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CRIMINAL APPEALS BULLETIN
刑事上訴案判例簡訊

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This Bulletin summarises recent judgments which the editors consider of significance.
本簡訊輯錄近期上訴案件中各編輯認為重要判詞的摘要。

(* Denotes Government Counsel
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Appeal No. (Date of Judgment)	Case Title	Significance

A. HONG KONG COURT OF FINAL APPEAL
香港終審法院

FACC 5 & 6/2004 Bokhary Chan & Ribeiro PJJ Litton & Sir Anthony Mason NPJJ (18.10.2004) *Arthur Luk SC, Alain Sham & Anthea Pang #Gerard McCoy SC & RJJ Pierce (1) Lawrence Lok SC & E Choy (2)-(7)	(1) SZE Kwan-lung (2) PANG Hon-kwan (3) FU Mo (4) LAM Hing-luen (5) YEUNG Yee-ping (6) YEUNG Yee-yim (7) CHAU Hung-chuen	**Homicide and arson/Misdirection on defence evidence fatal to convictions/Doctrine of joint enterprise distinct from common law principles of accessorial liability** **殺人及縱火罪 – 就辯方證據作出的錯誤指引對定罪是致命的 – 共同犯罪的原則有別於普通法原則的從犯法律責任**

At trial A1 was convicted of two offences of murder and one of arson. A2 to A7 were convicted of two offences of manslaughter and one of arson. In the Court of Appeal, the convictions of A1 for murder were quashed and manslaughter convictions substituted. The appeals of A2 to A7 were dismissed.

The Appellants were members of a group of 23 protesters who went, with others, to the Immigration Service's headquarters at Immigration Tower to press their right of abode in Hong Kong on 2 August 2000. Some of the protesters had lighters and bottles containing liquid. As the Immigration Service personnel evicted the protesters, a fireball erupted in Room 1301, where they all were. A protester, Lam Siu-sing (*'Lam'*) was engulfed in flames, and died, as did Leung Kam-kwong, an immigration officer. The irresistible inference upon the whole of the evidence was that the fire broke out because thinners splashed by one or more of the 23 protesters were ignited by one or more of them with a lighter or lighters.

The prosecution case at trial against A1 to A7 was that the three offences charged had been committed by them acting in the course of a joint enterprise to stage a violent protest by starting a fire with intent to kill or at least cause really serious injury. Lam and A2 to A7 were each holding a bottle. A2 and A3 each said he was aware that his bottle contained thinners. A4, A5 and A6 each said his bottle contained water. A1 and A7 did not testify, but chose to rely on the evidence of A2 to A6, which was to the effect that none of the protesters meant to harm anyone. The most that any of them admitted was that the protesters wished to make the Immigration Service believe that they were prepared to set themselves on fire if any attempt was made to evict them from Room 1301. The prosecution case in regard to the death of Lam was based on the principle of *'transferred malice'*.

Dealing with the position when an accused gave evidence, Gall J said:

> *What he is doing is providing you with information which, when you look at it and then look at the prosecution evidence, without comparing them but looking at* ***what you are sure is true****, might assist you in finding doubts in the prosecution's case.*

On appeal

Held :

(1) It was crucial that when the jury were directed on how to approach defence evidence, they received a clear and accurate direction. The direction given by the judge was a positive misdirection: *HKSAR v Wong Wai-man (No 2)* [2003] 4 HKC 517. The message had to be conveyed to the jury that '*even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue'*: *Liberato v R* (1985) 159 CLR 507;

(2) Having regard to the way in which the prosecution presented its case, the evidence given by A2 to A6 was of material assistance to A1 and A7 as well as themselves. On each count, there was defence evidence on which each Appellant could place reliance and in respect of which each of them was entitled to have the jury receive an accurate direction on the proper approach to defence evidence. Contrary to accepted norms, no such direction was given. To avoid substantial and grave injustice, all the convictions must be quashed;

(3) Although this was not the occasion for giving a definitive decision on the entirety of the doctrine of joint enterprise, the doctrine was distinct from the common law principles of aiding, abetting, counselling or procuring. Each participant was criminally liable for all the acts done in pursuance of the joint enterprise. And whether or not he intended it, he would be criminally liable for any such act if it was of a type which he foresaw as a possible incident of the execution of the joint enterprise and he participated in the joint enterprise with such foresight: *Chan Wing-siu v R* [1985] AC 168;

(4) Usually all the participants were present when the crime was committed. But presence was not invariably essential: *Osland v R* (1998) 197 CLR 316. It was not necessary for a party to be present at the scene of a crime to be acting in pursuance of a common purpose with others who were present: *Johns v R* (1980)

143 CLR 108. Just because A1 had been evicted from Room 1301 immediately before the fire broke out, it did not mean that he could not be guilty of manslaughter or arson in this case.

Result - Appeals allowed on all counts. Retrials ordered.

B. HONG KONG COURT OF FINAL APPEAL/ APPEAL COMMITTEE 香港終審法院/上訴委員會

FAMC 33/2004 YU Wing-hung

Bokhary Chan & Ribeiro PJJ

(24.9.2004)

*Cheung Wai-sun & Tsang Oi-kei

#Paul Tong

Reasonable doubt/Standard of proof/Direction to jury/No particular formula required/Effect of summing-up
合理疑點 – 舉證準則 – 向陪審團作出指引 – 無須作出特定的公式化指引 – 總結詞的效果

The Applicant was convicted after trial of an offence of trafficking in ice.

The Applicant's application for leave to appeal against conviction was dismissed by the Court of Appeal. In seeking leave to appeal to the Court of Final Appeal, he criticised the trial judge's summing-up in relation to the standard of proof, particularly on the meaning of '*reasonable doubt*'.

At trial, when asked by the jury, the judge gave a direction on '*reasonable doubt*' in terms approved by the English Court of Appeal, namely, '*A reasonable doubt is the sort of doubt that might affect the mind of a person dealing with matters of importance in his own affairs*'.

The Applicant submitted that this direction, which had been adopted in Hong Kong, was unintelligible and that the Chinese translation used by the judge did not carry the mental element of '*affect the mind*'. It was also said that the law on reasonable doubt was not readily intelligible and that attempts to explain the term in English cases often added to confusion. These were said to be points of law of great and general importance which should be re-visited by the Court of Final Appeal, and, alternatively, as a result of the judge's summing-up on this crucial issue, the Applicant had suffered substantial and grave injustice.

