible with the Bill of Rights and/or the Basic Law. It was not incompatible with either. Neither the Bill of Rights nor the Basic Law had changed the mental element of murder.

Result - In directing the jury, they would be told that the mental element of murder was an intention to kill or cause really serious injury.

Obiter - The conclusion reached in this matter was the same as that of Gall J in *HKSAR v Pun Gandra Chardra* [1999] 2 HKC 579, and of Nguyen J in *HKSAR v Chan Chui-mei* HCCC 378/98.

CA 567/98

Stuart-Moore VP
Leong JA &
Woo J

(17.9.99)

*A A Bruce SC &
Jonathan Man

#M Poll (1)

(1) TSANG Chiu-tik
(2) KUM King-fung

Diminished responsibility/Distinction between psychiatrist and psychologist/Psychologist not medically qualified and not in a position to testify as a psychiatrist upon abnormality of mind induced by disease
因神志失常減輕刑責 - 精神科醫生與心理專家的分別 - 心理專家不具有醫學資格，而且不能就由疾病所引起的神志失常，以精神科醫生的身分作證

The Applicants were each convicted after trial of the murder and kidnapping of Law Wai-yin.

A1 admitted the killing of the deceased in circumstances amounting to murder. He had offered a plea to manslaughter on the ground of diminished responsibility but that plea was not acceptable to the prosecution. The issue at trial was whether A1 was guilty of murder or manslaughter by reason of

D Boyton (2)

diminished responsibility. S 3(1) of the Homicide Ordinance, Cap 339, provided:

> *Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.*

The deceased was a 12 year old boy, the son of a Madam Ng. They lived together with Madam Ng's mother. In May 1996, A1, the boyfriend of Madam Ng, moved in to live with them.

The financial position of A1 and Madam Ng deteriorated. A1 indicated on occasion to Madam Ng that he could not cope and at times he was found crying.

The relationship between Madam Ng's mother and A1 had not been good. The mother considered A1 did not treat the deceased well. A1 did not think that she treated him well either. He found that her attitude towards him became worse as they were unable to reduce their debts. He found that the deceased started to disrespect him. As a result, he came to hate the family. In his interviews with police, he said it might be that he loved his girl friend too much and shifted all the responsibility to the mother and son and, gradually, he considered that only if either Madam Ng's mother or the boy was not there, he and Madam Ng would be able to live happily. A1 decided to kill the deceased.

In about June 1996, A1 took out an insurance policy in the name of the child for US$200,000 which, he said, was intended for the deceased's future education. The beneficiary of the policy was Madam Ng but he never told her about it and she had no idea of such a policy until the death of the boy.

On 5 August 1997, A1 waited for the deceased at his school, picked him up, and drove him to Tai Po. Madam Ng telephoned A1 and told him that the deceased was absent from school. A1 told her that the deceased could have gone to play and she was not to worry when, in fact, the deceased was then with A1. A1 took the deceased to Tai Po Plaza to meet A2. Earlier, A1 had told A2 that he wanted to kill the deceased and A2 agreed to be his driver and alibi witness. At the car park at the plaza, A1 used an electric wire to strangle the deceased. Then he told A2 to phone the boy's home and demand a ransom of $150,000 to divert the attention of the family members and to create an alibi. Then A2 drove the body to a rubbish dump and disposed of it. A1 then phoned Madam Ng who said she had reported the deceased missing to the police. A1 told her to go home first to see how the police could help her.

At trial, the prosecution case against A1 was that he killed the deceased to obtain the insurance money and because he felt the deceased was impeding his relationship with Madam Ng. The case of A1 was that he was suffering at the time of the killing from an abnormality of mind induced by disease such that his mental responsibility was substantially impaired. The defence called two experts, Dr Peter Ho, a qualified medical doctor and a psychiatrist, and Dr Timothy Law, a psychologist who was not a qualified medical doctor.

The qualifications and experience of Dr Law as a psychologist were not challenged. In his report on A1, he said he was suffering from an abnormality of mind as a result of multiple factors which manifested itself in a form of mental illness; mental disorder with varying degrees of pathology as to have lessened, diminished and impaired his mental responsibility, his customary self-

control, judgment and discretion. Dr Law said that the mental condition of A1 was best described under the diagnosis of (a) major depressive disorder, single episode, severe without psychiatric features, and (b) schizotypal personality disorder. At that stage it appeared that Dr Law had not identified in his observations whether the state of mental disorder of A1 was induced by disease or otherwise.

At a hearing of the preliminary issue of whether Dr Law with his qualifications and experience was an expert qualified to tell the jury that A1 was suffering from an abnormality of mind induced by disease, the judge ruled that he was not qualified. The judge considered that only a psychiatrist was qualified to give an opinion on disease of the mind and Dr Law as a psychologist was not medically qualified to give an opinion in that regard. She found that although Dr Law might well be accepted by a Hong Kong court when dealing with matters within the purview of a psychologist, such as the assessment of personality and intellect, characteristic traits and psychological testing, etc., he could not be accepted as an expert in assessing an abnormality of mind '*induced by disease*', in terms of s 3 of the Homicide Ordinance, Cap 339, because he lacked medical training or practice.

The sole ground of appeal was that the judge was wrong to deny the jury the vital evidence of Dr Law that A1 was suffering from a disease of the mind, otherwise the jury might have concluded that A1 was suffering from diminished responsibility. It was submitted that to exclude the opinion of Dr Law would be to deny the jury a piece of evidence vital to the determination of the case by the jury, and that in light of his experience and qualifications he should have been allowed to give an opinion on mental illness induced by disease.

Held :

(1) In England a distinction was drawn between psychiatrists and psychologists on matters involving psychiatric evidence. In *R v MacKenny* (1983) 76 Cr App R 275, an issue arose of whether there was any medical evidence to show that a witness suffered from some disease or defect or abnormality of mind that affected the reliability of his evidence, and it was held that psychiatry was a branch of medical science dealing with diseases and disorders of the mind and a witness who was not a psychiatrist was not qualified to give psychiatric evidence;

(2) In the speciality of psychiatry in medical science, which was highly professional, a person without medical qualification was not sufficiently qualified to give evidence. Dr Law had been called to give his opinion as a psychiatrist that A1 was suffering from an abnormality of mind and to say that was induced by a disease. The clear distinction between the two professions and the absolute requirement of a medical qualification for a psychiatrist showed that a psychologist was not qualified to give medical evidence in the speciality of psychiatry. An abnormality of the mind induced by disease was a matter of medical diagnosis. The judge was quite right not to have allowed Dr Law to give evidence as a psychiatrist to that effect before the jury.

Result - Application of A1 dismissed. (Application of A2 dismissed on other grounds.)

Identification

CA 397/98 CHIU Keung

Power ACJHC
Mayo &
Stuart-Moore
JJA

(19.3.99)

*D G Saw, SC
& Vivien Chan

#E Laskey

Identification evidence/Truthfulness of witness not to be confused with correctness of identification
認人的證據 - 證人是否誠實不應與認人是否正確混淆

The Applicant was convicted after trial of a charge of robbery.

The evidence against the Applicant was based solely on the identification of him by two witnesses. In her Reasons for Verdict, the judge found:

> '*There is clear evidence that PW1 and PW2 had no hesitation and were never indecisive in the way they made the identifications of (the Applicant) in the identification parade. I therefore have no doubt that PW1 and PW2 were positive when they identified the 1st and 2nd defendants. I have reminded myself of the rule in Turnbull.*'

On appeal, it was submitted that there was no satisfactory identification evidence.

Held :

(1) The judge was entitled to place emphasis on her finding that the witnesses were truthful and had made positive identifications but the real issue was whether their evidence was correct. PW2 had characterised her own evidence as '*average*', and PW1, when asked about his identification, had agreed that he was '*not quite sure about that*';

(2) The court could not help but feel that when the judge came to the conclusion that there was '*strong evidence of identification*', she was relying upon her finding that the witnesses were truthful and that they had made positive identifications and that she had, somehow, lost sight of the fact that their evidence, on their own admissions, was far from strong. There was a lurking doubt as to the propriety of the conviction.

Result - Appeal allowed.

MA 606/99 CHAN Yiu-ki

Pang J

(12.10.99)

* Cheung
Wai-sun

P Loughran

Identification evidence/When *Turnbull* warning required
認人證據 - 裁判官何時須提醒自己應用 *Turnbull* 一案的指引

The Appellant was convicted after trial of one charge of trafficking in dangerous drugs.

The evidence against the Appellant at trial consisted of a police officer who testified that, while he was on under-cover duty at the cooked food bazaar at Mui Fong Street, Western, he approached an unknown person who was playing mahjong with three others at a mahjong table and made known to him that he intended to purchase dangerous drugs. The unknown male took out the drugs in question and handed them to the Appellant who was standing beside the mahjong table. The Appellant asked for $200 from the witness. The money was duly handed over and, in exchange, the Appellant gave the drugs to the witness. The witness then left the scene and returned to his safehouse where he reported the matter to his superior.

Some three months later the Appellant was arrested and, apart from admitting that he had been to the cooked food bazaar at Mui Fong Street

occasionally, he denied that he was involved in any trafficking activities. At an identification parade on 3 September 1999 the witness identified the Appellant as the person who had supplied him with the drugs on 20 May 1999.

At trial, the Appellant did not testify and the correctness of the identification of him by the prosecution witness was a key issue. Counsel for the defence reminded the magistrate of the inherent weaknesses in the identification evidence, and reminded him that an honest witness could be mistaken in so far as identification was concerned. The magistrate was invited to acquit the Appellant on the basis that the identification evidence was so tenuous and inherently weak that the prosecution had not proved the case against the Appellant beyond reasonable doubt. Counsel addressed the magistrate on the requirements of the *Turnbull* guidelines.

The magistrate concluded that this '*was not a situation in which the principles set out in Turnbull applied*' and that '*a Turnbull warning was not apposite*'. He said he found the witness to be '*a strong and reliable witness of the truth.*'

On appeal, it was submitted that the magistrate had erred in his approach to the evidence of identification in that he had failed to deal with any of the dangers especially associated with such category of evidence.

Held:

(1) It was bizarre that having been alerted to the possible weaknesses of the identification evidence, the magistrate refused to give himself a direction along the *Turnbull* guidelines. He gave no reason as to why he found the case was not one in which the principles of *Turnbull* applied, or why he was confident that a *Turnbull* warning was not apposite. Although the magistrate was entitled to rely on *R v Ramsden* [1991] Crim LR 295, where it was held by the English Court of Appeal that trained police witnesses were less likely to make mistakes when it came to identification, *Ramsden*, was not authority for the suggestion that a direction according to the guidelines of *Turnbull* could be dispensed with altogether in cases where the identification of a defendant was made by police officers. While a magistrate sitting as judge and jury did not have to adopt a specific formula of words to remind himself of the inherent weaknesses of the identification evidence in a particular case, nowhere did he alert himself to such dangers. On the contrary, he refused to give himself any sort of reminder or warning. That approach was contrary to established principles of law and practice;

(2) If it was the case that the magistrate accepted the evidence of the police officers as unmistakable recognition of the Appellant, he needed to be reminded that in *Beckford & Others v R* (1993) 97 Cr App R 409, 415, Lord Lowry had said:

> *The need to give the general warning even in recognition cases where the main challenge is to the truthfulness of the witness should be obvious. The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely, is he right or could he be mistaken?*
>
> *Of course no rule is absolutely universal. If, for example, the witness's identification evidence is that the accused was his workmate whom he had known for 20 years and that he was conversing with him for half an hour face to face in the same room and the witness is sane and sober, then, if credibility is the issue, it*

> *will be the only issue. But cases like that will constitute a very rare exception to a strong general rule.*

Lord Lowry added*:*

> *Their Lordships, however, having regard to their conclusion upon the judge's failure to give a general warning, and also because they wish to emphasise that such failure will nearly always by itself be enough to invalidate a conviction which is substantially based on identification evidence …*

That Privy Council judgment was followed in *Tran Duc Cuong v R* Cr App 424/93;

(3) In so far as the only evidence against the Appellant was identification by the officer, it was incumbent upon the magistrate to address himself on the possible weaknesses of the evidence of the officer and the circumstances under which the purported identification was made.

Result - Appeal allowed.

Judge/Direction/Discretion/Summing Up

CA 682/97

KWOK Chi-wah

Mortimer VP
Leong &
Stuart-Moore
JJA

(14.10.98)

*IC
McWalters

#J
McLanachan

Extent of duty on judge sitting alone to set out elements of offence/Single judge, in absence of indication to contrary, assumed to be aware of elements of offence charged
單獨主審的法官述明犯罪要件的責任範圍 – 在沒有顯示相反的情況下，應假設單獨主審的法官已知悉所控罪行的犯罪要件

In the course of dismissing an application for leave to appeal against convictions for ten offences of accepting an advantage contrary to s 9(1)(b) Cap 201, the court

Held :

(1) It was incumbent upon a judge sitting alone to set out the necessary elements of each offence and relate the evidence to those elements in the reasons for verdict. He should deal specifically with any element upon which there was an issue;

(2) The failure to set out the elements, and even the elements upon which the case turned, was not fatal to a conviction if it was clear that the judge had before him evidence upon which a conviction could be founded and that evidence had been clearly accepted to the necessary standard. That might particularly be so where counsel had been instructed on both sides to present the case for the prosecution and the defence and the whole focus of the case was upon the establishment of those elements, or, in particular, one of them;

(3) When assessing the evidence, the judge should start by setting out the elements of the offence which were specifically in issue. Those usually related to intention or the mental element. Where the judge was a professional judge sitting alone, however, it could be assumed, unless there were indications to the contrary, that the judge was well aware of the elements of the offence charged and that the reasons, pointing to where the evidence was accepted or rejected, were directed to those elements.

FAMC 21/99

Litton ACJ
Ching &
Bokhary PJJ

(7.9.99)

*M C
Blanchflower
& Alex Lee

#J Matthews

(1) SHING Siu-ming
(2) KWONG Po-yin

Observations on provision of copies of sections in Ordinance to jury/Whether failure to identify ingredients of offence fatal when object of conspiracy clear
就向陪審團提供法例條文副本一事作出評論 - 如串謀販毒這個目的清楚明晰，法官未有指出犯罪要件是否屬嚴重錯誤

The Applicants sought leave to appeal out of time to the Court of Final Appeal. They complained that:

1. The Court of Appeal erred in ruling that the supplying to the jury of various sections of an Ordinance, namely, the Drug Trafficking (Recovery of Proceeds) Ordinance Cap 405, and the failure to direct them of the use that they might make of the same, did not amount to a material irregularity;

2. The Court of Appeal erred in ruling that as it was generally accepted that there was an overwhelming case that there had been a conspiracy along the lines charged that the trial judge's direction to the jury was sufficient in the circumstances of the case, notwithstanding that there had been a failure to direct the jury on trafficking in dangerous drugs, the substantive offence which was the object of the alleged conspiracy.

The Applicants sought a certificate that those complaints raised points of law of great and general importance.

Held :

(1) If the Court of Appeal had ruled as alleged, the correctness or otherwise of such a ruling could well have formed the basis of a question of law of great and general importance. But the Court of Appeal did not suggest that it was acceptable to supply a jury with various sections of a relevant statute without directing them on what use they might make of such sections. Having explained the sections to the jury, the judge provided them with copies as an aide memoire. Whether his explanations and directions were sufficient was primarily a matter for assessment by the Court of Appeal as an intermediate appellate court. The Court of Appeal assessed those explanations and directions as sufficient, and there was no proper basis for challenging that assessment by way of a final appeal;

(2) As to future cases, there might be circumstances in which there were advantages in supplying jurors with copies of relevant statutory provisions. But there were also attendant risks in that course. Trial judges had always to bear carefully in mind the need to ensure that jurors received adequate directions and that, if copies of statutory provisions were supplied to them, they were not allowed to become more than a means of refreshing memory;

(3) Although it would perhaps have been better had the judge told the jury what were the ingredients of the offence of trafficking in a dangerous drug, his failure to do so was not fatal in all the circumstances. The conspiracy could not have been for any purpose other than to traffick in dangerous drugs by exporting them from Hong Kong, importing them into Australia, and selling them there.

Result – Application dismissed.

Leave (CFA)

CACC 734/97 CHOI Wing-man

Nazareth VP
Rogers &
Stuart-Moore
JJA

(15.1.99)

*IC
McWalters

#AC Macrae

Application for certificate under s 32(2) Cap 484/Late application/Observations on need to comply with *Practice Direction*/Effect of lateness upon application
按第 484 章第 32(2)條申請證明 – 過期申請 – 有關*實務指引*須予遵守的意見 – 過期對申請的影響

The Applicant sought a certificate under s 32(2) of the Court of Final Appeal Ordinance, Cap 484, that a point of law of great and general importance was involved in the decision of the court given on 16 July 1998. The application in respect of sentence was, due to the absence of one of the members of the court, stood over to 22 October 1998.

Section 33 Cap 484 provides that an application to the Court of Final Appeal for leave should be made within 28 days from the date of the decision of the Court of Appeal. To cater for that, a *Practice Direction* was issued on 1 January 1998, paragraph 3 of which provides:

> *Applications for a certificate to the Court of Appeal or the Court of First Instance that the decision involves a point of law of great and general importance should be made immediately after the judgment is given from which the appeal is to be brought.*

The next paragraph provides:

> *The applicant should provide the court with a written statement of the point of law involved. Submissions on the application will then be heard and determined.*

Held :

(1) There was good reason in the *Practice Direction*. The reason was that the constitution of the Court of Appeal varied. Sometimes it took time to gather together the same members of the Court of Appeal. It was very much in the public interest that the same members of the Court of Appeal should consider the question of whether there was a point fit to go to the Court of Final Appeal or not. Furthermore, where the decision was given the facts of the case and the arguments were fully in the mind of the court. Hence the provision that application for a certificate should be made immediately after judgment. The requirement that the matter be raised immediately after the judgment should cause no difficulty because, save in exceptional circumstances, the point would have been argued and would have been dealt with in the judgment. It was of great importance that the *Practice Direction* be adhered to;

(2) Any application to the Court of Final Appeal would now be well out of time, and this application was made in clear breach of the *Practice Direction* which had been in force for over a year. It was fallacious to submit that the *Practice Direction* might be something which could be safely infringed and that applications could be made to the Court of Appeal in breach of the practice directions. Such a submission ignored the purpose of practice directions, which were there to show how applications were to be made. If they were not observed and there was no adequate explanation, the court would not entertain such applications;

(3) At the latest, the initial application should have been made at the conclusion of the appeal against sentence, by which time the Applicant would have had three months in which to consider the judgment in relation to conviction.