Held :

(1) The principle that the prosecution had a duty to prove the guilt of a defendant beyond reasonable doubt was a cornerstone of our criminal justice. This had for years been taken to mean that the prosecution must make the jury feel sure that the defendant was guilty of the charge. This principle had to be followed in every criminal case, although individual judges might choose different wording;

(2) As Lord Goddard CJ said in *R v Kritz* [1950] 1 KB 82, (and cited with approval by the Privy Council in *Walters v R* [1969] 2 AC 26):

> *It is not the particular formula that matters: it is the effect of the summing-up. If the jury are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the judge uses one form of language or another is neither here nor there.*

(3) This fundamental principle did not need to be re-visited. Nor was it reasonably arguable that what the judge had said in his summing-up had departed from this principle. He had repeatedly told the jury that they must be sure of the Applicant's guilt before they could convict him. The jury could not have been confused.

Result - Application dismissed.

C. APPLICATIONS FOR REVIEW OF SENTENCE 申請刑罰覆核

AR 2/2003

Stock & Yeung JJA
Pang J

(28.9.2004)

*K Zervos SC & David Leung

#Edwin Choy (1) Andrew Raffell (2) – (3) Duncan Percy (4) – (5) James Cheng (6) Lily Yew (7)

SJ
v
(1) LEE Cho-keung
(2) YU Yiu-wing
(3) CHAN Wai-hung
(4) LAI Yun-hung
(5) CHOY Man-fai
(6) CHAU Siu-kei
(7) CHAN Hok-man

Vice establishment/Sentencing levels for keepers and staff/ Large-scale operation/Young illegal immigrants employed as prostitutes/Deterrence required/Suspended sentences wrong in principle

賣淫場所 – 對管理人及職員的量刑等級 – 經營規模龐大 – 僱用年輕非法入境者為娼妓 – 有需要起阻嚇作用 – 判處緩刑在原則上錯誤

The Respondents pleaded guilty to one offence of conspiring to manage premises as a vice establishment, and another of conspiring to live on the earnings of prostitution. The judge adopted a starting point of 12 months' imprisonment for R1 on each charge, and for the remainder she took a starting point of 9 months' imprisonment. She sentenced R1 to 8 months' imprisonment, suspended for 18 months, and R2 to R7 to 6 months' imprisonment, suspended for a period of 12 or 18 months.

The Applicant submitted that the sentences in so far as they were suspended were wrong in principle, and were in any event manifestly inadequate.

The facts showed that the Respondents were involved in the management of a vice establishment called '*Yat Yuet Sing Massage*', which was located in Kowloon. The massage parlour consisted of three locations all situated on the floor. There were 22 rooms altogether in the three locations which were principally used as a vice establishment. Each of these rooms was furnished with one bed, one television and one bathroom. There were four rooms in another location on the same floor which was used as a dormitory for the prostitutes. Surveillance cameras were installed at the entrances and staircases to the locations and they were connected to monitors and televisions at a central location.

An undercover police officer worked in the premises for three weeks in 2002. He observed that: R1 was the supervisor of the massage parlour; R2 was the keeper of one of the locations of the massage parlour during the day shift; R3 was the cashier of one of the locations of the massage parlour during the night shift; R4 was one of the keepers of one of the locations of the massage parlour during the day shift; R5 was the cashier of one of the locations of the massage parlour during the day shift; R6 was one of the keepers of one of the locations of the massage parlour during the day shift; R7 was the cashier or keeper of one of the locations of the massage parlour during the day shift.

The undercover police officer observed that each customer was charged $420 for sexual services provided and that a total of 1,320 customers were served during the 3-week period he was there. The level of sophistication of the operations of the massage parlour was reflected by the organizational structure and defined roles of the various people involved, the attention to customers and the handling of any complaints in relation to the sexual services provided, the system in place in the event of any police raid, the provision of legal services for the staff in the event of arrest and the extensive promotional and advertising campaign of the massage parlour and the services provided. Prostitutes who came to Hong Kong from China on a two-way permit would perform sexual services for a certain number of customers before they were paid by the management of the massage parlour. The number of customers for whom they were required to perform sexual services before they got paid depended upon the length of their stay under the permit; the longer the stay, the greater number of customers before they got paid. After this, the prostitute would get $100 for each customer served.

In sentencing, the judge acknowledged that this was a large-scale operation '*intended*', she said, '*to be reasonably sophisticated*'. The prostitutes who were employed there were brought from the Mainland and they knew they were illegally in Hong Kong. The judge said that '*these were willing women aged between 16 and 25*'. The judge also noted that cases within the categories of these offences, managing vice establishments and living on the earnings of prostitution, carried no tariff; that everything depended on the facts of the case; and cited *R v Kwan Wah-sang* MA 1324/1988, in which it was said that the range for this type of offence was very wide, and where custodial sentences were concerned they ran between 3 to 18 months, with 3 to 6 months being the most common. She noted as well that in 1998 the legislature had increased the maximum penalty for the offence of managing a vice establishment from 7 years to 10 years' imprisonment.

The judge said it was relevant that the bail of the Respondents had been suspended in May 2002 after their arrest so that they had been in custody before sentence for 7½ weeks. She then said what influenced her to suspend the sentences was the fact that these Respondents had either obtained employment by the time their bail was suspended or had a good prospect of employment. She said that '*in these hard economic times the fact that they have shown willingness to go out and find any kind of job, worked hard and not be dependent on the Social Welfare Services of Hong Kong is a big plus in their favour'* .

Held :

(1) The starting point adopted in respect of each Respondent was far too low, falling outside the range which a judge properly applying his or her mind to the particular facts would reasonably reach;

(2) The judge was right to say that the cases did not set a tariff. As Cross and Cheung correctly remarked in *Sentencing in Hong Kong*, 4th ed., at p 571, there was no customary sentence for this type of offence and

> … *everything depends on the particular facts of the case: whether the accused is the keeper, the manager or the assistant; the scale of the operation; the age of the prostitutes. Managers or keepers regularly receive terms of imprisonment; those who assist, less regularly. The maximum penalties for keeping a vice establishment under section 139 of the Crimes Ordinance, Cap 200, were increased from 2 years to 3 years on summary conviction and from 7 years to 10 years on conviction on indictment on 22 May 1998 (the maximum fine of $20,000 was repealed). Cases decided before that day should be considered in the light of those increases.*

(3) Having acknowledged that '*everything must depend on the facts of each case*', the judge then seemed entirely to ignore that principle in that the sentence passed self-evidently paid no regard, in its effect, to the facts of this case. The judge acknowledged that this was a sophisticated operation, but gave no effect to that fact in the sentences passed. She noted that the maximum sentence for these offences had been increased by the legislature in 1998 but relied on ranges suggested by cases decided before that date and gave no effect to the legislature's intention;

(4) This was no ordinary or simple vice establishment. This was a large operation involving a significant number of prostitutes and a stream of customers; the use of several premises; four different floors, 22 rooms; and it was also a sophisticated operation involving the generation of substantial sums of money within a matter of weeks; an operation that ran promotional campaigns requiring the visits of photographers to take nude photographs of the women for the purpose of advertisement; and those who were actively involved in its functioning must self-evidently have been aware of the scale of the operation in which they were involved;

(5) The judge could not have paid attention to the message that

sentences of this kind would impart to those who contemplated running prostitution businesses of this size, or being involved in them in an employee capacity: the resulting message could only be, if such sentences were to stand, that it was well worth the candle commencing a lucrative business of prostitution by engaging persons to operate and manage such places with the promise of lawyers and compensation to those minded to keep their mouths shut; for the prospective employees could simply be told that all that was likely to happen, especially if they obtained a job before the day of sentence, was a suspended sentence of imprisonment, with, in addition, an amount of compensation not to be sneezed at, and all legal expenses covered. If these were the sentences for large-scale operations, how much less would the sentences be for the standard or smaller business of this kind?

(6) Some of the women were aged as young as 16 years, and for the judge to say they were willing was correct as far as it went but it ignored the exploitation and dangers to which a system such as this subjected them;

(7) Each of the Respondents exercised an active role in controlling the daily activities of the women and in running the establishment. The operation continued after a closure order on one of the premises, and R1 tore down a closure order and carried on regardless. That was an aggravating feature;

(8) It was impossible to see what economic considerations had to do in such circumstances as a mitigating feature, as against the requirement for deterrence that involvement in prostitution on this scale required. If sentences of this kind were imposed for an operation on this scale, even on those employed as keepers not as supervisors, it was difficult to understand what possible deterrence there could be in carrying on operations on this or on a lesser scale. The sophistication of the operation went so far as to detailed arrangements for lawyers and for substantial compensation in case of arrests. These women were all illegal immigrants or two-way permit holders who ought not to have been working;

(9) The fact that the Respondents, or some of them, had for a week or two obtained employment of some kind before trial was hardly a matter which warranted the suspension of sentences: it certainly did not constitute anything exceptional. In suspending the sentences, the judge took into account that the men had already been in prison for seven or so weeks but with no recognition of the fact that those weeks were counted as part of time served pursuant to any sentence imposed. There was no good reason whatsoever for suspending the sentences and to do so was fundamentally wrong in principle;

(10) In so far as the sentences were suspended the judge erred in principle, and the terms themselves were manifestly inadequate.

Result - SJ's review allowed.
R1: concurrent sentences of 24 months' imprisonment substituted;
R2-R7: concurrent sentences of 13 months' imprisonment substituted.

D. CRIMINAL APPEALS/ AGAINST CONVICTION 刑事上訴案件/針對定罪

CA 234/2004 CHAU Hon-kwong

Yeung & Yuen JJA Tong J

(13.10.2004)

*Kevin Zervos SC

#Wong Man-kit SC & Joe Luk

Jury Ordinance/Taking of verdict/Jury not asked if verdicts unanimous and if not by what majority they were reached/ Material irregularity

《陪審團條例》– 記錄裁決 – 沒有詢問陪審團在裁決上是否一致，以及如非一致，贊成裁決多數的比例 – 重大的不當之處

The Applicant stood trial in the High Court on an indictment containing three counts of trafficking in dangerous drugs, namely, ice and heroin. He was acquitted of these charges, but convicted of three alternative charges of possession of the dangerous drugs specified in the charges.

The only ground of appeal arose out of the way in which the verdicts were taken by the jury. The transcript read as follows:

Court:	*Thank you.*
Clerk:	*Madam Foreman, please stand up. On the 1st count of trafficking in dangerous drugs against Chau Hon-kwong, have you reached a verdict? Please answer yes or no.*
Madam Foreman:	*Yes.*
Clerk:	*Is the verdict unanimous? Please answer yes or no.*
Madam Foreman:	*No.*
Clerk:	*By what majority have you arrived at such a verdict?*
Madam Foreman:	*Six to one.*
Clerk:	*What is your verdict? Do you find the accused guilty or not guilty of trafficking in dangerous drugs?*
Madam Foreman:	*Not guilty.*
Clerk:	*Having found the accused not guilty of trafficking in dangerous drugs, do you find him guilty or not guilty of possession of dangerous drugs?*
Madam Foreman:	*Guilty.*
Clerk:	*On the 2nd count of trafficking in dangerous drugs against Chau Hon-kwong, have you reached a*

verdict? Please answer yes or no.

Madam Foreman: *Yes*

Clerk: *Is the verdict unanimous? Please answer yes or no.*

Madam Foreman: *No.*

Clerk: *By what majority have you arrived at such a verdict?*

Madam Foreman: *Five to two.*

Clerk: *What is your verdict? Do you find the accused guilty or not guilty of trafficking in dangerous drugs?*

Madam Foreman: *Not guilty.*

Clerk: *Having found the accused not guilty of trafficking in dangerous drugs, do you find him guilty or not guilty of possession of dangerous drugs?*

Madam Foreman: *Guilty.*

Clerk: *On the 3rd count of trafficking in dangerous drugs against Chau Hon-kwong, have you reached a verdict? Please answer yes or no.*

Madam Foreman: *Yes.*

Clerk: *Is the verdict unanimous? Please answer yes or no.*

Madam Foreman: *No.*

Clerk: *By what majority have you arrived at such a verdict?*

Madam Foreman: *Six to one.*

Clerk: *What is your verdict? Do you find the accused guilty or not guilty of trafficking in dangerous drugs?*

Madam Foreman: *Not guilty.*

Clerk: *Having found the accused not guilty of trafficking in dangerous drugs, do you find him guilty or not guilty of possession of dangerous drugs?*

Madam Foreman: *Guilty.*

As the clerk did not ask the jury whether the guilty verdicts of possession of dangerous drugs were unanimous and if not by what majority were the verdicts arrived at, the Applicant submitted that such a failure constituted an irregularity and that the verdicts returned by the jury were not valid or indeed lawful verdicts authorized by law.