Result – Application dismissed.

CA 378/98

LUI Kin-hong, Jerry

Certification of point of law of great and general importance/ Point within criteria for certification/Certification refused as court did not have to decide point/Comments upon Court of Final Appeal later considering the point

證明有關裁決涉及具有重大而廣泛的重要性的法律論點 – 有關論點符合給予證明的準則 – 法庭因無須就論點作出判決而拒絕給予證明 – 就終審法院日後考慮有關論點作出評論

Power VP
Mayo &
Stuart-Moore JJA

(5.3.99)

*J Reading

#G McCoy SC & R Pierce

The Applicant applied under section 32(2) of the Hong Kong Court of Final Appeal Ordinance, Cap 484, for a certificate that points of law of great and general importance were involved in the decision of the court.

The court agreed to certify two of the questions. However, as regards the third, the court, whilst agreeing that it might be said to have raised a point of law that met the criteria set out in section 32(2), did not consider that of itself to be a reason for certifying the question. That was because it dealt with a matter which the court did not have to decide. However, the court acknowledged that if the Court of Final Appeal itself granted leave, then that court might wish to hear argument upon it.

Civ App 161/98

SJ v WONG Yeung-ng

Contempt of court/Criminal cause or matter/Observations on practice to be followed where certification of point of law of great and general importance sought/Consideration of whether point must be of great *and* general importance

藐視法庭 – 刑事訟案或事項 – 就要求法庭證明具有重大而廣泛的重要性的法律論點時須依循的常規作出評論 – 考慮有關論點是否必須具重大*而*廣泛的重要性

Mortimer VP
Mayo &
Leong JJA

(26.3.99)

*Ronny Tong SC &
Johannes Chan

#Cheung Huan SC & Jason Pow

This was an application for either leave to appeal to the Court of Final Appeal if this matter were a civil one, or for the certification by the court of a point of law of great and general importance involved in the decision if the contempt was a criminal cause or matter. The parties and the court agreed that this was in essence a criminal cause or matter.

Held :

(1) The *Practice Direction* provided that application for a certificate should be made immediately after the judgment was given. That provision was important and there were good reasons for it. The court would then determine how the application was to be dealt with and would ensure that the application was dealt with in time for the parties to comply with time limits for application for leave to appeal to the Court of Final Appeal. Although in this case the Respondent took out a summons on the same day that judgment was handed down, that did not comply with the direction. When the judgment was handed down, as in this case, counsel should attend and make the application, after informing the other party that they would attend. This case was unusual because although it was a criminal cause or matter, the decision was handed

down rather than given orally. The reasons were that the Respondent was not present in court for the judgment. Nonetheless, in the circumstances it was proper for the court to hear the application;

(2) It was submitted that even if a point of law might be of great importance, it could not meet the test of being of both '*great* ***and*** *general importance*' if the point of law was rare. However, that was not exactly the point, and the court had to determine the isolated question whether to certify that a point of law of great and general importance was involved. Since the point related to constitutional freedoms, albeit a rather limited application of them, it was appropriate to certify. Although the court had decided that this was a plain and obvious case of contempt, that was not a matter to influence the court in its present consideration.

Result - The court would certify this point as being of great and general importance arising from its decision:

> '*In the light that Article 16(2) of the Bill of Rights Ordinance (Cap 383) read together with Article 27 of the Basic Law require that freedom of expression shall be subject to restrictions that are necessary for the maintenance of public order (ordre public) whether the offence of scandalising the court by scurrilous abuse can only survive in Hong Kong if the offence requires proof that the acts complained of constituted a clear, present and imminent danger to the administration of justice*' .

FACC 5/99 SO Yiu-fung

Appeal to Court of Final Appeal under s 32(2), Cap 484/ Meaning of '*substantial and grave injustice*'/Role of Court of Final Appeal considered

根據第 484 章第 32 (2)條向終審法院提出上訴 - "*實質及嚴重的不公平情況*"的意思 - 考慮終審法院的職分

Litton Ching & Bokhary PJJ Nazareth & Hoffmann NPJJ

(14.12.99)

*D G Saw SC & Liu Yuen-ming

#G Plowman SC

The Appellant was convicted at trial of one offence of rape and one offence of attempted rape. He was sentenced to a total of 7 years' imprisonment.

He was granted leave to appeal to the Court of Final Appeal on the basis that he had shown that it was at least reasonably arguable that substantial and grave injustice had been done within the terms of s 32(2), Cap 484, which stated:

> *Leave to appeal shall not be granted unless it is certified by the Court of Appeal or the Court of First Instance, as the case may be, that a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done.*

On behalf of the Appellant, it was submitted, as regards the basis on which appeals brought under the '*substantial and grave injustice*' limb might be allowed, that even though an appellant had obtained leave to appeal on the basis of his having shown that it was reasonably arguable that substantial and grave injustice had been done, the success of the appeal itself was not dependent on it being shown that substantial and grave injustice had indeed been done. The Court of Final Appeal ('CFA') itself should consider - just as the Court of

Appeal considered - whether the conviction or convictions concerned were unsafe or unsatisfactory.

Held:

(1) If the Appellant's submission were accepted, it would result in the CFA functioning as something it clearly was not, namely, as a second court of criminal appeal. The formula '*shown that substantial and grave injustice has been done*', was taken from the Privy Council's decision in *Re Dillet* (1887) 12 AC 459. Mr Dillet was a legal practitioner in British Honduras who challenged his conviction for perjury and a consequential order striking him off the roll of practitioners. Lord Watson said:

> *The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.*

That test was expressly reiterated by the Privy Council in *Kamarul Azman bin Jamaluddin v Wan Abdul Majid bin Abdullah* [1983] 1 WLR 579;

(2) In common with the systems of criminal justice for which tribunals like the House of Lords and the Privy Council had ultimate judicial responsibility, our system of criminal justice aimed to be careful and speedy at the same time. It was geared to that objective. Reviewing convictions to see if they were safe and satisfactory was entrusted to the intermediate appellate court. If the matter proceeded further to the CFA, the task of the court did not involve repeating that exercise. The CFA performed a different one. In order for an appeal brought under the '*substantial and grave injustice*' limb of s 32(2), Cap 484, to succeed, it had to be shown that there had been to the appellant's disadvantage a departure from accepted norms which departure was so serious as to constitute a substantial and grave injustice. That was the test. On the facts of the case, the Appellant had not met such test.

Result - Appeal dismissed.

Lies

CA 92/99 (1) HO Sik-kuen
(2) LEUNG Yee-chiu

Stuart-Moore VP
Mayo &
Leong JJA

(30.9.99)

*A A Bruce SC & Ned Lai

Handling stolen goods/Applicability of doctrine of recent possession/Use of lies to support evidence of identification
處理贓物 - 新近管有原則的適用情況 - 利用謊言支持認人證據

The Applicants were convicted together with a third defendant of handling two stolen Mercedes cars knowing or believing them to have been stolen.

The evidence showed that A1 exported left-hand drive cars to the Mainland. He gave instructions to purchase a container and he dispatched it to

#D Y Marash
SC (1)
A C Macrae
SC (2)

a remote spot in Chau Tau for loading the two left-hand drive Mercedes cars which had no registration plates and to take them over the border to the Mainland. After a visit by police, there was a change of plan and he instructed that the container with the stolen cars be taken back to the yard and stored in the name of the company from which he operated his business. The two Mercedes cars were not the only cars he dealt with in the course of his business. The evidence also showed that A2 knew A1 and he dispatched the private car to guide the truck driver, PW5, to that remote spot for loading the two Mercedes cars. The evidence showed that there were suspicious circumstances in the events leading to the handling of the two Mercedes cars on 8 December 1997 and both Applicants were involved in the operation.

The judge found that A2 was in physical possession of the stolen Mercedes cars and A1 was exercising control and direction over them. He found that, having regard to the distance from the United States and barely one month after they were stolen, the two Applicants were in '*recent possession*' of the two Mercedes cars.

The first two grounds of appeal of A1 were that the judge was wrong in applying the doctrine of '*recent possession*' in respect of the stolen cars and that the judge failed to direct himself in law as to how to approach the evidence when he applied the doctrine to A1. Reliance was placed upon *R v Liu Kam-wah* [1987] HKLR 439, where Roberts CJ considered that six weeks was too long to be considered as '*recent*' in the case of a stolen camera, and *R v Li Chi-ho* MA 1330/96, where the court found that 3 months was too long to allow the doctrine to be invoked.

The third ground of appeal of A1 was that the judge failed to direct himself on the lies told by A1. It was submitted that the judge had to be satisfied that he was in no doubt, despite the explanations offered, that A1 had the necessary guilty knowledge. A1 had given statements to the police containing details and explanations, and it was submitted that in rejecting his explanations the judge must have found A1 had lied. That being so, it was said, the judge should have directed himself in accordance with *R v Goodway* [1993] 4 All ER 894, in particular, that there was no innocent motive for the lies before he relied upon them.

Held :

(1) The judge found that having regard to the circumstances in which the two Mercedes cars were being dealt with by the Applicants, and the period of one month between the disappearance of the cars in California in the United States and their subsequent appearance in Hong Kong in the possession of the Applicants and the distance between Hong Kong and San Francisco, the Applicants' possession was sufficiently recent to invoke the doctrine. The judge was entitled to reach that conclusion in the circumstances of this case. There was nothing special about the nature of the stolen property. Although there was no evidence that these Applicants were involved in the documentation and shipment of these cars to Hong Kong, in the circumstances one month was sufficiently recent to invoke the doctrine. The real question was whether the only reasonable and logical inference was that the Applicants knew or believed the Mercedes cars to have been stolen;

(2) The case of *R v Goodway* applied *R v Lucas* [1981] 2 All ER 1008, and held in effect that where lies told by the defendant when interviewed by the police were relied upon by the prosecution to support the identification evidence, the judge should have directed the jury that the defendant's lies had to be deliberate and had to relate to a material issue and that there was no innocent motive for the defendant to lie before the lies were relied on to support the

prosecution evidence. The prosecution in this case did not rely on lies to prove either possession or guilty knowledge. The judge did not rely on lies of A1 to convict A1. The judge simply rejected the explanation given by A1 to account for the possession of the two cars and as to the role he played in the San Fat Company and in directing and controlling the truck drivers. The judge found that there was no satisfactory explanation as to the possession of the vehicles by A1 and he inferred from the circumstances that A1 knew or believed the vehicles were stolen. *Goodway* had no application here.

Result – Application dismissed.

Magistrate

MA 595/98

Gall J

(9.12.98)

*T Law & Kwok Wing-lung

#A C Macrae

(1) LEE To-nei
(2) LEE Chun-wing

Storage of Part I poisons contains element of *mens rea*/ Some knowledge required of possession of unregistered pharmaceutical products/Magistrate in error in proceeding on basis of strict liability
貯存第 I 部毒藥須有犯罪意圖 - 要確立管有未經註冊的藥劑製品的罪行須證明被告人在若干程度上是知情的 - 原審裁判官在聆訊時以嚴格法律責任基礎判案是錯誤的

Each Appellant was convicted after trial of one charge of failure to store Part I First Schedule poisons in a locked receptacle, the key for which was retained by the registered pharmacists, and one charge of possession of unregistered pharmaceutical products for the purpose of sale, distribution or other use. On appeal

Held :

(1) It was conceded by the prosecution that the first charge contained an element of *mens rea* in that the word '*store*' in Regulation 19(2)(a) of the Pharmacy and Poisons Regulations required, at the very least, knowledge that some items were being stored in the premises;

(2) It was conceded that to establish the second charge there had, at the very least, to be some knowledge that an item was in the possession of the Appellant;

(3) Both charges were based on the type of mixed offence contemplated by the Privy Council in *Gammon (HK) Ltd v AG of Hong Kong* [1985] 1 AC 1. As in that case, the section creating the offence required an element of *mens rea* and an element of an absolute offence;

(4) It was incumbent upon the magistrate to make findings as to knowledge of the Appellants in respect of each charge and then to deal with the remaining elements of the charge not requiring *mens rea*. He did not do that. Instead, the magistrate took the whole of each offence as being one of strict liability with no knowledge required even to the elements of '*store*' or '*possession*'. That could not be right.

Result - Appeal allowed.

MA 551/98 LI Wai-man

Nguyen J

(19.8.98)

*Edmond Lee

#Eric Kwok

Good character/Whether direction on credibility required/ Failure in oral reasons to mention danger of convicting on uncorroborated evidence of complainant in sexual case/ Situation not remedied by reference *ex post facto* in statement of findings

良好品格 – 是否需要就可信性作出指引 – 在口頭裁決理由內沒有提及在性罪行案件中根據事主欠缺佐證的證據定罪的危險性 – 裁斷陳述書中的事後提述不能夠使情況得到補救

The Appellant was convicted after trial of indecent assault.

In his oral reasons for verdict, the magistrate mentioned that the Appellant had a clear record.

On appeal, it was submitted that the magistrate did not warn himself of the danger of acting on the uncorroborated evidence of the complainant in a case such as this. The second ground was that even though the magistrate mentioned that the Appellant had a clear record, he did not deal with credibility. In other words, it was said that when the magistrate gave himself the *Berrada* direction, what he said centred on propensity and not on credibility.

Held :

(1) A judge or magistrate is not required to state in his reasons for verdict that he has given himself a *Berrada* or a *Vye* direction: *R v Cheng King-ho* Cr App 255/93. A *Berrada* direction is not always necessary: *R v Chan Wu-nam* [1994] 2 HKCLR 56. That which the magistrate had done as regards the *Berrada* direction was sufficient and it was not incumbent upon him to have gone into details of how both limbs of that direction might have affected his assessment of the evidence;

(2) The magistrate never alluded to the danger of acting on the uncorroborated evidence of the complainant in a sexual case. It was incumbent upon the magistrate to have made clear in his oral reasons that he was aware of such a danger: *R v Wong Shing-fai* MA 1482/90. It would not have required much for the magistrate to have said in one sentence that he was aware of such a danger, but, in the absence of corroboration, was nevertheless accepting the evidence of the complainant;

(3) Although when the magistrate prepared his written statement of findings he gave himself the appropriate warning, this had not been included in the earlier oral reasons, and by that time it was too late in the day to cure the defect.

Result – Appeal allowed.

MA 1005/98 YEH Tsann-tarng

Beeson J

(1.2.99)

*Wesley Wong

#Monica Chow

Magistracy appeal against sentence/Court changing mind after dismissal of appeal/Whether court *functus officio*

針對刑罰的裁判法院上訴案件 – 上訴法院於駁回上訴後改變主意 – 上訴法院是否職分已完

The court initially dismissed an appeal against concurrent sentences of 18 months imposed upon an accused who was convicted after trial of two offences of evasion of liability by deception, contrary to s 18B(1)(b) of the Theft Ordinance.

However, when finalising the judgment the court reviewed the facts and the Reasons for Sentence and noted that the magistrate '*found a deterrent sentence was apposite*'. He did not elaborate on that, and counsel did not

address it at the appeal. It appeared to the court that a deterrent sentence was not necessary, and that the sentences were too long. The court therefore re-convened. On the issue of jurisdiction

Held :

(1) The judgment had not been sent to the magistrate's clerk for entry in his record and endorsing on the conviction, as required by s 119(f) of the Magistrates Ordinance. The court was not *functus officio* as it was within the power of an appellate judge to make a downward revision of sentence before the original order had been perfected: *Lau Kwok-wah v R* [1980] HKLR 24;

(2) In *R v Wong Siu-cheung* Cr App 571/94 the Court of Appeal, when preparing a judgment for signature, changed its original view of an application for leave to appeal and granted leave because they had revised their views in the interim. It was accordingly open to the court to amend the original decision given orally, and to allow the appeal against sentence in part.

MA 1159/98 FUNG Siu-chung

Lugar-Mawson DJ

(12.2.99)

*Chan Fung-shan

#Simon Lam

Two sets of reasons/Oral reasons at time of verdict and written reasons later/One set of reasons preferable/Scope of second set of reasons
兩套理由 – 作出裁決時提出口頭理由，之後再提出書面理由 – 只適宜提出一套理由 – 第二套理由的範疇

The Appellant was convicted after trial of theft.

On appeal, it was submitted, *inter alia*, that the magistrate erred in giving lengthy oral reasons for his verdict, and then, once the notice of appeal had been filed, in writing a further document explaining at length his reasons for admitting the cautioned statement. Reliance was placed upon *Attorney General v Ng Sheung-chun* [1993] 2 HKLR 156, where it was said that the court '*disapproved of*' the practice of giving oral reasons at the time of sentence and additional reasons later.

Held :

(1) Unlike the detailed provisions in s 80 of the District Court Ordinance, which dealt with the duties of a District Court judge at the time he delivered his verdict, there was no requirement that a magistrate should deliver full oral reasons for his decision at the time of conviction. His only statutory duty in relation to summary proceedings was contained in s 19(2) Cap 227, which required the magistrate to hear the evidence, to consider the whole matter and determine the same, and to convict or to acquit, as the case might be. By virtue of s 93(a) Cap 227, the provision also applied to indictable offences dealt with summarily by a magistrate;

(2) It was obviously better if a magistrate confined himself to just one set of reasons. But magistrates worked under considerable pressure, dealing with many cases in one day. They did not have the luxury of time enjoyed by High Court and District Court judges. Provided that the reasons in the additional document did no more than expand on the oral reasons given at the time of verdict, and were not an attempt to change the basis of the decision, there was no good reason to brand this practice as improper.

Result - Appeal dismissed.

MA 325/99 WONG Lap-chi

Gall J

(8.6.99)

*Chan Fung-shan

#I/P

Magistrate's findings/Disbelief of defence evidence where not inherently contradictory/Need to indicate basis of disbelief
裁判官的裁斷 - 裁判官不相信辯方證供而這些證供本身沒有矛盾之處 - 裁判官有需要提出證供不足信的理據

The Appellant was convicted of illegal parking at a trial in which the Appellant and his witness each gave evidence.

The issue to be decided by the magistrate was whether the evidence of the traffic warden was believable to a degree that, taking into account the evidence of the Appellant and his witness, he could be sure that the offence had been committed. In his Statement of Findings, the magistrate said:

> *No burden of proof rested upon the appellant but nevertheless having heard and seen him giving evidence I did not believe him. I did not believe the witness he called.*

On appeal

Held :

Where the evidence of an appellant in a court below and that of a witness or witnesses he called were attacked but remained intact, and where there were no inherent contradictions or inconsistencies either within that evidence or between the witnesses, it was incumbent to some degree upon a magistrate in his findings to give some reason why that evidence did not cast a doubt upon the evidence of the prosecution. That was so notwithstanding it was very difficult for a magistrate at times to point to why he disbelieved a particular witness.