Section 26 of the Jury Ordinance, Cap 3, provided:

> *The verdict of the jury shall in all cases be given by the foreman in open court and in the presence of all the jury, and, if in a criminal proceeding, in the presence of the person accused, and shall thereupon be recorded by the Registrar or clerk of court who shall, before taking the verdict, ask if they are all or by what majority agreed upon, and …whether they find such person accused guilty or not guilty…*

Held :

(1) In *R v Bateson* (1969) 54 Cr App R 11, 15, Salmon LJ said that '*the court had no power under the Act to accept a majority verdict of Guilty unless the foreman stated in open court the number of jurors who respectively agreed to and dissented from the verdict'* . The headnote to *R v Barry* (1975) 62 Cr App R 172 stated:

> *Section 13 of the Criminal Justice Act 1967 which has been re-enacted in section 17 of the Juries Act 1974, provides: '(2) A Court shall not accept a majority verdict of guilty unless the foreman of the jury has stated in open Court the number of jurors who respectively agreed to and dissented from the verdict. (3) A Court shall not accept a majority verdict unless it appears to the Court that the jury have had not less than two hours for deliberation or such longer period as the Court thinks reasonable having regard to the nature and complexity of the case.'*
>
> *The requirement regarding majority verdicts imposed by section 17(2), as well as that imposed by section 17(3), is mandatory and failure to comply with it vitiates the majority verdict. Where, therefore, the judge, having decided to accept a majority verdict, omitted to ask the jury how many of them were agreed on their verdict. Held, that the conviction must be quashed.*

(2) The House of Lords examined the issue in *R v Pigg* (1983) 76 Cr App R 79. In deciding the point of law, '*whether it is necessary in order to comply with the terms of section 17(3) of the Juries Act 1974 for the foreman of the jury, having stated in open court the number agreeing to the verdict, to go on to state the number of those dissenting*', Lord Brandon of Oakbrook said:

> *In short, compliance with the requirement of section 17(3) of the 1974 Act is mandatory before a judge can accept a majority verdict of guilty; but the precise*

form of words used by the clerk of the court when asking questions of the foreman of the jury, and the precise form of words used by the latter in answer to such questions, as long as they make it clear to an ordinary person how the jury was divided, do not constitute any essential part of that requirement.

(3) Section 26 of the Jury Ordinance might not be couched in exactly the same words as its counterparts in the Criminal Justice Act 1967 or the Juries Act 1974; however, the words used were clear and they prescribed that '*the verdict of the jury shall…be recorded by the…clerk of court who shall, before taking the verdict, ask if they are all or by what majority agreed thereon…*';

(4) In his summing-up to the jury, the judge reminded them that the court would only accept a verdict of 6 to 1 or 5 to 2 and that there must be at least five of them who were agreed. However, it was not open to the court to second guess what was in the minds of the jury or that of the foreman. It was not certain whether the foreman was returning a unanimous verdict or a majority, and if a majority verdict, how many jurors convicted and how many acquitted;

(5) As the case involved the liberty of an individual, any ambiguity must be resolved in favour of the Applicant. However, the admitted facts indicated that the Applicant had admitted possession of all the drugs set out in the particulars of the first count, and the proviso would be applied.

Result - Appeal dismissed on count 1, on the application of the proviso. Appeal allowed on counts 2 and 3, and convictions quashed.

Obiter - It was important for all parties concerned to pay the closest attention to all procedural matters, including the taking of the verdicts from the foreman, to avoid similar errors in future.

E. CRIMINAL APPEALS/ AGAINST SENTENCE 刑事上訴案件/針對刑罰

CA 93/2004 LAM Chung-san

Stuart-Moore VP
Pang J

(14.9.2004)

*Vincent Wong

#C Remedios

Mental Health Ordinance/Hospital order with minimum term not appropriate/Release date unclear/Need for certainty
《精神健康條例》– 入院令訂明須入院的最短期限屬不恰當 – 釋放日期不清晰 – 羈留期必須明確

The Applicant pleaded guilty to an offence of attempted robbery.

At the time of offence, the Applicant was a mental patient receiving out-patient treatment. The judge sent for two psychiatric reports, pursuant to the Mental Health Ordinance, Cap 136 ('*the Ordinance*'). Both psychiatrists diagnosed the Applicant to be suffering from chronic schizophrenia which required in-patient treatment in a mental institution for '*not less than one year*'. The judge followed the recommendations and imposed a hospital order, pursuant to s 45 of the Ordinance, in the following terms:

> *I order that he be admitted to and detained in Siu Lam Psychiatric Centre for a **minimum** of 12 months.*

On appeal, it was submitted that the judge erred in failing to specify a period for the hospital order. It was also said that in light of the subsequent reports made by the two psychiatrists, in which they said that the Applicant need not be detained in Siu Lam for more than, respectively, 1 year and 6 to 9 months, the original hospital order should be set aside and substituted by one with a specific term.

Held :

(1) A convicted person who was the subject of a hospital order made under the Ordinance was treated as a patient who was suffering mental illness and required treatment in a secure setting either as protection for the patient himself or for the protection of the general public;

(2) A hospital order could be of indeterminate duration or it could be for a fixed term. For the former, the patient would be discharged if the superintendent of the mental institution was of the view that the patient was sufficiently cured or that his mental illness was in remission;

(3) For a patient detained under a hospital order with a specified term, the patient could either be discharged at the end of the term

pursuant to s 50 of the Ordinance, or if the superintendent considered him to be not sufficiently well for the discharge, the patient could be certified under the provisions of s 36 for continued treatment in the institution. The patient would then be subject to discharge pursuant to the provisions of s 42A if his condition improved. The relevant part of the section stated:

> *(1) … a patient who is for the time being liable to be detained shall cease to be so liable if there is made in accordance with this section an order in writing discharging him from detention ….*

(4) The present order created difficulties because of the apparent uncertainty on the face of it. While the minimum term was specified as 12 months, the exact period of detention remained unclear. Was the Applicant to be released when the 12-month period expired or was he to be released at a date thereafter? The order made by the judge was inconsistent with s 50 of the Ordinance which read:

> *No person shall be detained -*
>
> *(a) in pursuance of a hospital order, being an order authorizing his detention for a specified period, after the expiration of that period …*
>
> *unless he is detained under Part III [s 36] otherwise than as applied by this Part.*

(5) The problem confronting the psychiatric institutions was that upon the expiration of the 12-month period, it was not clear whether the institution would have power pursuant to the court order to further detain the patient if his mental condition was not such that he could be discharged;

(6) Further, if the superintendent of the psychiatric institution considered the patient was not sufficiently fit for discharge, then it would be for him to certify the patient for further detention for treatment under s 36 of the Ordinance. But s 36(4) provided that such procedures should not be commenced more than 30 days before the date when the patient would, in the absence of such procedures, be discharged from detention. The obvious question was when did the 30-day period start to run? It made no sense if it was to run 30 days before the end of the minimum term because the institution was not bound to release the patient at the end of the minimum term specified by the court. The release date of the Applicant under the order imposed was uncertain so that time under s 36(4) could not start to run;

(7) A hospital order specifying a minimum term was not an appropriate one to make: *R v Tsui Chung-leung* [1979] HKC 419 distinguished. Given the uncertain nature of the order, and the

condition of the Applicant, the original order would be substituted with an order that the Applicant be admitted to and detained in Siu Lam for 12 months pursuant to the Ordinance. The effect of this would be that if, at the end of the 12-month period, the Applicant's mental illness was in remission, he would be discharged by Siu Lam pursuant to s 50. Otherwise, he could be detained for further treatment pursuant to s 36 of the Ordinance.

Result - Appeal allowed. Hospital order of fixed duration substituted.

CA 107/2004 NGO Van Huy

Ma CJHC
Stock &
Cheung JJA

(28.9.2004)

*Kevin Zervos SC
& Norton Pang

#Kevin Chan

Theft/Pickpocketing by recidivist/Prevalence of offence/ Enhancement of sentence/Sentencing considerations
盜竊罪 – 積犯犯扒竊罪 – 罪行的普遍程度 – 加重刑罰 – 判刑時須考慮的事宜

The Appellant pleaded guilty to a charge of theft.

The facts showed that the Appellant took a mobile phone, worth $3,680, from the jacket pocket of the victim as she crossed the road.

The Appellant had 35 previous convictions, of which 17 were for theft or attempted theft. The sentences for the theft related offences ranged from 3 to 18 months' imprisonment. Although aged only 34, he was an habitual criminal.

The judge took a starting point of 27 months as being appropriate for a professional pickpocket with '*some*' previous convictions. That was reduced to 18 months on account of the guilty plea. He then added 6 months to the 18 months because of the Appellant's poor record of previous convictions. The judge then added another 6 months by reason of the prevalence of the crime of theft by pickpocketing, which represented a 25% increase which he said he was able to impose by using either his common law powers or the jurisdiction under s 27 of the Organized and Serious Crimes Ordinance, Cap. 455, ('*OSCO*').

By his sentence of 30 months' imprisonment, the judge said he intended to send a clear message to pickpockets. He said that:

> *… my concern is that this District Court sends a firm message to the pickpockets plying their trade in Hong Kong that if you come here, you face 30 months on a plea, and these shades of distinctions between one or two men, how many convictions and the like, do not really matter. It will be one consistent message that we*

send, and it should be a hard one.

The statistics showed an increase in this type of theft over the past 3 years. In 2001, the total number of reported cases was 717. In 2002, this had increased by 19.8% to 859. In 2003, the figure had become 1,681, an increase of 95.7% from the previous year. The figure for January 2004 was 255 reported cases, which was suggestive of another further increase in trend for this crime.

Held :

(1) Theft by pickpocketing could be regarded as the type of offence that society severely and rightly condemned. Although in many cases the value of the items might not amount to much, the significant degree of inconvenience, the relative ease with which it could be effected by a direct invasion of or about the person and privacy of those minding their business in public places, and the adverse reputation that this type of crime collectively brought upon a city, made this type of offence a particularly serious one. It was one which attracted a heavy penalty;

(2) The guideline sentence of 12-15 months after trial was therefore appropriate for a first time offender, and not suspended;

(3) Account must be taken of any aggravating, or particular mitigating, features before the court;

(4) Aggravating factors included:

(a) The presence or use of a weapon;

(b) Where the offence was committed in a place in which the public was at particular risk, such as crowded places like the MTR or the racecourse, crowded shopping areas where the pedestrian traffic was heavy;

(c) If the accused committed the offence in conjunction with another, the sentence should be higher. Where he was part of an organized and professional ring of thieves a substantial increase in sentence might be called for. For example, where professional pickpockets from overseas came to Hong Kong to carry out this activity, an increase of sentence could be imposed;

(d) Where the accused was a repeat offender or, worse still, a persistent one.

(5) Sentencing policy now recognized that where there were repeat offences of the same kind, a person's previous record was likely to be an aggravating feature where this demonstrated in particular either the need to impose a deterrent sentence on the accused as the previous ones had not had this effect, or the need to

protect society from criminals like him: *HKSAR v Chan Pui-chi* [1998] 2 HKLRD 830. Where a poor previous record for similar offences existed, a court would be justified in imposing a substantially higher sentence;

(6) Where, as in this case, an application was made under s 27 of OSCO by reason of the increased prevalence of the crime of theft by pickpocketing, it would, where the prevalence was proved, be appropriate for the court to enhance sentence. As a matter of public policy, a meaningful and deterrent sentence should be imposed. Where it had become increasingly prevalent, an enhancement of the sentence was therefore entirely appropriate. The figures showed an alarming increase, and an enhancement of sentence by one-third would be appropriate;

(7) The correct sentence for the Appellant was 24 months' imprisonment. The starting point was 15 months, and from that there must be a substantial increase of 9 months on account of the appalling previous record for theft. There was the aggravating feature that the offence was committed in a crowded area, which attracted another 3 months. That produced 27 months, which became 18 months after the one-third discount for the guilty plea. At the final stage of the assessment, an enhancement was to be made: *HKSAR v Tam Wai-pio* [1998] 4 HKC 291. The enhancement would be one-third, bringing the overall sentence to 24 months.

Result - Appeal allowed. Sentence reduced to 24 months.