Result - Appeal allowed.

MA 414/99 (1) LEE Man-yee
(2) SUEN Oi-mei

Woo J

(30.6.99)

*Polly Wan

#Kenny Chan

False statement to Housing Authority/Subjective test to be applied/Turning of blind eye to obvious justifies inference of knowledge/Failure to supply accurate information not same as knowledge of falsity
向房屋委員會作出虛假陳述 – 應用主觀的驗證標準 – 對明顯是虛假的陳述視若無睹足以支持兩名被告知情的推論 – 沒有提供準確資料不等如知悉資料是虛假的

A1 was the daughter of A2. They were each convicted after trial of an offence contrary to s 26(2)(a) of the Housing Ordinance, Cap 283. Each was accused of having made a statement to the Housing Authority which each knew to be false or misleading as to a material particular.

On appeal, it was submitted that the magistrate had erred in applying an objective standard of test in reaching his decision that each Appellant had made a statement which she knew to be false or misleading. Reliance in support of the contention that it was for the court to apply a subjective test was placed upon *Atwal v Massey* (1972) 56 Cr App R 6, and *Secretary of State for Trade and Industry v Hart* [1982] 1 WLR 481.

Held :

(1) While the magistrate on occasion referred to the objective test, he treated the turning of a blind eye as entitling him to draw an irresistible inference that the Appellants knew they had provided a false particular to the Housing

Authority. If the magistrate had stated the evidence correctly, the drawing of such an inference could not be faulted, but there was no such concrete evidence to enable him to have so concluded. For the magistrate to have properly used the term '*irresistible inference*' it was necessary for there to have been evidence that the Appellants turned a blind eye to the obvious, or turned a blind eye to their belief;

(2) The magistrate appeared to have applied a reasonable man standard in assessing the evidence. A comparison between section 26B(3) Cap 283, which made provision for an alternative *mens rea* of failing to use reasonable diligence, which was an objective test, and section 26(2), which contained no such alternative *mens rea*, served to demonstrate that the court must apply a subjective test when considering an offence under s 26(2);

(3) There was a lurking doubt that in reaching his verdict the magistrate had not applied the proper subjective test. Although the Appellants were under a duty to provide information to the Housing Authority which was accurate, the magistrate erred in apparently treating a failure in that duty as tantamount to their knowing the material particular of the information so provided by them to be false.

Result – Appeal allowed.

MA 445/99 LAW Kwok-wai

Woo J

(20.7.99)

*Albert Wong

#Isaac Sadiq

Overloading goods vehicle/Whether power to order disqualification
貨車超載 - 裁判官是否有權力頒令取消駕駛資格

The Appellant pleaded guilty to an offence of overloading a goods vehicle, contrary to Regulations 7(4) and 121(1) of the Road Traffic (Construction and Maintenance of Vehicles) Regulations made pursuant to s 9 of the Road Traffic Ordinance, Cap. 374. The vehicle was overloaded by 56.5%.

The magistrate imposed a fine of $5,000, and disqualified the Appellant from holding a driving licence for all classes for a period of two months. The only issue on appeal was whether the magistrate had power to order disqualification.

Section 69 of the Road Traffic Ordinance provided :

(1) Without prejudice to any other provision relating to the penalty that may be, or is required to be, imposed for an offence, a court before which a person is convicted of any of the following offences may order him to be disqualified for such period as the court thinks fit -

(a) any offence under this Ordinance in connection with the driving of a motor vehicle;
….

(g) any offence under any regulation made under section 9 of using or causing or permitting the use on a road of any motor vehicle or trailer in contravention of any provision or requirement of any such regulation as to brakes, tyres or steering gear, except where the convicted person proves that he did not know and had no reasonable cause to suspect that the facts of the case were such that the offence would have been committed….

Regulations 7(4) and 12(1) of the Road Traffic (Construction and Maintenance of Vehicles) Regulations were made pursuant to the power given to the Secretary for Transport by s 9 of the Ordinance.

Whilst the prosecution accepted that the magistrate had no power under s 69(1)(g) to order disqualification, it was nonetheless submitted that the magistrate had the necessary power under s 69(1)(a), and reliance was placed upon *Yip Wai-kay v R* [1969] HKLR 335, where, in a case involving an accused who had been convicted of driving a goods vehicle with excessive weight, the Full Court held there was a power to order disqualification.

The Appellant, however, relied upon the judgment of Penlington J in *Chan Tse-kei v R* Cr App 378/82, where it was held that in a case involving the driving of a vehicle with excessive passengers the Legislature did not intend that there be disqualification. Penlington J declined to follow *Yip Wai-kay*.

Held :

The Appellant admitted driving a vehicle with an excessive weight. There was no doubt that he committed an offence in connection with driving covered by s 69(1)(a). The interpretation of s 69(1)(a) was covered by the judgment of *Yip Wai-kay*. The judgment and reasoning of Penlington J in *Chan Tsz-kei* were not easy to follow, and the interpretation of s 69(1)(a) was covered by the decision in *Yip Wai-kay*. In light of *Yip Wai-kay* the court was bound to hold that the offence of which the Appellant was convicted was one within the ambit of s 69(1)(a), and the magistrate therefore had the power to disqualify.

Result - Appeal dismissed.

MA 338/99 PAT Kim-por

Tong DJ

(13.8.99)

*Winnie Ho

#J Kynoch & K Sadhwani

Magistrate pre-judging case/Views expressed before ruling of case to answer might have precluded possible defence/Material irregularity
裁判官對案件事先已有裁決 - 在裁定被告人須作答辯之前所發表的意見會阻抑了被告人可能作出的抗辯 - 重大不當之處

The Appellant was convicted after trial of one charge of permitting the employment on licensed premises between the hours of 6 am and 10 pm of a person under the age of 18 years, without the written permission of the Liquor Licensing Board, contrary to Regulation 29(1)(c) of the Dutiable Commodities (Liquor) Regulations, made under the Dutiable Commodities Ordinance, Cap 109.

At trial, the Appellant was legally represented. The prosecution called three witnesses. The gist of the prosecution case was not really in dispute. Defence counsel made a submission of no case to answer, which the magistrate rejected. The Appellant elected to give evidence. Having heard further submissions by defence counsel, the magistrate convicted the Appellant.

When defence counsel indicated that he planned to make a no case submission, the magistrate enquired if it would be on the point of '*permitting*'. However, when the prosecution produced the case of *R v Ng Chung-hing* [1990] 2 HKC 389, the magistrate and the defence counsel entered into a lengthy discussion about the impact of the case which decided that the offence in question was one of strict liability. In the exchange, the magistrate, albeit

implicitly, tried to point out that there was really no defence. It seemed that defence counsel agreed that the case was fatal to his client, and he said '*I am perhaps minded that the court should hear from the defendant, at least very briefly.*' Then the magistrate observed '*If you feel you want to call the defendant anyway, then I will rule a case to answer now and you can simply call him and put him in the box.*' After defence counsel assured the court that the defence evidence would be brief, the magistrate announced his ruling that there was a case to answer. The Appellant then proceeded to give evidence.

Even before the ruling of a case to answer, it seemed that both the magistrate and the defence counsel had formed the view that there could be no defence and that a conviction seemed inevitable. The authorities indicated that even for strict liability offences, it would be a defence to prove, on the balance of probabilities, that he/she had honestly held, upon reasonable grounds, a belief in the existence of facts which, if true, would make his conduct innocent. On appeal

Held :

The magistrate had apparently made up his mind to convict even before the Appellant gave evidence. That constituted a material irregularity in the trial. The magistrate's views expressed before the ruling of a case to answer might have effectively precluded a possible defence.

Result - Appeal allowed.

Obscene Articles

HCAL 26/99

Stock J

(26.8.99)

G J X McCoy SC & Wendy Lee (*for Applicants*)

Wesley Wong (*for Respondents*)

(1) TAN Jwee-huat

(2) CHOW Ping-wah

and

Commissioner of Customs and Excise

and

Obscene Articles Tribunal

Whether a stamper, as a tool for replicating compact discs, an article for the purposes of Control of Obscene and Indecent Articles Ordinance/Whether stamper capable of classification as obscene
用作複製光碟工具的母版是否《淫褻及不雅物品管制條例》所指的物品 - 母版可否評定為不雅物品

This case concerned the issue of whether a stamper, which was a tool for replicating compact discs, was an article for the purpose of sections 8 and 29 of the Control of Obscene and Indecent Articles Ordinance ('the Ordinance'), and whether it was capable of classification as obscene within the contemplation of that Ordinance.

The Obscene Articles Tribunal had classified a number of stampers of that kind seized from the Applicants as obscene articles and by applying for judicial review the Applicants contended that such a classification was unlawful because a stamper was not and could not be an article which, as defined by the Ordinance, was one in respect of which the Tribunal had power to make any classification; and that was if, contrary to that contention, it was in an article, the information on the stamper itself, as opposed to the information converted from it into the form in which it was reviewed by the Tribunal, could not be said to be obscene. The court was asked to quash the decision of the Tribunal that the stampers were obscene articles.

The facts were that A1 ran a business in Macau, and exported stampers. A2 operated a business in Hong Kong and, it was said, ordered stampers from A1. On 20 May 1998, A1 arrived in Hong Kong from Macau, carrying 11 stampers, eight of which he declared to the authorities, but there were three others found on him in a jacket pocket which he did not declare, and it was suspected that these stampers were used to make infringing copies of video compact discs. He told the customs officer who questioned him that he was due to place the stampers in a locker and that they were to be collected. He was permitted to do that, and in due course A2 arrived at the Hong Kong and Macau Ferry Terminal, removed the stampers and was carrying six others in a plastic bag. Tests were conducted and the investigators concluded that the stampers were used to copy obscene films. In June 1998, the stampers were sent by the Customs authorities to the Obscene Articles Tribunal for classification and they were classified as obscene articles. In November 1998 the Applicants were charged with criminal offences, and the stampers were sent again to the Tribunal and, once again classified or certified as obscene articles, which certification was used for, or intended to be used for, the purpose of the criminal proceedings before the magistrate.

The Applicants were charged with importing for the purpose of publication obscene articles, namely, three obscene video compact disc stampers, contrary to s 21(1)(c) of the Ordinance; and A2 was charged with possession for the purpose of publication obscene articles, namely, six obscene video compact disc stampers, contrary to s 21(1)(b) of the Ordinance. The stampers were then sent to the Tribunal for a determination, and it seemed that the Customs and Excise Department spent in the order of $100,000 to modify a laser disc player to enable the stampers to be viewed by the Tribunal. The nine stampers were classified by the Tribunal as obscene articles on 24 November 1998, and a certificate of that decision was drawn by a magistrate, the purpose of which certificate was for use in any proceedings as conclusive evidence of the facts stated in it.

The Applicants then appeared for trial in the magistracy on 27 January 1999, and when counsel sought on their behalf to argue that a stamper was not an article for the purpose of the Ordinance, the problem was recognized that the magistrate was faced with a certificate, conclusive for the purpose of those proceedings, that it was. That was why this matter came before this court with an application to quash the decision of the Tribunal which formed the subject matter of the certificate.

Section 8 of the Ordinance delineated the jurisdiction of the Tribunal. It provided:

> *(1) In relation to any article, or any matter publicly displayed, referred to it by a court or magistrate under Part V a Tribunal may determine whether -*
>
> *(a) the article is obscene or indecent;*
>
> *(b) the matter is indecent; or*
>
> *(c) the ground of defence under section 28 is proved in respect of the publication of an article or the public display of any matter.*
>
> *(2) In relation to any article submitted to it under section 13 a Tribunal may -*

(a) refuse an application to make a classification in respect of any article if it considers that article cannot be adequately described for the purpose of giving notice of classification under section 19; or

(b) make a classification that the article is -

(i) a Class I article if it is of the opinion that the article is neither obscene nor indecent;

(ii) a Class II article if it is of the opinion that the article is indecent; or

(iii) a Class III article if it is of the opinion that the article is obscene; and

(c) in respect of any classification that an article is a Class II article and at the time of making that classification, impose conditions relating to the publication of that article.

Part V, to which s 8(1) referred, comprised s 29 of the Ordinance, which, in so far as was relevant, stated that:

(1) A Tribunal shall have exclusive jurisdiction to determine whether -

(a) any article is obscene or indecent;

(b) any matter that is publicly displayed is indecent; or

(c) the ground of defence under section 28 is proved in respect of the publication of an article or the public display of any matter.

(2) Subject to subsection (3), where in any civil or criminal proceedings before a court or magistrate a question arises as to any of the matters mentioned in subsection (1), that court or magistrate shall refer that question to a Tribunal; and the parties to those civil or criminal proceedings and, in the case of proceedings to which a public officer is not a party, the Attorney General or their representatives, may appear and be heard at any hearing of that Tribunal relating to that reference.

(3) ..."

The determination by the Tribunal in this case was a determination under s 29(1)(a) of the Ordinance.

An article was defined by s 2(1) of the Ordinance as meaning:

"...anything consisting of or containing material to be read or looked at or both read and looked at, any sound recording, and any film, video-tape, disc or other record of a picture or pictures,...".

That was the provision of the Ordinance which was the centre of this application.

The matters to which a Tribunal had to have regard in determining whether or not an article was obscene were prescribed by s 10 of the Ordinance. They were:

> *(1) In determining whether an article is obscene or indecent or whether any matter publicly displayed is indecent, or in classifying an article, a Tribunal shall have regard to -*
>
> *(a) standards of morality, decency and propriety that are generally accepted by reasonable members of the community, and in relation thereto may, in the case of an article, have regard to any decision of a censor under s 10 of the Film Censorship Ordinance (Cap 392) in respect of a film within the meaning of s 2(1) of that Ordinance;*
>
> *(b) the dominant effect of an article or of matter as a whole;*
>
> *(c) in the case of an article, the persons or class of persons, or age groups of persons, to or amongst whom the article is, or is intended or is likely to be, published;*
>
> *(d) in the case of matter publicly displayed, the location where the matter is or is to be publicly displayed and the persons or class of persons, or age groups of persons likely to view such matter; and*
>
> *(e) whether the article or matter has an honest purpose or whether its content is merely camouflage designed to render acceptable any part of it.*"

Subsections 2(4) and 2(5) of the Ordinance provided:

> *"(4) For the purpose of this Ordinance, other than s 24(1E) and (1F), a person publishes an article if he, whether or not for gain -*
>
> *(a) distributes, circulates, sells, hires, gives or lends the article to the public or a section of the public*;
>
> *(b) in the case of an article -*
>
> *(i) consisting of or containing material to be looked at; or*
>
> *(ii) that is a sound recording or a film, video-tape, disc or other record of a picture or pictures,*
>
> *shows, plays or projects that article to or for the public or a section of the public*.

(5) For the purposes of subsection (4) -

(a) 'article (物品) includes anything which is intended to be used, either alone or as one of a set, for the purpose of manufacturing or reproducing an article; and

(b) 'person (人、人士) and 'public (公眾人士) include, respectively, a person having the control or management of anything which is or purports to be a club, and the members of that club."

A stamper was something which was intended to be used for the purpose of reproducing an article, as article was defined by s 2(1).

As for the offences with which the Applicants were charged, the relevant section was s 21 of the Ordinance which provided that:

"...any person who -

(a) publishes;
(b) possesses for the purpose of publication; or
(c) imports for the purpose of publication.

any obscene article, whether or not he knows that it is an obscene article, commits an offence and is liable to a fine of $1,000,000 and to imprisonment for 3 years."

A stamper was a device used to replicate the production of the ultimate compact disc product. A compact disc was a piece of plastic impressed with bumps arranged in a spiral track. A compact disc player was used to enable a laser to read the data which was stored as bumps. The compact disc began life as a master tape – the master tape was the source material. The master tape was then copied to a tape master, which was the master tape in digital form. The data on the tape master was placed on a disc of polished glass which was then covered with a liquid materials called photoresist, and this covered glass product was called the glass master. On to the glass master, with the use of a laser, was recorded the information from the tape master. When the photoresist was washed away there was left a pit of information formed by the laser during that recording. A layer of nickel was then placed onto the glass master, and the nickel part was then separated after a process called electroforming. The nickel part thus separated from the glass master was called the '*father*' and that sheet of nickel thus removed from the glass master was the reverse image, or negative impression, of the pit track or data. It could be used to stamp or replicate discs, but for the purpose of mass production the process in fact adopted was for a new layer of nickel to be grown onto the '*father*' and then separated as the '*mother*'. The '*mother*' was then used for the creation of yet a further layer of nickel which was removed from the mother and was called the '*son*' or '*stamper*'. So the stamper was the same in its effect as the '*father*', in that it bore the reverse image of the data and was used to replicate compact discs. A number of stampers would be cut into circumference shape and used with a machine to replicate compact discs. By this process the stamper imprinted, transferred or stamped the data onto the final product, the compact disc itself. The evidence adduced by the Applicants' expert was that the stamper itself was not intended itself to be viewed and could not be played without substantial modifications to the disc player.

The argument for the Applicant was that a stamper could not be an article as that word was defined by s 2(1) of the Ordinance. It was not something which consisted of material to be read or looked at, or both read and looked at. In any event, it contained only the negative impression of digital data and such material, being in digital form and the very inverse of the final, albeit obscene, product, could not, for that very reason, be obscene. What the Tribunal saw was not the stamper itself. The stamper, it was said, was intrinsically harmless, yet was made into something harmful only by an expensive process undertaken by the Customs and Excise Department. It was the *transformed* product which was examined by the Tribunal; the *transformed* product that was obscene. Indeed, the Tribunal never examined the stampers themselves; they did not examine the very articles which the Applicants had in their possession upon their arrest. It was therefore patently nonsensical for the Tribunal to determine that the stampers themselves were obscene. In so far as the definition of '*article*' referred to a film or a record of a picture, it was contented that the stamper was not, nor did it contain, a picture. A picture, it was said, was a representation of an object; something comprehensible in itself to an ordinary member of the public; whereas a stamper contained digital data which, if produced as digital data, was to the ordinary member of the public quite meaningless, and therefore incapable of being assessed as obscene.