CA 44/2004

LAM Wai-ming

Cheung & Yeung JJA
Lugar-Mawson J

(13.10.2004)

*G Goodman

#Edwin Choy

Crimes Ordinance/Possession of counterfeit banknotes/ Prevalence of offence/Enhancement of sentence by 50%/ Need for deterrence

《刑事罪行條例》– 管有偽製銀行紙幣 – 罪行的普遍程度 – 加刑百分之五十 – 需具阻嚇作用

The Applicant was convicted after trial of an offence of being in custody or control of counterfeit notes or coins with intent, contrary to s 100(1) of the Crimes Ordinance, Cap 200.

The prosecution alleged that during a police raid on 17 July 2003, a black plastic bag containing $53,000 of counterfeit HK$100 banknotes was found under the Applicant's bed in his room in Temple Street, Mongkok, where he worked. After caution, the Applicant took another counterfeit HK$100 banknote from a drawer and told the police that a man called '*Ying Kit*' had brought them to him at the premises, and that the price for each

counterfeit banknote was $25, but he had not yet paid for them.

The judge adopted a starting point for sentence of 3 years' imprisonment. He said that because of the prevalence of this type of offence, he would enhance the sentence by a further 50% under the Organized and Serious Crimes Ordinance, Cap 455, ('*OSCO*'). The Applicant was sentenced to 4½ years' imprisonment.

Prior to sentence, the prosecution served the Applicant with a notice of intention to furnish information pursuant to s 27 of OSCO, and provided the court and the defence with three witness statements given by a Chief Inspector of Police. The officer produced statistics showing the number of counterfeit HK$100 banknotes which had surfaced in Hong Kong and been seized by the police. He also provided statistics of persons prosecuted for offences connected with counterfeit HK$100 banknotes.

On appeal, it was submitted that the statistics provided to the judge were insufficient to support the proposition that the offences were prevalent.

Held :

(1) The principles governing a judge's use of his powers to enhance sentences under OSCO were set out in *HKSAR v Wong Fung-ming and Another* Cr App 515/2001. There was no doubt that it was both an extraordinary power and a draconian one, and it was a power that should only be used where there was cogent evidence both that the offence in question remained prevalent at the date of the accused's sentencing and that there was demonstrable need by its exercise to deter others from committing that offence;

(2) The statistics provided to the judge showed that in 2003 a total of 15,719 counterfeit Hong Kong banknotes in denominations ranging from $20 to $1,000 were seized in Hong Kong, 11,650 of that total were counterfeit $100 banknotes. In 2002, the figures showed that a total of 19,396 counterfeit Hong Kong banknotes in denominations ranging from $20 to $1,000 were seized, of which 14,125 were counterfeit $100 banknotes. The statistics also showed that in 2003, 15 persons were prosecuted for offences relating to counterfeit $100 banknotes, whereas only 7 persons were prosecuted in 2002. The 1999 figure was 3 persons and it was only in the year 2000 that the number of persons prosecuted, 14, approached the 2003 figure. The Chief Inspector's statistics also showed that in 2003 there was a rising trend in the number of counterfeit $100 banknotes produced on color-ink-jet printers. The counterfeit banknotes involved in this case were produced by this method. In January 2003, 462 counterfeit banknotes so

produced were seized; by December the monthly seizure figure had risen to 1,695 counterfeit banknotes;

(3) It was true, when the 2002 and 2003 figures were compared together, that in 2003 there was a drop in total numbers of counterfeit banknotes seized. However, when those figures were compared with the 1999 figures of a total number of counterfeit banknotes of 6,519 and counterfeit $100 banknotes of 2,032, as well as with the figures for the number of persons prosecuted for offences relating to counterfeit $100 banknotes, and the figures showing a rising trend in the number of counterfeit $100 banknotes produced on color-ink-jet printers, the judge's conclusion at the time of the Applicant's sentencing that offences relating to counterfeit banknotes were prevalent in Hong Kong was an inescapable one. Clearly there remained a need to invoke the provisions of the OSCO and deter others from committing such offences;

(4) As regards the need for the enhancement to be as high as 50% of the starting point sentence, in *HKSAR v Yip Kwok-fai* Cr App 306/2002, a case involving possession of counterfeit coins with intent, the court opined that for future offences against section 100(1) of the Crimes Ordinance, a 50% enhancement would be justified.

Result - Application dismissed.

F. MAGISTRACY APPEALS/ AGAINST CONVICTION
裁判法院上訴案件/針對定罪

MA 795/2004

Lunn J

(12.10.2004)

*Lynda Shine

#Andrew Bruce SC

CURRIE Alistair Charles

Crimes Ordinance/Access to computer with a view to dishonest gain/Obtaining of information a gain/Prosecution not required to prove motive for obtaining information

《刑事罪行條例》– 目的在於不誠實地獲益而取用電腦 – 取得資料即屬獲益 – 控方無須證明取得資料的動機

The Appellant was convicted after trial of an offence of obtaining access to a computer with a view to dishonest gain for himself, contrary to s 161(1)(c) of the Crimes Ordinance, Cap 200.

The Appellant was a Chief Inspector of Police who at the time of the alleged offence was attached to the Marine Regional Command and Control Centre ('*MRCCC'*). That centre had a computer system entitled '*Enhanced Computer Assisted Command and Control System*' ('*ECACCS*'), which contained personal particulars of persons, whether related to crimes or not. Police officers attached to the MRCCC were authorised to access the computer to obtain information.

On 15 October 2003, the Appellant requested a police communication officer, PCO Shum, to access the computer. She did so by entering into the computer her own UI number 87289 and then the Appellant's UI number 29072, a Hong Kong identity card number and the police reference number M91710, all of which information was supplied by the Appellant. The Appellant's request of her was to obtain the address of the person whose identity card number he had supplied.

In response to the request made of the computer by PCO Shum, information relating to Leung King-hang, including his residential address, appeared on the screen. After an inquiry of PCO Shum by the Appellant as to whether or not that was the address, to which she replied affirmatively, and her reply that she was not able to print out what appeared on the screen, the Appellant wrote something on a piece of paper upon which had been written the identity card number and the police file reference number.

The police file reference number M19710 was a number assigned to an inquiry begun on 13 October 2003 in relation to a vessel '*Noor*', which inquiry had been assigned to the Appellant.

Mr Leung King-hang, with an identity card number identical

to that number which had been supplied to Miss Shum by the Appellant, was a person who had been the tenant of domestic premises let by the Appellant as landlord on 21 May 2001. The tenancy had been terminated at the initiation of the tenant during 2001.