Held :

(1) The definition of article in s 2(1) was not confined to material to be read or looked at. So, for example, a sound recording was not something which was intended to be read or looked at, but was nonetheless an article. A video tape was not an object which was intended to be looked at itself, yet it was undoubtedly a '*record of a picture*' and a '*record of a picture or pictures*' was undoubtedly an '*article*' as defined by s 2(1). Neither the Tribunal nor a member of the public would view a video cassette itself or the celluloid running through it, yet the fact that the cassette and the celluloid were neither of them comprehensible in themselves did not preclude them from being articles. Though that which was viewed was the picture produced when electrical signals were fed by a cable to a receiver, the tape remained nonetheless a record of the film or picture which had been fed onto it from a master tape or master recording;

(2) It seemed clear that a stamper fell within the definition of '*article*' under s 2(1) of the Ordinance in two ways. First, it was a disc. Second, it was a record of a picture. The master tape was a record of that picture. The stamper was a record of the particular picture recorded by the master tape, and of no other picture. It was designed to replicate that picture, and no other. '*Record of the picture*' was to be distinguished from the picture itself. The stamper was said to house the inverse of the picture or of the record. But, inverse or not, it was nonetheless a record of that picture. The fact that it was a record in digital form did not, somehow render it something other than a record; just as a video tape was a record of a picture or pictures even though that record was constituted by electrical impulses on a tape. A stamper was, in essence, a recording from which other copies were pressed, and the very fact that the stamper would then be, and was intended to be, treated so as to produce a particular picture, and none other, in its usual viewable form, itself illustrated that the stamper was a record of that picture;

(3) The suggestion that the stamper was not capable of being obscene because it was in digital form and was the very inverse of the original and of the ultimate obscene product, was an echo of one of the arguments deployed in respect of video cassettes utilized by cinema operators in *AG's Reference (No. 5*

of 1980) [1983] All ER 816, a case which turned on the interpretation of s 1(2) and (3) of the Obscene Publications Act 1959 in England, where article was defined by subsection (2) as '*any description of article containing or embodying a matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures*'. The court concluded that the object of that subsection '*was to bring all articles which produced words or pictures or sounds within the embrace of the Act*';

(4) It availed nothing to say that the stamper, or the information on the stamper, was meaningless as it stood because it was in digital form. That was to suggest that anything which required the application of some extraneous mechanism to render it audible or viewable could not be classified as obscene. If that held good as a proposition, it was difficult to see how logic would then permit classification as obscene of such objects as a video tape, or a gramophone record, even though the contents were grossly obscene and even though the manufacturer or dealer intended to sell thousands; for each such object required the application of extraneous mechanisms to render it into a form which in itself could give offence. Such a result would defy common sense and defeat the weakest of purposive constructions; such as saying that proposition was untenable, and the same must follow for any proposition which suggested that something in mere digital form could not as it was, and without more, be obscene. The fact of digital recording did not warrant an aura of mystique by which the intricacies of high technology were permitted to unravel and cloud the common sense approach which applied to less complex machinery and articles; articles which could readily and sensibly be labelled as obscene, even though they could not, as they were without more, be read, or be viewed as a film, or be heard. All that digital recording did was to convert analog waves into numbers; and to produce a higher quality reproduction than other forms of recording;

(5) The argument which latched onto the fact that the information was in reversed or negative form at a given point, as in the case of a stencil or a mould, was but an extension of the argument already rejected. The reverse image itself was not intended to be viewed as a reverse image; just as the video tape and the gramophone disc were not intended to be viewed or absorbed as they were. Yet what they had in common was that they each housed information which it was intended would be produced with the aid of extraneous mechanisms. It was the information housed that was the key. A stamper was in effect a mould or a print, the sole function of which and the sole intent behind the possession of which, was to house information and to then reproduce that information – information which in the case of video compact disc would be an image or images. The fact that at a given point in time the image happened to be reversed did not preclude the information from being obscene for the purposes of the Ordinance;

(6) Although it was said that, by its very nature, a stamper was not an article intended for, or indeed capable of publication, and thus out with the contemplation of the Tribunal function, the question of intended publication was not outwith the province of the Tribunal's task. The Tribunal was required by the terms of s 10(1), in determining whether an article was obscene, to have regard '*in the case of an article [to] the person or class of persons, or age groups of persons, to or amongst whom the article is or is intended or is likely to be published*.' It followed that it was bound to ask itself first whether an article was capable of publication. If it were then to say to itself that it could not however examine a stamper, or the pictures which were recorded by a stamper, because a stamper was merely an object intended to be used for the purpose of manufacturing or reproducing an article contemplated by s 2(1), then

it would render s 2(4) and (5) entirely *otiose* and would defeat the evident intention of the Ordinance. It would follow that there could then never be a circumstance in which possession of a thing intended solely for the purpose of manufacturing or reproducing an article - such as a stencil or a mould - could be the subject of consideration by a magistrate. He could never consider whether, for example, an obviously obscene stencil was possessed for the purpose of publication, because the stencil itself could never be placed before him as an obscene object, because as an object for the purpose of reproducing an article, the stencil could not be examined by the Tribunal under sections 13 or 29, and therefore could never be held to be obscene. The problem with the Applicants' argument was that it ignored the point that the fact and manner of publication was a necessary ingredient of obscenity;

(7) A stamper was an article because it was a disc, and also because, in the case of video discs, it was a record of a picture. If its custodian possessed it for the purpose of producing compact discs which were to be sold, or distributed, or shown to the public, then he intended to publish the record of that film; in other words the '*positive*' of the negative which was constituted by the stamper itself. The fact that the information housed by the stamper was in digital form and in inverse form to that in the master original and to that in the intended final product, did not preclude it from classification as obscene. The contrary argument if successful would undermine the clear intention of the legislature in its enactment of this Ordinance and was an argument which ran contrary to authority. A vehicle for reproduction, such as a stamper, was within the Ordinance's contemplation as capable of publication, and the Tribunal was entitled to examine it and the information which it housed, including the positive manifestation of that information, and to render a classification of that article, or vehicle;

(8) A stamper was an article as defined by s 2 of the Ordinance and the Tribunal had jurisdiction to classify it as obscene under the powers conferred upon the Tribunal by sections 8 and 29 of the Ordinance.

Result - Applications dismissed.

Offences under LegCo Ordinance

香港特別行政區訴梁國雄
HKSAR v LEUNG Kwok-hung

*__陳雨舟__
Johnny Chan

#__上訴人自辯__
I/P

高等法院原訟法庭 – 高院裁判法院上訴 1999 年第 561 號

高等法院原訟法庭法官胡國興
聆訊日期：一九九九年十一月八日
宣判日期：一九九九年十一月十五日

COURT OF FIRST INSTANCE OF THE HIGH COURT
MAGISTRACY APPEAL NO. 561 OF 1999
WOO J
Date of Hearing: 8 NOVEMBER, 1999
Date of Judgment: 15 NOVEMBER, 1999

引起混亂致令立法會的會議程序相當可能中斷 - 條例弁言是相關的考慮事項 - "*中斷*"的涵義

上訴人被控一項罪名，指他在立法會大樓內，在立法會舉行會議時，引起擾亂，致令立法會的會議程序相當可能中斷，違反香港法例第 382 章第 17(c)條。另一人也一同被控參與擾亂，致令立法會的會議程序相當可能中斷，也是違反該條例。上訴人經審訊後被判處入獄 14 天，緩刑一年。上訴人就判罪及判刑上訴。

上訴時，上訴人的第一個上訴理由指第 382 章《立法局（權力及特權）條例》不適用於本案，因為該條例及其用意是防止行政機關濫權欺壓立法會。上訴人指出，根據第 382 章的弁言的意思，是要確保立法會內所有人士的言論自由，所以也包括上訴人。第二個上訴理由指裁判官對"*中斷*"的解釋有錯誤。

裁決：

(1) **第 382 章的弁言如下：**

> ***"本條例旨在公布和界定立法局（即立法會）與其議員及人員、總督（即香港特別行政區行政長官）與總督就有關立法局會議及其委員會會議的出席而指定的公職人員的某些權力、特權及豁免權；確保立法局內言論自由；就進入立法局會議廳範圍及在其內的行為等事作出規限；對於在立法局或其委員會的會議程序中作證事訂定條文，並就此等程序及有關事項訂定罪行；以及為其他附帶或相關的目的訂定條文。"***

這明示了本案所涉的第 17 條有關藐視罪的目的。在立法會內旁聽的人士，當然要遵守紀律。香港是一個言論自由的社會，但是這言論的自由在某些情況下要有些約束。

(2) 在會議進行的情況中，"*中斷*"的意思是令到參與會議的人所進行的事務被從中打斷，是妨礙到他們要停止他們正在進行的事宜，不須一定要令到他們休會。上訴人和另一名被告被控的罪行，是他們分別引起及參加擾亂，致令立法會的會議程序"*相當可能中斷*"。這"*相當可能中斷*"是一個客觀的測試，而裁判官正確地應用了這項測試。

(3) 特首的集中力被打斷，這正是上訴人擾亂行為部份的後果，是上訴人被裁定有罪的基礎的一個案情元素，並無顯示裁判官對他有偏見。

上訴駁回。

[English digest of MA 561/99 above]

LEUNG Kwok-hung

Woo J

(15.11.99)

*Johnny Chan

#I/P

Creating a disturbance likely to interrupt the Legislative Council proceedings/Relevance of the preamble/Meaning of '*interruption*'

The Appellant was convicted after trial of one charge of creating a disturbance which was likely to interrupt the Legislative Council while the Council was sitting inside the Legislative Council Building, contrary to section 17(c) of Cap 382. Another person was also charged with joining in a disturbance which was likely to interrupt the proceedings of the Council under the same section. The Appellant was sentenced to 14 days' imprisonment, suspended for one year. He appealed against both his conviction and sentence.

On appeal, it was submitted, first, that the Legislative Council (Powers and Privileges) Ordinance, Cap 382 was not applicable to this case as its objective was to prevent the executive authorities from abusing their powers to oppress the Legislative Council. It was argued that the preamble of Cap 382 was meant to secure the freedom of speech of all persons in the Council and that included the Appellant. Second, it was said that the magistrate had erred in the interpretation of '*interruption*'.

Held:

(1) The preamble of Cap 382 provided:

> *To declare and define certain powers, privileges and immunities of the Legislative Council and of the members and officers thereof and of the Governor (namely the Chief Executive of the Hong Kong Special Administrative Region) and public officers designated by him in relation to attendance at sittings of the Legislative Council and committees thereof; to secure freedom of speech in the Legislative Council; to make provision for regulating admittance to and conduct within the precincts of the Chamber of the Legislative Council; to provide for the giving of evidence in proceedings before the Legislative Council or committees thereof, and for offences in respect of such proceedings and related matters; and for purposes incidental to or connected therewith.*

The purpose of section 17, which regarded contempts and related to this case, was clearly shown. Any person who sat in at the meetings of the Legislative Council must abide by disciplinary rules. Hong Kong was a society where freedom of speech prevailed. However, such freedom was subject to limitations under certain circumstances;

(2) When a meeting was in progress, '*interruption*' meant causing a halt to the business the people attending the meeting were engaging in; the interference was such that it prevented them from doing what they were doing, but not necessarily to the extent that it caused them to adjourn. The offences with which the Appellant and the other defendant were charged were that they respectively created and joined in a disturbance which was '*likely to interrupt*' the proceedings of the Council. '*Likely to interrupt*' was an objective test and the magistrate correctly applied such test;

(3) The fact that the Chief Executive was distracted because of the act of the Appellant was part of the consequence of the disturbance created by the Appellant. It was an element of the facts of the case which formed the basis of the Appellant's conviction. It did not show that the magistrate had a prejudice against him.

Result - Appeal dismissed.

OSCO

FAMC 27/99

Litton & Ching PJJ Nazareth NPJ

(25.11.99)

*AA Bruce SC & G DiFazio

#L Lok SC & P Duncan

(1) LOK Kar-win, Kevin
(2) CHAN Chi-keung
(3) WAI Kwan-lung

Section 25 of OSCO/Whether person who dealt with property representing proceeds of own crime guilty of offence/Whether necessary for prosecution to prove that property represents proceeds of conduct which, if occurring outside Hong Kong, was an offence where it occurred
《有組織及嚴重罪行條例》第25條 - 處理財產的人如所處理的財產代表自己犯罪的得益，則該人是否有罪 - 如所處理的財產代表從某項行為所獲的得益，而該項行為是在香港以外地方發生，則控方是否需要證明該項行為在其發生的地方屬於罪行

On 4th October 1999 Burrell J, after dismissing appeals by the Applicants against their convictions by a magistrate, certified the following points of law under s 32(2) of the Hong Kong Court of Final Appeal Ordinance, Cap 484:

> *(1) Whether a person who deals with property which represents the proceeds of his own crime is guilty of an offence under s 25(1) of the Organized and Serious Crimes Ordinance, Cap 455 ('the Section').*
>
> *(2) Whether it is necessary, to establish an offence under the Section, for the prosecution to prove that the property, the subject of the charge, represents the proceeds of conduct which, if occurring outside Hong Kong, was an offence where it occurred.*

Pursuant to such certification, the Applicants sought leave to take the matter to the Court of Final Appeal. It turned upon the proper construction of s 25(1) of the Organized and Serious Crimes Ordinance ('*the Ordinance*'). If it was clear that the judge had come to the right view regarding the proper construction of s 25(1) leave should be refused; if it was arguable that the judge had erred in regard to either point as certified, leave should be given.

The convictions arose from the following circumstances: The Applicants, professional footballers, were parties to a conspiracy to fix a match

in which they were representing Hong Kong against Thailand in a World Cup qualifying game in Bangkok. The scheme was that Hong Kong would lose the match, preferably by a score of 2-0 and they would collect gambling winnings as a result. Their convictions under s 25(1) were based on the fact that they received $30,000 each as winnings upon their return to Hong Kong.

Held :

(1) The Ordinance was first enacted in December 1994. The long title stated:

> *An Ordinance to create new powers of investigation into organized crimes and certain other offences and into the proceeds of crime of certain offenders; provide for the confiscation of proceeds of crime; make provision in respect of the sentencing of certain offenders; create an offence of assisting a person to retain proceeds of crime; and for ancillary and connected matters.*

Section 25 as relevant stated:

> *s 25(1)* *Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property.*
>
> ……
>
> *(4) In this section and section 25A, references to an indictable offence include a reference to conduct which would constitute an indictable offence had occurred in Hong Kong.*

The section aimed at dealings with the proceeds of crime. '*Dealing*', in relation to property referred to in section 25, was defined in section 2 as including:

> *(a)* *receiving or acquiring the property;*
>
> *(b)* *concealing or disguising the property (whether by concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it or otherwise);*
>
> *(c)* *disposing of or converting the property;*
>
> *(d)* *bringing into or removing from Hong Kong the property;*
>
> *(e)* *using the property to borrow money, or as security (whether by way of charge, mortgage or pledge or otherwise).*

From this list, it was clear that a person dealt in terms of the section whether the property represented the proceeds of his own crime or someone else's crime. There were no words of qualification in section 25 - or anywhere else - which cut down on the scope of the section. The expression '*Any person's proceeds*' meant just that. It included the criminal himself. The only possible answer to Question (1) was '*Yes*'. The contrary was not arguable;

(2) As to Question (2), it was plain from the wording of s 25 that the section aimed at criminalizing dealing in Hong Kong with property derived from conduct which was indictable here, regardless of where that conduct occurred. Subsection (4) made clear that the determining factor was the conduct complained of as judged by Hong Kong law, not whether that conduct was an offence in the foreign country where the conduct took place. The answer to Question (2) must be '*No*'. The contrary was not arguable.

Result - Applications dismissed.

Plea

香港特別行政區 訴 羅建國
HKSAR v LO Kin-kwok

高等法院原訟法庭 – 裁判法院上訴案 1999 年第 30 號

***謝家樹**
Hayson TSE

高等法院原訟法庭法官楊振權
一九九九年五月十五日

#孔慶碩
HUNG Hing-Shek

COURT OF FIRST INSTANCE - MAGISTRCY APPEAL NO. 30 OF 1999
YEUNG, J
15 MAY, 1999

認罪之後上訴 – 對被控罪行有所混淆

上訴人承認三項控罪，包括使用偽造身分證、盜竊及非法入境後未得入境事務處處長授權而留在香港。

就第三項控罪，即非法入境後未得入境事務處處長授權而留在香港一罪，上訴人提出上訴時，指出他是持雙程證合法抵港，他是過期居留而不是非法入境。據悉，他承認有關控罪是因為誤會過期居留和非法入境兩罪相同。他承認控罪是希望得到減刑及盡快被遣送離港。

上訴人向法庭提供文件以支持上訴，而有關的文件亦支持上訴人是以雙程證來香港的說法。

裁定：

法庭不應因一名人士愚蠢或不忠實而將他定罪。上訴人指稱以雙程證來港的說法有可能是真確的。雖然上訴人承認非法入境後未得入境事務處處長授權而留在香港的罪名，惟基於上述情況將有關罪名維持有不公之處。

上訴得直。

Appeal after guilty plea/Confusion over offence

[English digest of MA 30/99, above]

The Appellant pleaded guilty to three charges, namely, using a forged identity card, theft and remaining in Hong Kong without the authority of the Director of Immigration, after having landed unlawfully in Hong Kong.

On appeal, it was submitted that in relation to the third charge of remaining in Hong Kong without authority after having landed unlawfully, the Appellant had entered Hong Kong legitimately on a two-way permit and that therefore he only committed the offence of overstaying instead of unlawful landing. It was said that he pleaded guilty to the charge because he was mistaken that overstaying and unlawful landing were the same. He pleaded guilty in the hope that there would be a remission of sentence and that he could be repatriated as soon as possible.

In support of his appeal, the Appellant produced documents which supported his claim that he came to Hong Kong on a two-way permit.

Held :

An accused should not be convicted because of his foolishness or dishonesty. Since the claim that the Appellant came to Hong Kong on a two-way permit appeared to be true, it would be unjust to uphold the conviction despite his plea of guilty to the offence of remaining in Hong Kong without the authority of the Director of Immigration after having landed unlawfully in Hong Kong.

Result - Appeal allowed.

MA 120/99 AU YEUNG Boon-fai

Appeal after guilty plea/Jurisdiction considered/Whether plea a nullity/Comments on use of case stated procedure/Property capable of being subject of theft charge included thing in action and other intangible property/Difference between overdraft facility with bank and credit card company account
認罪後提出上訴 - 考慮司法管轄權的問題 - 所作的認罪是否無效 - 就採用案件呈述的程序作出評論 - 能作為盜竊罪所指被竊物的財產包括據法權產及其他無形財產 - 銀行透支額與信用卡戶口的分別

Stuart-Moore VP Mayo & Keith JJA

(16.6.99)

*Albert Wong

#Ernest Lim

[Reserved pursuant to s 118(d), Cap 227]

On two occasions, the Appellant borrowed the credit card of a friend. This was, he assured the friend, for the purposes of hotel registration as the hotel required an imprint of a credit card as a '*deposit*'. The friend on each occasion was assured that he would himself settle the bill. In the event, the Appellant on each occasion settled the bill with the friend's credit card.