The prosecution also led evidence of approaches by the Appellant to Station Sergeant Ng and PCO Tang on 12 October 2003. S/S Ng was asked by the Appellant if the address of a person could be obtained by use of the ECACCS computer by reference to a person's identity card number or driver's licence number, and the Appellant was told that it could. PCO Tang was asked by the Appellant if the particulars of a person holding a driver's licence number written on a piece of paper he produced could be checked. But in face of a requirement by PCO Tang that a police file reference number accompany the request, the Appellant desisted with his inquiry.

The Appellant did not give or call evidence. His counsel submitted that it was necessary for the prosecution to prove not simply dishonest access to the computer, but access with a view to improper use of the information derived as a result of the unauthorised access. It was said that there was no evidence why the Appellant had asked PCO Shum to input the identity card number and display the particulars of that person on the computer monitor. Of the improper use of the police file number assigned to the inquiry into the vessel '*Noor*', it was submitted that was relevant to the issue of improper access to the computer but not to the issue of whether the conduct of the Appellant was '*with a view to dishonest gain for himself*'.

Section 161(1) of the Crimes Ordinance, Cap 200, provided:

any person who obtains access to a computer

(a) with intent to commit an offence;

(b) with a dishonest intent to deceive;

(c) with a view to dishonest gain for himself or another; or

(d) with a dishonest intent to cause loss to another, whether on the same occasion as he obtains such access or an any future occasion commits an offence …

In his Statement of Findings, the magistrate noted that the definition of '*gain*' and '*loss*' provided that they were '*to be construed as extending not only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent*', and that '*gain*' included getting what

one had not.

The magistrate found that the Appellant had gained access to a computer and that as a result he made a written note of the particulars which were displayed of the holder of Hong Kong Identity Card No. G……(1), namely, Mr Leung King-hang, the Appellant's former tenant. The purpose to which the information accessed was to be used was not shown from the evidence and was a matter of conjecture. The magistrate indicated that it sufficed for the prosecution to prove that access was made '*with a view to dishonest gain*', and that '*gain*' in this context included '*obtaining information which one did not have prior to access to a computer*'. There had clearly been a gain, and the conduct of the Appellant was dishonest in terms of *R v Ghosh* [1982] 1 QB 1053.

On appeal, it was submitted that the magistrate erred in law in:

> *holding that, on the basis that the conduct of the appellant amounted to gaining access to the ECACCS computer systems, the conduct of the appellant could be categorised as 'with the view to dishonest gain' within the meaning of that phrase in section 161 of the Crimes Ordinance, Cap 200, when there was no evidence before the learned magistrate as to the purpose of such access. In this regard, the learned magistrate erred in holding that access to a computer without authority was, in effect, or itself, with a view to dishonest gain within the meaning of section 161.*

Held :

(1) No issue was taken as regards the magistrate's finding that the evidence established that the Appellant obtained access to a computer, albeit through PCO Shum. Nor was it disputed that in consequence of that access the address of Mr Leung was made available to the Appellant who then made a written note;

(2) In *HKSAR v Tsun Shui-lun* [1999] 2 HKC 547, Chan CJHC analysed the ingredients of the offences created by s 161 (1). He said:

> *… The actus reus is obtaining access to a computer. Each of the four situations constitutes the mens rea of the respective crime. What s 161 is intended to do is to punish access into a computer with a particular intent or for a particular purpose. The intent with which or the purpose for which the access is made must be either criminal or dishonest. It would also follow that it is the intent or purpose of the offender at the time of the access which must be looked at, not his intent or*

> *purpose at some later stage …*
>
> *… Looking at the definition of gain in the context of a computer crime, it is clear, in my view, that the subject matter of a gain as defined in s 161 would include information which the person obtaining access to the computer did not have before the access. It is clear that the section, is intended to cover the acquisition of information which is in itself (i) neither a monetary nor proprietary benefit; but is (ii) something that is capable of retaining at least temporarily if not permanently and (iii) something that is capable of keeping when one has already got it and capable of getting when one has not. What is anticipated by 'gain' in s 161(1)(c) is a benefit or an advantage. However, I do not agree that it must be something which can be utilised or used. That is not expressed nor can it be implied in the section.*
>
> *For these reasons, I take the view that s 161(1)(c), when it is construed in the context of a computer crime and the rest of the section, permits the construction of the word 'gain' to include obtaining information which one did not have prior to his access to a computer. The information may be transient if it is read on the screen or permanent if it is printed out or copied onto another diskette.*

(3) The magistrate was correct to find that the obtaining of the address of Mr Leung, being information which the Appellant did not have prior to the access to the computer, was a '*gain*' within the context of the use of that term in s 161(1)(c) of the Crimes Ordinance;

(4) It was not an ingredient of the offence that the prosecution prove the purpose for which the Appellant obtained that information. The simple language of the subsection did not permit of that interpretation. What was there described as the '*purpose*' was in reality the motive for the Appellant to obtain the gain of that information. It was not necessary for the prosecution to prove that motive;

(5) In respect of dishonesty, the evidence to which the magistrate had regard, namely, evidence relating to the circumstances in which the Appellant had come to obtain access to the computer and then to gain the information, the address of Mr Leung, was sufficient to determine that the Appellant had conducted himself '*with a view to dishonest gain for himself*'. It was both relevant and cogent evidence in respect of that issue. On that evidence the magistrate was entitled to make the finding he did.

Result - Appeal dismissed.

MA 727/2004 YIP Tak-ming

Fung DJ

(16.9.2004)

*John Reading SC & Wong Sze-lai

#Edwin Choy

Public Order Ordinance/Behaving in a disorderly manner in a public place/Defendant placing a mobile phone camera under a female's skirt on an escalator/Act witnessed by another/ Breach of the peace likely to be caused

《公安條例》– 在公眾地方作出擾亂秩序的行為 – 被告人將具拍攝功能的流動電話放在正乘搭自動梯的女子的裙底 – 行為被另一人目睹 – 相當可能會導致社會安寧破壞

The Appellant was convicted after trial of behaving in a disorderly manner in a public place, contrary to s 17B(2) of the Public Order Ordinance, Cap 245.