The Appellant was charged in the magistracy with two offences of theft, contrary to section 9, Cap 210. In each charge, he was alleged to have stolen a chose in action, namely, a debt of the amount of the hotel bill owed by the credit card company to the Appellant's friend, that chose in action being the property of the Appellant's friend. The Appellant pleaded guilty unequivocally, and agreed the '*brief facts*'.

At that stage, the magistrate expressed concern about the charges, and decided that they should be amended to describe in a different way the choses in action which the Appellant was alleged to have stolen, namely, a credit balance of the amount of the hotel bill with the credit card company. Thus the amended first charge read:

> '*On the 9th day of September 1998, at Newton Hotel, 218, Electric Road, North Point, in Hong Kong, you did steal a chose in action, namely, a credit balance of $6,383.40 with Aeon Credit Service (Asia) Co Ltd, belonging to Chew Kwan-kit*.'

The second charge was significantly amended and, again, the Appellant unequivocally pleaded guilty to both charges. He confirmed that he still admitted the original '*brief facts*'. The Appellant was sentenced to concurrent terms of imprisonment of 4 months on each charge.

The Appellant, despite the guilty pleas, lodged an appeal against conviction under section 113(1) Cap 227, which stated:

> *Any person aggrieved by any conviction, order or determination of a magistrate in respect of or in connection with any offence, who did not plead guilty or admit the truth of the information or complaint, may appeal from the conviction, order or determination, in manner hereinafter provided to a judge*.

The Appellant contended that the unequivocal guilty pleas did not prevent him from appealing, and relied upon *R v Li Tung-hing* [1992] 2 HKC 427, where it was held that the court could entertain an appeal against conviction from a magistrate's court under section 113, even when an apparently unequivocal plea of guilty had been recorded, if upon the admitted facts the Appellant could not in law have been convicted of the offence with which he had been charged.

On the merits, the Appellant submitted that he could not in law have been convicted on the amended charges because the hotels in each charge were protected from loss by the imprints which the Appellant had given them of his friend's credit cards. If the bills were not paid by the Appellant, the hotels could debit the credit card companies with the bills. It was accordingly contended that the debits on the his friends' credit card accounts represented simply civil debts owed by the Appellant to his friends.

Held :

(1) A plea of guilty which was a nullity did not amount to a plea at all. Such a plea, therefore, was not caught by section 113, Cap 227. The classic example of a plea being a nullity was where the plea was tendered involuntarily, as where it had been induced by duress or misrepresentation. A plea of guilty presupposed that on the admitted facts the defendant was in law guilty of the offence to which he pleaded guilty. A plea of guilty was a nullity if, upon the admitted facts, the defendant could not in law be convicted of the offence for which he was charged;

(3) It followed that the court should proceed to hear the appeal against conviction on the two amended charges. If it found that on the admitted facts the Appellant could not have been convicted of the charges, the appeal would be allowed. If it was found that he had to have been convicted of the charges, the court would dismiss the appeal for want of jurisdiction, because the condition on which the appeal might be entertained, namely that the pleas of guilty were nullities, would not have been established;

(4) The only ground upon which it could be said that the Appellant could not in law have been convicted on the amended charges was that he did not steal anything. The argument would be that what he did was simply to incur for his friends a liability which would not have existed but for his use of their credit cards. That might or might not amount to some other offence, but on this

argument the creation of a debt for another person did not amount to the appropriation of property belonging to another. That argument, however, could not be accepted. The kinds of property capable of being the subject of a charge of theft included '*things in action and other intangible property*' : s 5(1), Cap 210. A similar provision existed in the Theft Act 1968 in the UK, and there the law had been correctly summarised in Griew, '*The Theft Acts*', as follows:

> *Where a bank is in credit, the account holder has '**property**' in the form of a thing in action - a claim available against the bank as his debtor. If he has an enforceable overdraft arrangement with the bank, this too, it has been held, gives him '**property**' within the meaning of that word in the Theft Act so long as the overdraft facility has not been exhausted by drawings on the account. At any time, however, when the account is in debit and no right to draw on it exists, the account holder has no relevant property capable of being stolen by abuse of the account.*

That was also the law in Hong Kong;

(5) There was no relevant difference between an overdraft facility with a bank and an account with a credit card company. In the same way as the bank's customer was entitled to draw amounts up to the limit of his facility, so too was the account holder of a credit card account entitled to debit his account with the cost of goods and services up to his credit limit. Accordingly, the difference between the debit balance on a credit card account and the credit limit on that account represented property which was capable of being the subject of a charge of theft. It was true that the '*brief facts*' did not state that the sums still available for use on the Appellant's friends' accounts were not less than the respective hotel bills, but the charges were made out if part of the property was capable of being stolen;

(6) Since the Appellant could properly have been convicted on the two amended charges to which he pleaded guilty, the court could not entertain the appeal because the pre-condition, that the pleas of guilty were nullities, had not been established. The appeal had therefore to be dismissed for want of jurisdiction.

Result - Appeal dismissed.

Per cur - The problem presented by the Appellant's pleas of guilty would not have arisen if his appeal had been by way of case stated on a point of law under s 105, Cap 227. An appeal against conviction by way of case stated was not limited to cases in which the defendant pleaded not guilty. It would have been open to the magistrate to state a case for the opinion of the Court of First Instance as to whether he had been correct to accept the Appellant's pleas of guilty in the light of the admitted facts.

POOW

MA 456/99 CHAU Fung

Woo J

(10.9.99)

*Johnny Chan

#Charles Chan

Whether accused within jurisdiction of Hong Kong/ Territoriality considered/Whether closed area a public place
被告是否位於本港司法管轄權的地域內 - 考慮領土範圍 - 禁區是否屬於公眾地方

The Appellant was convicted after trial of one charge of possession of an offensive weapon, contrary to s 17 of the Summary Offences Ordinance, Cap 228; one charge of possession of an offensive weapon, contrary to s 33(1) of the Public Order Ordinance, Cap 245; and one charge of remaining in Hong Kong without the authority of the Director of Immigration after having landed unlawfully in Hong Kong, Cap 115.

At trial, it was undisputed that the Appellant was located and arrested at a place to the north of and outside the main fence at Tak Kwu Leng. The location was depicted in a sketch drawn by the arresting officer ('AO'). The sketch was not to scale but the position where the Appellant was located was marked with an X which was closer to the main fence than to the Shenzhen River which was also depicted on the sketch. The AO testified that the Shenzhen River was the boundary between Hong Kong and the Mainland. As the Appellant had crossed the Shenzhen River and gone towards the main fence at Tak Kwu Leng, it was the case for the prosecution that he had already stepped onto Hong Kong land.

On appeal, it was submitted, *inter alia*, that the magistrate erred in finding that the location where the Appellant was arrested was within the territory of Hong Kong. The Appellant contended that there was no evidence to that effect. He relied on *R v Roy Dillion* [1982] AC 484, and argued that the magistrate's finding that the location was within Hong Kong was based on the presumption of regularity that the location was within the area subject to the daily patrol and surveillance of the AO.

Held :

(1) According to the Order of the State Council of the People's Republic of China No. 221, published by Special Supplement No. 5 to Gazette No. 6/97, paragraph I(3) provided

> *The boundary runs from …… It continues along the centre line of the Shenzhen River to the mouth of the river at Shenzhen Bay (otherwise known as Deep Bay).*
>
> *After the realignment of the Shenzhen River, the boundary will follow the new centre line of the river.*

(2) Although there was no evidence of whether Shenzhen River was a navigable or a non-navigable river, the '*centre line*' of the Shenzhen River must have reference to its water, whether it was the '*centre line*' or '*median line*' of the water as it flew from time to time, or the line of the deepest point as a navigable channel: Para 174 in *Starke's International Law* 11th Ed. and *Brownlie's Principles of Public International Law* 4th Ed. As the location where the Appellant was spotted and arrested was outside the reach of water of the river, and he had admittedly crossed the Shenzhen River to the southern part

of it, reaching and stepping onto land, there was no doubt that he was in Hong Kong territory;

(3) The fact that the Appellant had entered Hong Kong and was hiding himself inside the tall grass and in the course of smoking a cigarette before he was spotted by the police was sufficient evidence to prove beyond a reasonable doubt that having entered Hong Kong illegally, he remained in Hong Kong and had the intention of doing so. His belief that he was still on the Mainland did not affect his *mens rea* that he intended to enter Hong Kong illegally;

(4) '*Public place*' was defined in s 2(1) of Cap 245 as meaning '*any place to which for the time being the public or any section of the public are entitled or permitted to have access, whether on payment or otherwise, ..*'. The important point was whether the persons who were entitled or permitted to have access to the particular location or area were so entitled or permitted *qua* their being members of the public or members of a section of the public. If they had access as a particular class of persons, though they might be considered also part of the public, that alone would not suffice: *R v Lam Shing-chow* [1985] HKC 162, *R v Chan Chu-shi* [1990] 1 HKC 341 and *R v Edwards* [1978] 67 Cr App R 228 considered;

(5) The location where the Appellant was found was within a closed area under s 36 of Cap 245. It was not owned by any private owner. It was closed because it was near the boundary between Hong Kong and the Mainland, for the purpose of better border and immigration control. The residents who were not yet adults were granted a general permission under section 38A of Cap 245, to enter and leave the closed area at any time. They were a section of the public permitted to enter an area which was not privately owned. The permission was general in nature, and did not depend on the purposes for their access or kinds of activities they performed inside the area. They had the permission to enter and leave as members of the public living in that area. Such a closed area was, therefore, a public place.

Result - Appeal dismissed.

MA 648/99 LEUNG Wah-chai

Woo J

(24.9.99)

*Jonathan Man

#Stephen Fong

Possession of offensive weapon/Whether paper cutter offensive weapon *per se*

管有攻擊性武器 - 剌紙刀本質上是否攻擊性武器

The Appellant was convicted after trial of an offence of possession of an offensive weapon, contrary to s 17 of the Summary Offences Ordinance, Cap 228, in that, at the material time and place, he had in his possession an offensive weapon, namely, a paper cutter 15 centimetres long, with intent to use it for an unlawful purpose.

On appeal, it was submitted, *inter alia*, that the paper cutter found on the Appellant could not be an offensive weapon. Reliance was placed upon *R v Ma Tak-yiu* [1991] 1 HKC 447, which involved the possession of a folding knife found in the pocket of the accused, and where Ryan J concluded that such a pocket knife was not by its nature an offensive weapon.

The Respondent conceded that the magistrate erred in relying on *AG v Chan Fuk-hing* [1979] HKC 495 to find the paper cutter an offensive weapon as that had been rendered absolute by the decision in *R v Chong Ah-choi* [1994] 3 HKC 68.

The Appellant further relied upon:

R v Petrie [1961] 1 All ER 466, wherein it was said that if the article was something like a sandbag or a razor, the onus was on the prosecution to show that it was carried with the intention of using it to injure;

R v Dayle [1973] 3 All ER 1151, a case involving a car jack and wheel brace, and in which it was said that if an article which was possessed lawfully and for good reason, was used offensively to cause injury, such use did not necessarily prove the intent which the prosecution must establish in respect of articles which were not offensive weapons *per se*. Each case must depend on its own facts;

R v Edmonds & others [1963] 1 All ER 828, which involved an unloaded stating pistol, a piece of lead piping, a hammer shaft, a single barrelled shot gun and a number of live cartridges, and the court held that the prosecution had to make the jury sure that each of the accused had the common purpose of using one or more of the articles for inflicting the using injury on someone;

R v Allamby; R v Medford [1974] 3 All ER 126, which involved three knives, two being domestic carving-knives and the third a vegetable knife, and the court held that it was not sufficient to prove that the accused had the intention to threaten someone at some time previously during the course of the car journey in which they took the knives;

Ohlson v Hylton [1975] 2 All ER 490, in which it was said that the offence-creating section was not concerned with the actual use of the weapon, but with the carrying of it with intent to use it if the occasion arose.

Held :

(1) In view of the authorities the magistrate erred in holding that the paper cutter was an offensive weapon *per se*, although he was correct in drawing inferences from the circumstances surrounding the arrest and how the paper cutter was found on the person of the Appellant;

(2) The Appellant could not have been found guilty of being in possession of an offensive weapon as charged although he might have been convicted under the other provisions in s 17 of the Summary Offences Ordinance, such as possession of '*other instrument fit for unlawful purposes*'. However, because of the similarity between the term '*fit for*' and the term '*suitable for*' in the definition of '*offensive weapon*' under the Public Order Ordinance, possibly with Bill of Rights implications, it was not fair to the Appellant or appropriate for this matter to be gone into at this stage. The main basis of the magistrate's ruling that the paper cutter was an offensive weapon was wrong, and the Appellant could not therefore be guilty as charged.

Result - Appeal allowed.

Practice & Procedure

CAs 138 & 139/97

YIP Kai-foon

Power & Mortimer VPP
Mayo JA

(8.12.98)

*I G Cross SC
Peter Chapman &
Chan Fung-shan

#G Plowman SC & Eric Kwok

Refusal to stay proceedings due to pre-trial publicity/Appeal competent despite absence of challenge to array/Overriding factor necessary before appeal pursuable after guilty plea/Questions for appellate court/Test to be applied to pre-trial publicity/Whether warning to jury sufficient/ Circumstances in which appellate court required to exercise its own discretion

拒絕因審前的報道而擱置法律程序 - 雖沒有反對陪審團人選但仍有權提出上訴 - 認罪後必須有凌駕一切的因素才可以進行上訴 - 審理上訴的法院面對的問題 - 對審前報道所應用的驗證標準 - 對陪審團的警告是否足夠 - 審理上訴的法院須行使酌情權的情況

The Applicant was convicted in October 1985 of two counts of handling stolen jewellery and of two firearms offences. He was ultimately sentenced to 16 years' imprisonment.

On 24 August 1989, the Applicant escaped from QMH, and in the process he kidnapped the driver of a van and his son. [The three counts in HCC 271/96, one of escaping from legal custody and two of kidnapping, arose out of that incident.]

The Applicant then disappeared for over 6 years but was apprehended on 13 May 1996 when he was spotted with other men by patrolling police officers in the Western District of Hong Kong. There was then an incident which resulted in the Applicant being charged, in HCC 270/96, with the offences of possession of arms and ammunition, of use of arms and ammunition with intent to resist arrest, of possession of an explosive substance with intent to endanger life or property.

In the months following his arrest, his personality and activities were sensationalised in the media. Because of this, an application for stay of the proceedings under both indictments was made at trial on the ground that the pre-trial publicity had made a fair trial impossible. That application was refused.

Thereafter, the Applicant pleaded guilty to the three offences under HCC 271/96, and received sentences totalling 5 years.

After trial in HCC 270/96, the Applicant was convicted of the three counts and received sentences which totalled 25 years. That sentence was ordered to run consecutively to the 5 years in HCC 271/96, making 30 years *in toto*. On appeal, the sole issue was whether the judge erred in refusing to stay the proceedings.

Held :

(1) Although the Applicant had not put the ruling of the judge to the test by challenging the array, the appeal was still competent. Whether or not an Applicant had sought to challenge the array, the judge's decision was '*of course open to review by this court because at the end of the day this court has to decide whether the conviction of an appellant is safe or unsafe*', as Roch L J put it in *R v Andrews* 14 October 1998, unreported;

(2) Although the Applicant was not debarred from appealing in HCC 271/96 by reason of his pleas, to have any chance of success he must establish that there was some overriding factor which made the conviction founded on the

unequivocal plea unsafe and unsatisfactory, as in *R v Lee, Bruce* [1984] 1WLR 578. The Applicant advanced no such factor and his application for leave to appeal against his convictions founded on his own pleas therefore failed;

(3) When a ruling of this kind was called into question, three questions were posed for a Court of Appeal :

(i) Did the judge advert to all of the relevant matters?

(ii) Did he fully comprehend the significance of each?

(iii) Did he deal with those matters in a way which would ensure a fair trial for the defendant?

(There was no complaint as to (i), but it was contended that (ii) and (iii) should have been answered in the negative);

(4) It was not open to the Court of Appeal to substitute its own discretion for that of the trial judge without it being shown that the judge had by a wrong exercise of his discretion caused injustice. The Court of Appeal could only substitute its discretion for that of a trial judge if it was satisfied that he took into account matters which he should not have taken into account or refused to take into account matters that he should have taken into account or, either in his reasoning or his law, was plainly wrong: *Hadmor Productions Ltd v Hamilton & Another* [1983] AC 191;

(5) Although it was said that the judge had erred in indicating that he would apply a test of actual prejudice, the application of such a test would have flown in the face of all that had been submitted to him both by counsel for the prosecution and counsel for the defence. He would be applying a burden of proof that no party had ever contended for. When read as a whole, it was clear that the judge was not applying an actual bias test but was, as he put it at one stage, examining the evidence to see whether there was '*a serious risk that a future jury may be so tainted with prejudice as the result of grossly adverse and unfair pre-trial publicity that a fair trial is probably no longer possible*' ;

(6) As regards the submission that the judge failed to have regard or proper regard to the likely issues at trial and to the likely effect of the prejudicial material upon those issues, it had to be borne in mind that the onus was on the Applicant to establish on the balance of probabilities that a fair trial was not possible. Whilst the issues to be taken into account varied from case to case, in the present case the issues were simple ones. The Applicant having pleaded not guilty, the principal issues that would fall for determination would be ones of credit - who was to be believed? It could not be foreseen that there would be complicated issues such as might arise in a complex commercial offence - and, indeed, none such did arise. The judge had fully in mind the issues likely to arise when considering the stay application;

(7) It was clear that the judge was fully aware of the nature and seriousness of the prejudicial material. Whether or not the minds of the potential jurors might have become '*clogged with prejudice*' was a matter for the judge hearing the stay application bearing in mind that he would conduct the trial and he would determine the nature of the warning which he would give to the jurors;

(8) What the judge had to consider was not whether potential jurors might have heard something adverse about the Applicant, but whether, given the possibility that they had heard or read some of the prejudicial matter, a properly stern warning from him could ensure a fair trial;

(9) The judge gave the jury strong and repeated warnings. If the judge had wrongly refused to exercise his discretion, the strong warnings he gave would not cure the matter. It would then be for the Court of Appeal to determine whether to exercise its discretion to order a stay. The judge, however, was not wrong to refuse to exercise his discretion. The three questions posed - in (3) above - must be answered in the affirmative. The judge fully comprehended the nature of the material, acknowledged that it was potentially damaging material but was satisfied that that potential could be set at naught if a sufficient warning was given. He gave a properly emphatic warning. In exercising his discretion the judge did not take into account any matters which he should not have considered, nor did he fail to consider matters which he should have considered, and he was neither plainly wrong as to the law or in his reasoning. There was no basis for interfering with the judge's refusal to stay.

Result - Application dismissed.

CA 496/97

Power VP
Liu &
Stuart-Moore
JJA

(9.12.98)

*Francis Lo

#EL
McGuinniety

LAM
Chi-keung

Sentencing of co-accused/Where possible all co-accused to be sentenced together/Need to avoid mistaken assessment of facts
共犯的判刑 - 全部共犯盡可能一起判刑 - 必須避免對事實作出錯誤的裁斷

In the course of allowing an appeal against sentence, the court observed :

> *This is another example of how difficulties can emerge when, without good reasons which will only rarely occur, sentence is imposed on one defendant at a different time to the sentence imposed on another defendant in the same proceedings ... there are positive advantages to adopting the time-honoured course of sentencing all defendants together at the end of the trial. By this stage, all the facts are known and, on the basis of these, mitigation speeches can then more sensibly be heard together. This will, in turn, lessen the risk of the judge making a mistaken assessment of the facts and the role played by each of the defendants which may otherwise lead to real or apparent disparity in the sentences imposed.*

HCAL 77/98

Keith J

(15.12.98)

*A Luk & F Lo

#I/P
Johannes Chan
as *amicus curiae*

SJ v YUEN
Lit-ping

When District Judge *functus officio*/Judge setting aside convictions and sentences after sentence/Acceptance of guilty plea does not require formal acknowledgement
區域法院法官何時職分已完 – 法官於判刑後撤銷定罪和刑罰 – 法庭接納被告認罪無須正式通知

The Respondent pleaded guilty to two offences of burglary, and one of remaining in Hong Kong without the lawful authority of the Director of Immigration. He admitted the correctness of the Summary of Facts. The judge then convicted the Respondent of the three charges. After the Respondent's solicitor had addressed the judge in mitigation, the judge stood the case down for a short while to consider sentence.

When the judge returned to court he pointed out that there was a discrepancy over the date of one of the burglaries. Whereas the charge sheet had alleged that the burglary to which charge 2 related had been on 21 February, the Summary of Facts recorded it as having been committed on 21 January. The prosecution accepted that the date in the Summary of Facts was an error and the Respondent's solicitor told the judge that both the burglaries occurred on 21 February. The judge decided that the safest course was to set aside his conviction on the burglary charge. The Respondent again pleaded guilty to the

charge, and agreed the Summary of Facts showing the date of offence as 21 February. This time, though, the judge did not say that he convicted the Respondent on the charge, and proceeded instead to sentence on 8 June 1998.

Although a judge in the District Court has no power to review in criminal cases, four days later he re-listed the case for hearing as he was worried that he had not again announced that he had convicted the Respondent on the burglary charge. Having discussed the case with counsel he set aside the sentence. When the Respondent was asked to confirm that he had pleaded guilty to the burglary charge, he refused saying that he had been assaulted by a police officer who had told him to plead guilty. After a discussion, the judge said he was not able to accept *any* of the pleas tendered by the Respondent as he was not satisfied they were voluntary. He had already set aside the sentence on the burglary charge, and he proceeded to set aside the convictions and sentences on the other two charges.

The case was listed for trial before another judge on another date. At that time, the prosecution asked for the trial not to proceed, on the basis that the original judge had no jurisdiction to make any order in respect of the case once sentence had been passed. The judge agreed with that submission, and suggested that the case be remitted to the previous judge so that he could revoke his orders. However, the prosecution pointed out that the original judge could not do that either.

The prosecution sought judicial review.

Held :

(1) There must come a time when the court was *functus officio*: it had completed its task. The District Court was a court of record. The only provision about records in criminal cases in Hong Kong was s 79(1) of the Criminal Procedure Ordinance, which provided that a record should be kept in accordance with rules made under section 9, of the proceedings at the trial. No rules had been made under section 9 relating to the keeping of a record of proceedings. Since the proceedings in this case were taped, it was the tape which constituted the record, and since the tape came into existence contemporaneously, it followed that, in the absence of any other statutory provision, that was when the proceedings were finally recorded. Accordingly, the judge was *functus officio* once he had pronounced the sentences: *HKSAR v Ho Tung-man* [1997] 3 HKC 375;

(2) The judge was in error in thinking that his failure to announce that he had convicted the Respondent on the burglary charge meant that there had not been an acceptance of a plea of guilty. The acceptance of a plea of guilty did not require a formal acknowledgement by the court to that effect: *S v The Recorder of Manchester* [1971] AC 481. Even if the judge had been correct to conclude that he had not accepted the Respondent's plea to the burglary charge, and was therefore not *functus officio* in respect of that charge, there was no basis on which he could have concluded that he was not *functus officio* on the other two charges. Having sentenced the Respondent on all three charges, the judge did not have the power to make any substantive orders in the case thereafter. He had no power to set aside the sentences on the three charges, or to set aside the convictions on the other two charges;

(3) As the Respondent had been properly convicted and sentenced on 8 June 1998 on all charges, a declaration would be issued to that effect.

Result - Judicial review allowed.

MA 120/99

Stuart-Moore VP Mayo & Keith JJA

(16.6.99)

*Albert Wong

#Ernest Lim [Reserved pursuant to s 118(d), Cap 227]

AU YEUNG Boon-fai

Appeal after guilty plea/Jurisdiction considered/Whether plea a nullity/Comments on use of case stated procedure/Property capable of being subject of theft charge included thing in action and other intangible property/Difference between overdraft facility with bank and credit card company account

認罪後提出上訴 - 考慮司法管轄權的問題 - 所作的認罪是否無效 - 就採用案件呈述的程序作出評論 - 能作為盜竊罪所指被竊物的財產包括據法權產及其他無形財產 - 銀行透支額與信用卡戶口的分別

On two occasions, the Appellant borrowed the credit card of a friend. This was, he assured the friend, for the purposes of hotel registration as the hotel required an imprint of a credit card as a '*deposit*'. The friend on each occasion was assured that he would himself settle the bill. In the event, the Appellant on each occasion settled the bill with the friend's credit card.

The Appellant was charged in the magistracy with two offences of theft, contrary to section 9, Cap 210. In each charge, he was alleged to have stolen a chose in action, namely, a debt of the amount of the hotel bill owed by the credit card company to the Appellant's friend, that chose in action being the property of the Appellant's friend. The Appellant pleaded guilty unequivocally, and agreed the '*brief facts*'.

At that stage, the magistrate expressed concern about the charges, and decided that they should be amended to describe in a different way the choses in action which the Appellant was alleged to have stolen, namely, a credit balance of the amount of the hotel bill with the credit card company. Thus the amended first charge read:

> '*On the 9th day of September 1998, at Newton Hotel, 218, Electric Road, North Point, in Hong Kong, you did steal a chose in action, namely, a credit balance of $6,383.40 with Aeon Credit Service (Asia) Co Ltd, belonging to Chew Kwan-kit.*'

The second charge was significantly amended and, again, the Appellant unequivocally pleaded guilty to both charges. He confirmed that he still admitted the original '*brief facts*'. The Appellant was sentenced to concurrent terms of imprisonment of 4 months on each charge.

The Appellant, despite the guilty pleas, lodged an appeal against conviction under section 113(1) Cap 227, which stated:

> *Any person aggrieved by any conviction, order or determination of a magistrate in respect of or in connection with any offence, who did not plead guilty or admit the truth of the information or complaint, may appeal from the conviction, order or determination, in manner hereinafter provided to a judge.*

The Appellant contended that the unequivocal guilty pleas did not prevent him from appealing, and relied upon *R v Li Tung-hing* [1992] 2 HKC 427, where it was held that the court could entertain an appeal against conviction from a magistrate's court under section 113, even when an apparently unequivocal plea of guilty had been recorded, if upon the admitted facts the Appellant could not in law have been convicted of the offence with which he had been charged.

On the merits, the Appellant submitted that he could not in law have been convicted on the amended charges because the hotels in each charge were protected from loss by the imprints which the Appellant had given them of his friend's credit cards. If the bills were not paid by the Appellant, the hotels

could debit the credit card companies with the bills. It was accordingly contended that the debits on the his friends' credit card accounts represented simply civil debts owed by the Appellant to his friends.

Held :

(1) A plea of guilty which was a nullity did not amount to a plea at all. Such a plea, therefore, was not caught by section 113, Cap 227. The classic example of a plea being a nullity was where the plea was tendered involuntarily, as where it had been induced by duress or misrepresentation. A plea of guilty presupposed that on the admitted facts the defendant was in law guilty of the offence to which he pleaded guilty. A plea of guilty was a nullity if, upon the admitted facts, the defendant could not in law be convicted of the offence for which he was charged;

(3) It followed that the court should proceed to hear the appeal against conviction on the two amended charges. If it found that on the admitted facts the Appellant could not have been convicted of the charges, the appeal would be allowed. If it was found that he had to have been convicted of the charges, the court would dismiss the appeal for want of jurisdiction, because the condition on which the appeal might be entertained, namely that the pleas of guilty were nullities, would not have been established;

(4) The only ground upon which it could be said that the Appellant could not in law have been convicted on the amended charges was that he did not steal anything. The argument would be that what he did was simply to incur for his friends a liability which would not have existed but for his use of their credit cards. That might or might not amount to some other offence, but on this argument the creation of a debt for another person did not amount to the appropriation of property belonging to another. That argument, however, could not be accepted. The kinds of property capable of being the subject of a charge of theft included '*things in action and other intangible property*' : s 5(1), Cap 210. A similar provision existed in the Theft Act 1968 in the UK, and there the law had been correctly summarised in Griew, '*The Theft Acts*', as follows:

> *Where a bank is in credit, the account holder has '**property**' in the form of a thing in action - a claim available against the bank as his debtor. If he has an enforceable overdraft arrangement with the bank, this too, it has been held, gives him '**property**' within the meaning of that word in the Theft Act so long as the overdraft facility has not been exhausted by drawings on the account. At any time, however, when the account is in debit and no right to draw on it exists, the account holder has no relevant property capable of being stolen by abuse of the account.*

That was also the law in Hong Kong;

(5) There was no relevant difference between an overdraft facility with a bank and an account with a credit card company. In the same way as the bank's customer was entitled to draw amounts up to the limit of his facility, so too was the account holder of a credit card account entitled to debit his account with the cost of goods and services up to his credit limit. Accordingly, the difference between the debit balance on a credit card account and the credit limit on that account represented property which was capable of being the subject of a charge of theft. It was true that the '*brief facts*' did not state that the sums still available for use on the Appellant's friends' accounts were not less than the respective hotel bills, but the charges were made out if part of the property was capable of being stolen;

(6) Since the Appellant could properly have been convicted on the two amended charges to which he pleaded guilty, the court could not entertain the appeal because the pre-condition, that the pleas of guilty were nullities, had not been established. The appeal had therefore to be dismissed for want of jurisdiction.

Result - Appeal dismissed.

Per cur - The problem presented by the Appellant's pleas of guilty would not have arisen if his appeal had been by way of case stated on a point of law under s 105, Cap 227. An appeal against conviction by way of case stated was not limited to cases in which the defendant pleaded not guilty. It would have been open to the magistrate to state a case for the opinion of the Court of First Instance as to whether he had been correct to accept the Appellant's pleas of guilty in the light of the admitted facts.

CA 169/89

Nazareth & Stuart-Moore VPP
Leong JA

(2.7.99)

*B Ryan

#I/P

YANG Mei-yung @ YEUNG Mei-yung

Application to treat abandonment of application for leave as nullity/Principles applicable/No inherent jurisdiction to permit withdrawal
申請將放棄申請上訴許可當作無效 - 適用於本案的原則 - 法庭沒有固有司法權准許撤回放棄

The Applicant was convicted on 23 March 1989, after a trial in the District Court, of five charges of theft.

On 29 March 1989, the Applicant applied for leave to appeal against conviction. After receiving advice from counsel, the Applicant gave notice of his abandonment of the application in relation to conviction, and the application was marked '*dismissed on abandonment*'.

In December 1998, the Applicant lodged an application to treat the abandonment of his first application for leave to appeal as a nullity.

Held :

(1) No good reason had been advanced for the court to treat the original abandonment of the application as a nullity, following the principles in *R v Wong Kai-kong and another* Cr App 332/89, which was concerned with the principles to be applied when leave out of time was sought. Silke VP quoted with approval that said in *R v Ip Chung-hang* Cr App 345/88, namely, that the court should take the '*unusual course*' of looking at the grounds of appeal to see if they seemed to be impressive and to check '*that by refusing leave to appeal the Court of Appeal was not shutting out a substantial and plainly arguable ground of appeal*'. Silke VP made it plain that the court should bear in mind that substantial grounds must be shown for the delay before granting the extension of time. The longer the delay, the more onerous was the duty on the person making the application to provide good reasons for the lateness of his application;

(2) The court had no inherent jurisdiction to permit a withdrawal of the abandonment and could only do so in circumstances where it had been shown that the mind of the Applicant did not go with his act of abandonment.

Result - Application dismissed.

CA 444/98

Nazareth & Stuart-Moore VPP
Wong JA

(17.8.99)

*Albert Wong

#W G Allan

CHANG Kit-wai

District Judge/Reasons for verdict/Extent of duty to set out matters prosecution must prove
區域法院法官 - 裁決理由 - 法官將控方須舉證的事情列出的責任範圍

In the course of dismissing an appeal against conviction from the District Court, the court observed:

> *As to mens rea, this court has on frequent occasions said that it is always desirable in cases which are other than simple and straightforward, to set out the essential ingredients which the prosecution must prove before guilt is established.*

MA 871/99

Burrell J

(4.10.99)

*A A Bruce SC & G Di Fazio

#A C Macrae SC

SJ v LEE Wai-man

Magistrate excluding evidence of prosecution witness/ Discretion to exclude exercisable only in exceptional circumstances/Considerations irrelevant to exercise of discretion/Comments on prejudice if case tried by magistrate alone
裁判官將控方證人的證據剔除 - 將證據剔除的酌情決定權只在特殊情況下行使 - 與酌情決定權的行使無關的考慮因素 - 就裁判官單獨審理案件時會否受證據的不利因素影響一事作出評論

This was an appeal against a decision of a magistrate to acquit the Respondent of an offence contrary to s 25(1) of the Organized and Serious Crimes Ordinance, Cap 455. That acquittal inevitably followed a ruling by the magistrate that the evidence of Chan Tsz-kong ('PW1'), who was an accomplice who had previously pleaded guilty to the offence of conspiracy to cheat at gambling and been sentenced to 12 months' imprisonment, was inadmissible, there being no other evidence against him. On appeal, it was submitted that the exclusion of the evidence of PW1 was wrong in law.

At trial, the submission made to the magistrate was that he should exercise his discretion to exclude the evidence of the accomplice on the basis that its admission would '*potentially prejudice a fair trial*'. It was also said that PW1 had not been '*finally dealt with*', as he had an arguable point to appeal his conviction even though he had pleaded guilty and had not lodged any notice of appeal, and therefore the principle in *R v Pipe* (1967) 51 Cr App R 17, should be applied. It was further submitted that there was a risk that PW1's evidence would be unreliable because his memory had been refreshed, and that the use of PW1 as a witness was contrary to the public interest.

The magistrate concluded that if PW1 testified, he would '*potentially prejudice a fair trial*', partly because he was an accomplice who had not finally been dealt with. He added that he found PW1's evidence to be unsafe on the basis of, prior to either hearing the evidence or reading his statement, '*the shaky conviction, the conditional immunity, his lengthy incarceration, the continued interviews and memory refreshing exercises whilst in ICAC custody, and the threats and inducements held out to him*'.

In the case stated, the magistrate posed three questions:

(1) Did I have a discretion to exclude the evidence of PW1?

(2) If the answer to question (1) is yes, should I have held a voire dire or some other procedure in order to have an evidential basis for the exercise of the discretion?

(3) If the answer to (1) is yes, did I err in the exercise of this discretion in excluding the testimony of PW1?

Held :

(1) In law a very narrow discretion exercisable only in wholly exceptional cases existed: *R v Lai Ka-to* Cr App 229/92, *R v Sang* [1980] AC 402. Although the findings made by the magistrate could not be accepted, it was their irrelevance which was more important. Those findings were:

(a) That PW1 had not been finally dealt with. In fact he had been, but it was nonetheless not a factor to take into account when exercising the discretion. It was highly relevant to the weight to be attached to his evidence once given;

(b) That his conviction was '*shaky*' and of '*a quality which was not of a high order*'. The same criticism applied. He, further, was not in a position to make such a judgment;

(c) That he had been given a conditional immunity. The Respondent conceded that this alone could not warrant exclusion of accomplice evidence;

(d) That PW1 had been threatened prior to pleading guilty. There was simply no proper evidence upon which he could have made that finding;

(e) That PW1 had been '*prepared*' by the ICAC as to what evidence to give. Again there was no investigation by the magistrate or evidence heard by the magistrate which could have led him to conclude that PW1 had been coached to give certain evidence;

(f) That allowing PW1 to testify would not only prejudice a fair trial but would be unfair to PW1 as well. There was no authority for fairness to the accomplice being a relevant factor which the trial judge should take into account on the issue of discretion. It was not relevant;

(g) That PW1's evidence would potentially prejudice a fair trial. This necessarily included a finding that the magistrate judged PW1 to be potentially unreliable. His potential to prejudice the fairness of the trial or the potential unreliability of his evidence, in the context of this case could only be assessed by hearing and evaluating his evidence, which he did not do. The '*potential*' effect of a man's evidence gleaned only from documents could not be enough;

(h) Potential unreliability could only be relevant to weight not admissibility.

(2) The magistrate was both judge and jury. The circumstances in which a single tribunal should exclude evidence, seen or unseen, were even more remote than when the verdict was in the hands of a jury. The reasoning was straightforward. A professional legally trained magistrate or judge sitting alone was able to distinguish between prejudice and probative value. However clear and correct a direction to a jury might be there was a risk that they might fail to put out of their minds matters which they were directed so to do and that they failed to heed warnings given to them about the inherent dangers of certain types of evidence. In *Attorney General v Siu Yuk-shing* [1989] 2 HKLR at p 102, the Privy Council stated :-

The risk of such prejudice overbearing the probative value of evidence is of infinitely less significance when a case is tried by a judge alone. The judge must of course guard against any such result but his whole background and training have fitted him to do so. In a trial by a judge alone the exercise of excluding the evidence on grounds of prejudice becomes somewhat unreal when it is remembered that the judge must be informed of the nature of the evidence in order to rule upon whether or not it is admissible. If the judge having ruled it inadmissible is to be trusted to put the evidence out of his mind he can surely be trusted to give it only its probative, rather than its prejudicial, weight if he rules that it is admissible.

(3) As regards the questions posed:

(i) There was a discretion to exclude relevant and otherwise admissible evidence if its reception would produce an unfair trial. However the court knew of no situation when the unheard evidence of an accomplice would qualify for exclusion by the exercise of this discretion. The question posed concluded with the words '*the evidence of PW1*'. The question was confined to the facts of this case and this accomplice;

(ii) The answer to the first question was '*no*'. The magistrate had not heard or read his evidence. In those circumstances the time when a magistrate might be able to exercise the very narrow discretion had not arrived. He could not have applied the principles correctly based purely on the documents that were placed before him. He made an error in law in making the findings he did based on those documents. Further, and for the sake of completeness, even if he had heard the evidence and thereafter made the same findings, they were substantially findings which were relevant to weight not admissibility;

(iii) The answers to questions (2) and (3) did not arise because they began with the words "*If the answer to question (1) is 'Yes' ….*" However, in order to provide an answer to question (2), the wording would be amended slightly. The court's answer was - in order to determine whether the discretion arose and if so whether it should be exercised, there must be an evidential basis to make such a determination. Similarly in answer to question (3) - if, having heard some evidence on the issue, the magistrate had made those findings which appeared in the written case stated, he would have been in error to thereafter rule the evidence inadmissible. They were matters relevant to weight only.

Result - SJ's appeal allowed. Retrial ordered.

CA 254/99 ZHENG Wai-tai

Stuart-Moore VP Wong JA & Woo J

(15.11.99)

*Cheung Wai-sun

#C Grossman SC & E Kwok

Directions for written arguments/Citation of cases
有關書面論據的指引 - 援引案例

(1) The almost invariable practice of the Court of Appeal was to require a written argument 10 days prior to the hearing day. The reasons were, firstly, that that allowed time for the members of the court to prepare for the application in depth and, secondly, it gave counsel for the respondent an opportunity to provide a considered reply. An applicant who was awaiting the hearing would expect the court to be conversant with the legal issues being raised by his counsel, quite apart from the factual matters which could be gleaned from the papers in the appeal bundle. When counsel had been briefed in sufficient time, they had to comply with the directions given and to have written arguments served on the court 10 days prior to the fixed hearing date;

(2) When cases were referred to, in terms of supporting a proposition of law, the full citation, together with a reference to the parts that were to be relied upon, should be given.

Prosecutor/Prosecutions

FAMC 1/99 CHIM Pui-chung

Li CJ Litton & Ching PJJ

(1.2.99)

*M Lunn SC & K Zervos

#Sir John Swaine SC & Richard Wong

Duty of prosecution to give particulars of offence if possible/Court of Final Appeal not to be used as a second court of criminal appeal/'*Substantial and grave injustice*' only available in exceptional cases
控方有責任在可能的情況下述明罪行詳情 – 終審法院不可作為第二刑事上訴法庭 – 「*實質及嚴重的不公平*」這項理由只適用於特殊情況

The Applicant was convicted after trial of conspiracy to forge, contrary to Common Law and section 71 of the Crimes Ordinance, Cap 200. It was alleged that he and another named person '*conspired together and with other persons unknown*'.

In refusing the application to certify a point of law of great and general importance and to grant leave, it was

Held :

(1) It could not be doubted that, generally, the prosecution should, if it could, give particulars which might assist in identifying the persons unknown and otherwise. It was a question of degree, dependant on the facts, whether the prosecution had discharged its duty. The prosecution had done so;

(2) The Court of Final Appeal did not sit and would not allow itself to be used as a second court of criminal appeal : *Zeng Liang- xin* [1997] HKLRD 1204, *Kwok Hung-fung* [1998] 1 HKLRD 334. The ground of substantial and grave injustice was available only in exceptional cases such as where something fundamental had gone wrong at trial.

CA 620/96

Stuart-Moore VP Gall & Pang JJ

(29.11.99)

*A A Bruce SC & Anthea Pang

#Robert Forrest

TANG Sau-leung

Preservation of evidence/Tapes and other similar items capable of preservation should be preserved where practicable/Burden on prosecution to ensure preservation of evidence
保存證據 - 錄音帶、錄影帶及其他同類物品如可予保存的，則在切實可行範圍內應予保存 - 控方有責任確保證據得到保存

In the course of dismissing an application for leave to appeal against convictions for attempted murder and murder, the court observed :

> *We pause here to observe that apparently it is regular police practice for tapes to be recycled after a period of about two months regardless of the importance of the case to which the tapes are relevant. We are concerned that for crimes, particularly of this gravity, potential evidence is allowed to be destroyed before all avenues of appeal have been exhausted, let alone before the trial has concluded. We can merely express the strongest disapproval of the present system and respectfully suggest to the powers that be within the police force that urgent improvements should be made to the system to ensure that evidence of this potential importance is not destroyed or erased in future. A heavy burden must also be borne by lawyers engaged in the prosecution of offences where tapes or other similar items, which are capable of being recycled, are involved to ensure that such evidence is preserved until the conclusion of all legal proceedings where this is practicable.*

Proviso

FACC 4/98

Li CJ Litton Ching & Bokhary PJJ Nicholls of Birkenhead NPJ

(16.3.99)

*A Luk & Wong Sze-lai

#A C Macrae

CHAN Chuen-ho

Reversal of burden of proof on trafficking/Careful direction required where presumption arises/Applicability of proviso
推翻販毒的舉證責任 - 作出推定時須要小心指引 - 但書的適用情況

The Appellant was convicted of trafficking in 197.17 grammes of a mixture containing 37.28 grammes of heroin hydrochloride. He appealed to the Court of Appeal against his conviction on the grounds of a misdirection. The Court of Appeal held that there was indeed a misdirection but applied the proviso to s 83 Cap 221, and dismissed his appeal. He was granted leave by the Appeal Committee to appeal to the Court of Final Appeal on the ground that a grave and substantial injustice had occurred.

The trial judge correctly directed the jury on those presumptions arising under s 47(1)(a) and (2) Cap 134, and told them that the standard of proof required of the Appellant in rebutting them was one upon the balance of probabilities. Having correctly directed the jury on possession and on the presumptions as to possession, the judge gave the direction of which complaint was made. He said,

> *Failure to rebut the presumptions will result in the accused's conviction as the prosecution will have proved beyond a reasonable doubt on the whole of the evidence adduced that he did have possession of the dangerous drugs, the subject of the two counts, and that his possession was for the purpose of trafficking in them.*

Held :

(1) There was no statutory presumption as to the intention to traffic. If the passage complained of was read in isolation it was clear that it was a misdirection. It was apt to be understood as meaning that as a matter of law there was a presumption of trafficking once possession was proved. Understood in that way it reversed the burden of proof on the question of trafficking. It was a matter of fundamental importance that a jury should be clearly and accurately directed in matters of the burden and standard of proof: *Kwan Ping-bong v R* [1979] 2 WLR 433;

(2) Although the circumstantial evidence against the Appellant was strong, it could not be said that properly directed the jury would inevitably have convicted the Appellant of trafficking. There remained a possibility that the jury might have convicted him of simple possession rather than trafficking;

(3) Where an offence involved two factors to only one of which statutory presumptions applied they had to be carefully directed. As there was a clear misdirection the conviction of trafficking could not stand. Given that there was a possibility of a conviction of simple possession on the available evidence, the proviso could not be applied;

(4) The conviction of trafficking would be substituted with one of simple possession. The original sentence of 6½ years' imprisonment would be substituted with one of 4 years.

Result - Appeal allowed.

Public Order Offences

MA 95/99 TSUI Yat-hung & 7 others

Woo J

(29.4.99)

*Hayson Tse

#Richard Wong & Albert Poon

Unlawful assembly/Basis of breach of peace/Behaviour constituting disorderly conduct

非法集結 – 破壞社會安寧的基準 – 構成行為不檢的行徑

The eight Appellants, together with 14 other persons, were charged with unlawful assembly, contrary to s 18(1) of the Public Order Ordinance, Cap 245.

The particulars of offence were that on 18 May 1998, at the Balasar Night Club, Wanchai, the accused persons assembled together and conducted themselves in a disorderly manner likely to cause any person reasonably to fear that they so assembled would commit a breach of the peace.

The magistrate accepted the prosecution case that all the people went into the club together in a hurry. They were seated at three sofas and did not order food or drink. They were either quiet or talking in low voices. The magistrate concluded that their behaviour was extraordinary, and therefore he treated it as disorderly conduct that would likely cause any person reasonably to fear that they so assembled would commit a breach of the peace. Five prosecution witnesses, all club employees, said they were scared. The ground for their fear was described as '*so many people coming in*'. On appeal

Held :

(1) On the question of a breach of the peace, it was said in *R v Howell* [1982] 1 QB 421, that there was:

> '*a breach of the peace whenever harm is actually done or is likely to be done to a person, or in his presence to his property, or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly, or other disturbance*'.

In the present case, the Appellants and others went into the club and sat there quietly. They did not hold anything. They did not shout or even speak loudly. They did not say they were there for the purposes of revenge. They did not damage any property nor did they cause any loss of business. They did not cause any nuisance to other customers;

(2) The conduct of the Appellants could not amount to disorderly conduct, let alone conduct likely to cause any person reasonably to fear that so assembled they would commit a breach of the peace. The employees of the club might be suspicious of what they were trying to do. They might be annoyed that these people would occupy so much space without ordering any drink or food, but the Appellants were arrested within six minutes after their arrival by the policemen summoned by the manager;

(3) Had the Appellants been asked to leave and refused or become agitated, there could have been an offence of unlawful assembly. When asked to produce their identity cards they complied, and when searched they possessed no weapons. There was insufficient evidence for the magistrate to have formed the conclusion he did.

Result – Appeals allowed.

香港特別行政區訴張新華
HKSAR v CHEUNG Sun-wah

*鄭紀航
A CHEANG

#黃達華
Richard WONG

高等法院原訟法庭 – 裁判法院上訴案件 1999 年第 394 號

高等法院原訟法庭法官胡國興
聆訊日期：一九九九年九月十五日
宣判日期：一九九九年九月二十四日

COURT OF FIRST INSTANCE OF THE HIGH COURT
MAGISTRACY APPEAL NO. 394 OF 1999
WOO J
Date of Hearing : 15 September, 1999
Date of Judgement : 24 September, 1999

襲擊和阻撓在正當執行職務的警務人員 - 所執行的職務必須合法 - "*擾亂公安*"的意義

上訴人被控一項襲擊和一項阻撓在正當執行職務的警務人員的罪名，經審訊後被裁定罪名成立。兩項控罪都是違反香港法例第 212 章第 36(b)條。

案件起因源於政府向元朗村民收地，以建築西北鐵路。控方第一證人是一名總督察，當他到達位於元朗八鄉的西北鐵路（"西鐵"）建築地盤時，有為數約 20 至 30 名村民在場示威，不許西鐵工人動工，又要求政府先給予賠償。部分示威者坐在鏟泥機前，並用樹幹阻止機器開動，也有村民持着盛滿糞便的膠桶。

經談判後雙方仍未能達成協議，於是控方第一證人警告示威者，著他們離去，否則會以“*擾亂公安*”的罪名拘捕他們。有部分村民自願離去，部分則仍留在現場，其中包括上訴人，他們意圖繼續阻撓工人動工。後來警務人員拘捕上訴人。上訴人被捕時不斷掙扎，並踢到一名警務人員，即控方第二證人。

上訴時，上訴人表示，當控方第一證人一旦宣布以“*擾亂公安*”的罪名拘捕村民，就不能以其他罪名執行拘捕行動。如果拘捕的理由是不合法的，則警方執行拘捕的職務亦不合法。

上訴人認為，所謂“*擾亂公安*”者，必是違反第 245 章《公安條例》第 17B 條或第 18 條的罪行。由於案發現場並非公眾地方，公眾無權進入，故第 17B(2)條不適用。上訴人又援引 ***R v To Kwan-hang & others*** [1994] 2 HKC 293 一案，表示由於並無證據證實非法集結的情況，因此第 18 條亦不適用。換言之，上訴人的行為並不構成第 17B 條或第 18 條所指的罪行，故警方所執行的職務並不合法。

裁決：

(1) 第 212 章第 36(b)條有以下規定：

> “*任何人襲擊、抗拒或故意阻撓在正當執行職務的任何警務人員或在協助該警務人員的人，即屬犯罪。*”

要證明上述控罪，有關的警務人員在案發時所執行的職務就必須是合法的：***R v Cheung Wai-wan*** MA 167/94。因此本案的爭論點，就是案發時候有關警務人員所執行的職務是否合法。

(2) 硬將“*擾亂公安*”的罪名解釋為必須是第 17B 條或第 18 條的罪名，是太狹窄，亦是不合理的。第 232 章《警隊條例》第 10 條清楚列明警隊的責任。警隊根據第 1 章第 39(1)條，有權不時因應情況所需而執行第 232 章第 10 條的職責：***R v To Kwan-hang & others*** (見上文)。

(3) 在案發現場，上訴人及 20 至 30 名示威村民阻撓西鐵工人開工，他們坐在鏟泥機前，用樹幹阻止機器開動，持着載有糞便的膠桶，因而有可能引致示威者受傷及/或令機器受損，工人也有可能被村民潑糞便或甚至襲擊。村民手持載有糞便的膠桶，令工人害怕示威者會作出擾亂公安和襲擊的行為，而警方亦害怕村民會破壞社會安寧或促使工人破壞社會安寧。故警方的職責是採取合法措施維持治安，防止刑事罪及犯法行為發生，以及防止損害生命及損毀財產。

(4) 破壞社會安寧的罪行可在私人物業上發生：***R v Chief Constable of Devon and Cornwall*** [1982] 1 QB 458；***HKSAR v Yeung King-ping and others*** MA 581/96。如果一名警務人員真實地懷疑破壞社會安寧的情況有可能會發生，他便可以在私有的場所中拘捕某人。警員這項權力是不會因場所是私人地方而受限制的：***McConnell v Chief Constable of Greater Manchester Police*** [1990] 1 WLR 364。

(75) 案發時，警方是在合法執行職務。由於村民阻礙警方執行正當職務，而警方在拘捕時並沒有使用過分武力，故此這是合法的拘捕。

上訴駁回。

[English digest of MA 394/99 above]

CHEUNG Sun-wah

Assault and obstruction of police officer in due execution of duty/Execution of duty must be lawful/Meaning of '*disrupting public order*'

Woo J

(24.9.99)

* A Cheang

\# Richard Wong

The Appellant was convicted after trial of one charge of assaulting a police officer and one charge of obstructing a police officer in the due execution of his duty, both contrary to s 36(b) of Cap 212.

The case arose out of the government's resumption of land, owned by the Yuen Long villagers, for the purpose of constructing the North-West Railway. When PW1, the Chief Inspector, arrived at the site of North-West Railway, there were about 20 to 30 villagers staging protests. They did not allow the West Rail workers to commence the work and demanded that the government pay compensation first. Some of the demonstrators sat in front of a bulldozer and prevented the operation of machines by tree trunks. Some villagers were equipped with plastic buckets filled with excrement.

Despite negotiations, no agreement was reached and PW1 warned the protesters to leave or they would be arrested for '*disrupting public order*'. Some of the villagers left voluntarily while some, including the Appellant, remained at the site with intent to continue obstructing the workers. The Appellant was arrested and, during the arrest, he struggled and kicked a police officer, PW2.

On appeal, it was submitted that once PW1 had announced that the ground for arrest was '*disrupting public order*', the villagers should not be arrested for other offences. If the ground for arrest was not lawful, the duty of arresting which was executed by the police would not be lawful.

It was submitted that '*disrupting public order*' must be an offence contrary to s 17B and s 18 of the Public Order Ordinance, Cap 245. Since the site was not a public place and the public had no right to enter, s 17B(2) did not apply. The Appellant also relied on *R v To Kwan-hang & others* [1994] 2 HKC 293, and submitted that s 18 was not applicable because there was no evidence to prove an unlawful assembly. In other words, no offence under either section was committed and therefore the execution of duty by police was not lawful.

Held:

(1) S 36(b) of Cap 212 provided

> *any person who assaults, resists, or wilfully obstructs any police officer in the due execution of his duty or any person acting in aid of such officer shall be guilty of an offence.*

To establish the charge, the duty which the police were executing at the material time must be lawful: *R v Cheung Wai-wan* MA 167/94. The issue was whether the duty being executed by the police officer at the material time was lawful;

(2) It would be too narrow and unreasonable to rigidly confine the meaning of the offence of '*disrupting public order*' to sections 17B or 18. The duties of the police force were clearly set out under s 10 of Cap 232. Every duty

thereunder, by virtue of s 39(1) of Cap 1, carried with it the power to perform the duty from time to time as required: *R v To Kwan-hang and other* (above);

(3) At the scene the Appellant together with 20-30 protesting villagers obstructed the work of the West Rail workers by sitting in front of the bulldozer, preventing the use of machines with tree trunks and holding buckets of excrement. The lives of the demonstrators might have been put in peril and/or the machines might have been damaged. The workers might even have been splashed with excrement or assaulted by the villagers. The buckets of excrement carried by the villagers caused the workers to fear that the protesters would disrupt public order and commit an assault. The police feared that the villagers would cause a breach of peace or provoke the workers to commit a breach of peace. Hence, the duties of the police were to take lawful measures for preserving the public peace, preventing crimes and offences and preventing injury to life and property;

(4) The offence of breach of peace could be occasioned on private property: *R v Chief Constable of Devon and Cornwall* [1982] 1 QB 458, *HKSAR v Yeung King-ping and others* MA 581/96. There was no restriction upon a police officer, in private premises, arresting someone if he genuinely suspected that a breach of peace might occur: *McConnell v Chief Constable of Greater Manchester Police* [1990] 1 WLR 364;

(5) The police, at the material time, were lawfully executing their duties. Since the villagers had obstructed the police in the execution of their duties and as no excessive force was used in the arrest, the arrest was lawful.

Result – Appeal dismissed.

Public Health Offences

MA 136/99 BIRDLAND (HK) Ltd

V Bokhary J

(25.5.99)

*Hayson Tse

#G Plowman SC

Selling food containing extraneous matter/Defence to show that extraneous matter a consequence of the process of collection or preparation of the food/Not sufficient to have taken all reasonable steps to avoid presence of extraneous matter

出售含有外來物質的食物 – 如能證明有關外來物質的存在是收集或配製過程中的後果則可以此作為免責辯護 – 已採取一切合理措施避免出現外來物質並不充夠

The Appellant was the company which operated the Kentucky Fried Chicken fast food chain in Hong Kong. A charge was laid against the Appellant under section 52(1) of the Public Health and Municipal Services Ordinance, Cap 132, which alleged that on 20 March 1998, at its D'Aguilar Street premises, it sold to a purchaser, a Miss Chu, an article of food, namely, a fried chicken wing, which was not of the substance of the food demanded by the purchaser in that the food contained the remains of a cockroach. The Appellant was convicted.

On appeal, it was submitted, *inter alia*, that there was a material irregularity in the course of the trial in that the magistrate failed to consider the defence available to the Appellant pursuant to s 53(3) Cap 132. Section 53(3) provided:

> '*In proceedings under section 52 in respect of any food or drug containing some extraneous matter, it shall be a defence for the defendant to prove that the presence of that matter was an*

unavoidable consequence of the process of collection or preparation.'

Held：

(1) In *Smedleys Ltd v Breed* [1974] 2 All ER 21, which dealt with a prosecution under section 2(1) of the Food and Drugs Act 1955 which was identical to s 52(1) Cap 132, and the defence under section 3(3) of that Act (which was identical to s 53(3) Cap 132), the House of Lords held that in order to establish a defence under section 3(3) it was necessary to show that the presence of the extraneous matter was a consequence of the process of collection or preparation of the food and that the consequences could not have been avoided by any human agency; it was not sufficient for the accused to show that he had taken all reasonable care to avoid the presence of the extraneous matter. That applied equally to the defence under s 53(3) of Cap 132;

(2) That defence was not raised at trial, and there was no evidence on which the magistrate could have found that the presence of the cockroach was a consequence either of the process of collection or preparation. Nor was there any evidence on which he could have found that its presence could not have been avoided by any human agency. There was therefore nothing for the magistrate to consider under s 53(3) Cap 132.

Result - Appeal dismissed.

香港特別行政區訴雀巢牛奶香港有限公司
HKSAR v Nestle Dairy Farm Hong Kong Limited

*黃崇厚
Albert Wong

#沈其亮
Timon KL
Shum

香港特別行政區
裁判法院上訴案件 1999 年第 508 號

高等法院原訟法庭法官楊振權
一九九九年八月十一日

COURT OF FIRST INSTANCE OF THE HIGH COURT
MAGISTRACY APPEAL NO. 508 OF 1999
YEUNG J
11 AUGUST 1999

售賣含有外來物質的食物 - 被告提出法例容許的免責辯護時有舉證的責任 - "*無可避免*"一詞的意思 - 食物生產商對公眾負有嚴格責任

上訴公司被控售賣食物而其物質與購買人所要求的不符，違反《公眾衞生及市政條例》第 52 條，經審訊後被裁定罪名成立。

控方案情顯示，投訴人從惠康超級市場購入一瓶由上訴公司供應的飲品。飲品經飲用後，投訴人發現瓶內有一隻兩厘米長的昆蟲翅膀。

《公眾衞生及市政條例》第 53(3)條中訂立了一項免責辯護，內容如下：

"在根據第 52 條就食物或藥物含有外來物質所引起的法律程序中，被告人如證明該物質的存

在是收集或配製過程中無可避免的後果，即為免責辯護。”

本案上訴時，主要的爭論點是上訴公司能否依靠法定的免責辯護理由來脫罪。上訴公司提出的證供顯示，公司已經採取了一切合理和謹慎的措施以防止外來物質的出現。但是，原審裁判官認為，有關的昆蟲有可能是通過公司的工序系統落在傳送帶上的蓋子上，然後掉進割切開的瓶子裏，跟着飲料注入程序才開始。原審裁判官認為，另一可能性是在有關的瓶子運送到上訴公司之前，昆蟲的翅膀已經在瓶子內。

裁決：

(1) 要成功得到法定的免責辯護理由的保障，上訴公司必須證明食物中存在外來物質，是收集或配製過程中無可避免的後果，而解釋“***無可避免***”一詞時，不應加入上訴人是否有採取所有合理、認真、勤奮的步驟：*Smedleys Ltd v Breed* [1974] AC 839。

(2) “***無可避免***”一詞應該理解為不論有沒有採取合理和適當的預防行動，後果都必會發生。在本案來說，“***無可避免***”一詞是表示在製造和配製過程中，無論上訴公司有沒有採取適當的預防行動，都不能避免昆蟲的翅膀混入有關的飲品內。這點是上訴公司不能亦不想證明的。

(3) 雖然上訴公司提出的證據顯示，公司已經採取多項的措施來避免外來物質滲雜在其產品之內，但這一點與案件涉及的爭拗點關係不大。食物生產商對公眾有一個非常重要及嚴謹的責任，而有關法例的目的亦是為了確保生產商必須為了保障公眾利益而達到最佳的表現水平。

(4) 原審裁判官指出，上訴公司的生產過程或程序有缺點，在盛注程序展開前未有檢查過瓶子，亦沒有安排員工檢查傳送帶上是否會有外來物體侵入產品內。要安排這樣的檢查過程可能會有很大的困難，檢查亦不一定有效，但這並不表示檢查程序無須執行。檢查過程可能會導致減產，亦可能導致生產成本增加，但這一點亦非檢查程序無須執行的合理原因。這點是額外因素，上訴公司須負上責任。

(5) 上訴公司未能證明飲品內有昆蟲翅膀是收集或配製過程中“***無可避免***”的後果。這一點表示上訴公司未能確立法定的免責辯護理由，並足以將上訴駁回。

上訴駁回。

[English digest of MA 508/99, above]

Nestle Dairy Farm Hong Kong Ltd

Selling food containing extraneous matter/Burden on accused to discharge statutory defence/Meaning of '*unavoidable*'/Strict responsibility owed by manufacturer of food to public

The Appellant was convicted after trial of an offence of selling food not of the substance demanded by the purchasers, contrary to s 52 of the Public Health and Municipal Services Ordinance ('the Ordinance').

The case for the prosecution was that the complainant had purchased a drink from the Wellcome Supermarket which was supplied by the Appellant and which was found after consumption to contain a 2 cm long insect wing.

S 53(3) of the Ordinance contained a statutory defence, and provided:

> *In proceedings under s 52 in respect of any food or drug containing some extraneous matter, it shall be a defence for the defendant to prove that the presence of that matter was an unavoidable consequence of the process of collection or preparation.*

On appeal, the main issue was whether the Appellant could exonerate itself by reliance upon the statutory defence. The evidence adduced by the Appellant had showed that all reasonable care had been taken to avoid the presence of any extraneous matter. However, the magistrate had concluded that the insect could have passed through the processing system, fallen onto the cover of the conveyor belt and dropped into a trimmed bottle before the filling process. The other possibility suggested by the magistrate was that the insect wing was already in the bottle in question before the bottle was delivered to the Appellant.

Held :

(1) To succeed under the statutory defence, the Appellant had to show that the presence of the extraneous matter was an unavoidable consequence of their process of collection or preparation, and the word '*unavoidable*' was not to be construed by inserting a reference to the care and diligence of the accused: *Smedleys Ltd v Breed* [1974] AC 839;

(2) The term '*unavoidable*' should be construed as meaning something that was bound to result, no matter whether reasonable and appropriate precautions had been taken or not. The word '*unavoidable*' in this case meant that in the process of manufacturing or preparation, the Appellant could not have prevented the presence of the insect wing in the drink, whether the Appellant had taken appropriate precautions or not. That was something the Appellant could not and would not want to prove;

(3) Although the evidence of the Appellant showed that a number of measures had been taken to avoid the presence of any extraneous matter in its products, that was not relevant to the issue. Food manufacturers had a grave and strict responsibility towards the public. The purpose of the legislation was to ensure the highest standard of performance from manufacturers in the interests of the public;

(4) The magistrate noted that there were defects in the manufacturing process or procedure, i.e. the bottles were not inspected prior to the filling process and no arrangement had been made to check if there was any extraneous object on the conveyor belt that might get into the product. Although it might be extremely difficult to arrange for such an inspection process, which might not, in any event, be effective, that did not mean that such an inspection was not

required. The fact that such an inspection process might result in a reduction in output and an increase in production costs was not a reasonable excuse for the omission of such a process. That was a factor which added to the burden of responsibility to be borne by the Appellant;

(5) The Appellant could not prove that the presence of the insect wing in the drink was an '*unavoidable*' consequence of the process of collection or preparation. That failure was a sufficient basis for dismissing the appeal, as it meant that the statutory defence had not been established.

Result - Appeal dismissed.

Road Traffic

MA 184/99 BUTT Tze-leung

Gall J

(17.6.99)

*P Madigan

#I/P

Careless driving/Test applicable/Skill and competence not to be used to assess care and prudence of driver
不小心駕駛 – 適用的驗證標準 – 技術和能力不可用來評估司機的謹慎和審慎程度

The Appellant was convicted of careless driving after trial.

The offence arose out of a minor collision that occurred on the downward track of Garden Road to north of the intersection of Lower Albert and Garden Road. The Appellant was turning right out of the slip road coming from St. John's Building and the vehicle with which his car collided had turned left with the traffic lights from Lower Albert Road. It was an intersection where, when the lights were green, two streams of traffic, one from the east and one from the west, each turned north into the downward track of Garden Road.

The versions of the two drivers were different, and the magistrate in reaching his verdict said :

> *Having considered all the evidence I was satisfied so that I was sure that the accident happened in the manner described by PW1 and I was satisfied beyond reasonable doubt therefore that the defendant had failed to exercise the degree of skill and prudence expected of a competent motorist.*

On appeal, it was submitted that skill and competence were not matters which were to be taken into consideration when assessing the degree of care and prudence taken by a driver in the course of his driving: *McCrone v Riding* [1938] 1 All ER 157.

Held :

Whilst the magistrate might have meant to refer to the care and prudence expected of a motorist, he did not say so. The Appellant was entitled to the use of the word '*skill*', and to argue that the test adopted by the magistrate was not the one which he should have adopted in all the circumstances. Since the magistrate might have considered matters which he ought not to have, the conviction would be quashed.

Result - Appeal allowed.

MA 373/99 SHAM Wai-man, Walker

Nguyen J

(7.7.99)

*Simon Tam

#Osmond Lam

Driving at excess speed/Effect of certificate under s 28 of Evidence Ordinance/Comments on margin of error of speedometer/No evidence from defence to rebut contents of certificate

超速駕駛 - 根據《證據條例》第 28 條發出的證明書的效用 - 就速度錶的誤差幅度作出評論 - 辯方沒有提出證據反駁證明書的內容

The Appellant was convicted after trial of the offence of driving a motor car on a road at a speed exceeding 50 kilometres per hour, which was the speed limit in force on that road, namely at the speed of 66 kilometres per hour.

The main ground of appeal was that a Lau Kwai-mang, who was called by the prosecution as the expert witness, did not establish himself as an expert, and in giving his evidence had relied upon hearsay evidence which the magistrate was wrong to have accepted.

Mr Lau was a director of a Hong Kong company which imported and serviced the particular model of laser gun used by the police. The company was owned by Mr Lau and his family, and the Appellant submitted that Mr Lau was not an impartial witness and was obviously biased in favour of the product in which he dealt.

The Appellant further contended that inasmuch as the witness himself had not conducted tests to check the reliability of the laser gun, he was relying on the manufacturer's specifications that the margin of error of the laser gun in question was only plus or minus two kilometres per hour.

The prosecution submitted that the offence was committed once a person drove in excess of 50 kilometres per hour and that it did not matter what exact speed he was doing, and that even though it was averred that the Appellant was driving at 66 kilometres per hour, it was not incumbent upon the prosecution to have to prove that precise speed.

The prosecution relied primarily on s 28 of the Evidence Ordinance which stated that a person who was authorised to sign a certificate, which was the certificate produced in evidence as Exhibit P 3, should be presumed under the section to have been a person authorised by the appropriate public officer to sign the certificate and that it was signed at the time and place specified. In addition, under s 28(2), it should be presumed that the facts stated in the document relating to the testing of the accuracy, inspection and servicing of the speedometer of the vehicle specified therein, or the radar or weighing device or any other apparatus specified therein, were true. And in s 28(2)(b), it was stated that the document - the certificate – should be *prima facie* evidence of all matters contained therein.

Exhibit P 3, the certificate, was signed by Mr Lau, and he purported to be a person authorised by the Commissioner of Police to certify as to the testing of the accuracy, inspection and servicing of the radar device or apparatus designed and used for the purpose of ascertaining the speed of a motor vehicle. It further stated that on 25 July 1998, at the given address, Mr Lau checked the unit LTI20-20 with the Serial No. 8816, and found the equipment to be functioning properly and that the test result was accurate within the manufacturer's specifications. It also stated that on 23 January 1999, at the same address, Mr Lau checked the same unit and again found the equipment to be functioning properly and the test result was accurate within the manufacturer's specifications. It also said that the said model, LTI20-20, was a device or apparatus designed and used for the purpose of ascertaining the speed of a motor vehicle.

Mr Lau, in accordance with the certificate that he signed, gave evidence and also produced two maintenance reports which were marked as P 1 and P 2, which showed that on the two days mentioned in the certificate, he had conducted six tests of the laser gun in question and found that the laser gun passed all the six tests on both occasions. The tests included a zero velocity test, as a result of which he found the unit to be functioning properly and the test result was '*accurate within the manufacturer's specifications*'.

The police officer who manned the laser gun on the day in question gave evidence that before he used the laser gun, he tested it in accordance with the instructions in the manual issued by the manufacturer. His test produced the figure '8888' which, according to the manual, showed that the laser gun was functioning normally.

Held :

(1) The phrase '*within the manufacturer's specifications*' must have included the specification that the margin of error was plus or minus two kilometres per hour. Therefore the expert's evidence was that after the test, he was satisfied that the margin of error was plus or minus two kilometres per hour;

(2) The gravamen of the offence was that the speed at which the car was driven exceeded 50 kilometres per hour. If the offence had not been committed, then it would have meant that the error margin must have been at least 19 kilometres because what the reading on that day showed was that the car had been going at 70 kilometres per hour, and if it had gone even at 51 kilometres per hour, the offence would have been committed;

(3) In *Penny v Nicholas* [1950] 2 All ER 89, it was held that even if there was no admissible evidence that the speedometer in that case had been tested and found to be working properly by other officers, the court was still entitled to act upon the evidence of the police officer who testified that the reading on the speedometer of the car showed a speed in excess of the permitted speed. If the difference was very great between the permitted speed and the speed shown on the speedometer, it would be a very considerable error if the speedometer was out so much. If evidence was given that a particular speed was recorded by a mechanical device, that recording was *prima facie* evidence on which the court could act. In the present case, for the offence not to have been committed, the margin of error would have had to have been at least 19 kilometres. In *Burton v Gilbert* [1984] RTR 162, it was said that '*in the absence of any evidence which indicated that the particular speed metre was not of sufficient quality or necessarily conflicted with the evidence afforded by the meter, the Justices erred in law in concluding that evidence of a reading shown by the meter was insufficient corroboration of the speed of the defendant's vehicle for them to be sure of the defendant's guilt*';

(4) Section 28 of the Evidence Ordinance stated that the contents of the certificate should be presumed to be true until the contrary was proved. The Appellant gave and called no evidence. In the absence of evidence by him that he was not travelling at the speed alleged, and in the absence of evidence that the laser gun in question was not functioning properly, the magistrate was entitled to rely upon the certificate and the contents therein to convict the Appellant of the offence. The expert was called not to try to prove the offence but to explain to the court how the laser gun worked.

Result - Appeal dismissed.

MA 278/99 POON Chi-hung, William

Li DJ

(21.10.99)

*C Ko

#I/P

Speeding/Driver targeted by laser gun/Need to establish reliability of laser gun/Vendor of laser gun not to give expert evidence

超速駕駛 - 司機被雷射槍偵察車速 - 有需要確定雷射槍的可靠性 - 雷射槍售賣人不應以專家身分作證

The Appellant was issued with a ticket for speeding. He had been targeted by a laser gun. The laser gun used was a '*Laser Speed Detection System Model LTI 20-20*', manufactured by Laser Technology Inc. of Colorado in the United States. The evidence at trial consisted of PW2, the police officer who operated the laser gun, and of PW3, a representative of the vendor of the laser gun.

On appeal, it was submitted, *inter alia*, that the reliability of the speed detection service was questionable, and the algorithm adopted for the laser gun was liable to give wrong readings. It was also said that the Appellant had not been allowed to challenge the status of PW3 as an expert witness and that the court erred in treating PW3 as an expert.

Held :

(1) On the issue of the reliability of the laser gun, the question was whether the standards and specifications were reliable. In these types of case, the courts generally adopted a '*black-box*' approach, namely, that irrespective of what was inside the box, if it was capable of consistently producing the same reliable results it was accepted as good for the purposes of the law. In order to determine whether the black box was capable of producing consistent and reliable results, the courts usually looked for some objective reference standard. Although PW3 was questioned about what recognised standards the laser gun conformed to, there was apparently no internationally recognised standard for verifying the performance of laser guns;

(2) Before Hong Kong courts accepted any standard that had been adopted by a foreign court, the rationale and the tests used by such foreign court should be scrutinised. It was not safe to take for granted the decision of a foreign court;

(3) Unless the laser gun had been tested with satisfactory results in accordance with some internationally recognised standard for verifying the performance of laser guns, there should be proof of its reliability in terms of consistency and accuracy by way of a battery of tests set by an acceptable independent expert. A suitable expert from one of the engineering or science faculties in Hong Kong should be able to design an experimental procedure for checking the operation and results of the laser gun used in field conditions. Alternatively, if an experimental procedure was proposed by the manufacturer, the procedure ought to be verified by an expert. Then the experiments were performed periodically by a person or persons authorised to issue a certificate under section 28(1) of the Evidence Ordinance, Cap 8, for proof. Both the expert and the person who issued a s 28(1) certification should be made available for cross-examination, if required. As it was, there were only tests according to the manufacturer's specifications. Justice must be seen to be done. The magistrate could not be satisfied beyond reasonable doubt that the laser gun accurately detected the speed of the Appellant's vehicle;

(4) As PW3 was the vendor of the laser gun, it was contrary to the accepted sense of justice to allow him to give expert evidence on a product he sold. Justice had to be seen to be done.

Result - Appeal allowed. Retrial ordered.