The prosecution case was that the Appellant behaved in a disorderly manner by placing his mobile phone under the skirt of a female, PW1, whereby a breach of the peace was likely to be caused. It was a folding-type mobile phone with a camera on the top-flap, and he held the lens facing upwards under the skirt of PW1 as she travelled on an ascending escalator. PW2 saw the Appellant's act and she patted or pushed the Appellant once and challenged why he was looking up the skirt of PW1. PW2 alerted PW1. The Appellant denied taking shots up the skirt of PW1.

The magistrate found that the behaviour of the Appellant caused concern or consternation on the part of PW2 so as to cause her to push or pat on the Appellant. He referred to the finding of the trial magistrate in *HKSAR v Cheng Siu-wing* [2003] 4 HKC 471, 481, as approved by Beeson J:

> *Taking into account the likely reaction of members of the public to a person photographing under the skirt of a woman I am very firmly of the view that there is every likelihood of a breach of peace being caused. In my judgment, the average Hong Kong citizen is likely to be outraged by such behaviour and it is entirely predictable that a hue and cry would be raised and that concerned citizens would endeavour to detain an alleged miscreant. In so acting, it is entirely predictable that both the members of the citizenry and the alleged miscreant would be likely to commit a breach of the peace. In my judgment, therefore, the behaviour alleged against the Appellant is entirely capable of being the sort of behaviour that would*

> *make it likely that a breach of the peace would be caused.*

The magistrate found that in view of the reaction of PW2, the behaviour of the Appellant towards PW1 was such that a breach of the peace was likely to be caused, and such likelihood was real and not a mere supposition.

Section 17B(2) of the Public Order Ordinance, Cap 245, provided:

> *Any person who in any public place behaves in a noisy or disorderly manner, or uses, or distributes or displays any writing containing, threatening, abusive or insulting words, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused, shall be guilty of an offence and shall be liable on conviction to a fine of $5,000 and to imprisonment for 12 months.*

On appeal, it was submitted that the magistrate erred in finding that the alleged conduct of the Appellant was such whereby a breach of peace was likely to be caused when no breach could have occurred in the circumstances of the case. Alternatively, it was said that the magistrate failed properly to address the issue of likelihood of occurrence of any breach of peace by reference to the circumstances of this case.

Held :

(1) In order to constitute a breach of the peace, there must be an act or threat of force or violence, or the likelihood of such act or threat: *R v Howell* [1982] 1 QB 416;

(2) It was necessary for a court to conclude that a breach of the peace was likely to occur and not liable to occur: *Parkin v Norman* [1983] 1 QB 92;

(3) What was likely to happen should have a tendency that it would have taken place. The fact that no breach of peace had taken place would thus be strong circumstantial evidence pointing to the lack of such likelihood in the first place;

(4) It was important to consider the nature of the alleged disorderly conduct. It was not the mere uttering of four-letter abusive words. It was placing a camera underneath a female's skirt in a public place. An average Hong Kong citizen was likely to be outraged by such conduct;

(5) The circumstances were relevant. The incident took place

on the escalator in an MTR station during the rush hour on a Monday evening. It was notorious that MTR stations in Hong Kong were crowded with people from all-walks in close proximity. *Cheung Siu-wing* (above) provided an illustration of how right-minded members of the public might react to such behaviour. It was inherently natural and probable that citizens would take the law into their own hands in particular circumstances such as the present case;

(6) The magistrate was right to conclude that there was a real likelihood of the Appellant's conduct provoking someone else to resort to an act of force or violence against him. The fact that there was no actual violence or detention against the Appellant by PW2 or anyone else at the material time was fortuitous and *non sequitur*.

Result - Appeal dismissed.

G. MAGISTRACY APPEALS/ AGAINST SENTENCE
裁判法院上訴案件/針對刑罰

MA 808/2004 YU King-man

Nguyen J

(6.10.2004)

*Norton Pang

#T L Kwan

Disorderly conduct/Surreptitious use of mobile phone in photographing secret parts of woman/Affront to female dignity/ Strong sentence required to deter others

擾亂秩序的行為 – 暗中使用流動電話拍攝女子私處 – 冒犯女性尊嚴 – 須予重罰以阻嚇其他人

The Appellant pleaded guilty to an offence of disorderly conduct in a public place. The particulars alleged that on board a bus he had behaved in a disorderly manner with intent to provoke a breach of the peace.

The facts were that the victim was seated in a bus and dozing. She awoke to find the Appellant sitting on the edge of his seat with his body leaning towards her and pointing the lens of his mobile phone up her skirt. When she asked him what he was doing, he apologised. When the victim and the Appellant got off the bus at the terminus the victim asked the Appellant to let her check his mobile phone, which he did. The victim did not find any photographs of her or her skirt in the Appellant's phone. She nevertheless called the police and the Appellant was arrested.

The magistrate said the offence was very prevalent and becoming yet more prevalent. She said the offence was akin to an offence of indecent assault on public transport where immediate terms of imprisonment were imposed. She said there was '*not the immediate touching, but in some respects it is more serious as the perpetrator can have a permanent record of the private parts of the victim, which can be distributed*.' The statistics showed that between January and August 2004, 41 such cases were reported to the police. Of those cases, 4 suspects were not located and 37 persons were charged by the police with either loitering causing concern or disorderly conduct in a public place.

The magistrate sentenced the Appellant to 2 weeks' imprisonment.

On appeal

Held :

(1) The offence of surreptitiously using a mobile telephone equipped with an inbuilt camera to take photographs of a woman's secret parts was born of modern technology. This was a serious

invasion of privacy and '*an affront to the dignity of the female victim*': *Attorney General v Wai Yan-shun* [1991] 2 HKLR 209. It could also cause unfathomable mental harm and distress to the victim if she became aware that such private photographs were taken. It might cause paranoia in certain victims when they took escalators, walked up staircases or even took a ride in a public bus or a train. It might affect how a victimized woman dressed after such an experience, as well as their future relations with friends and colleagues of the opposite sex. It was a repulsive and repugnant offence which called for strong sentences to deter other people of like mind from ever contemplating such offences;

(2) It was implicit from what the magistrate said that she had judicial knowledge of the fact that the offence was becoming more prevalent. That was also apparent to the average layman. A stop had to be put to this trend and a clear message sent out that any person committing such an offence was facing the danger of immediate imprisonment;

(3) Guidelines were for the Court of Appeal to issue. This judgment, however, would provide some sort of guidance for magistrates in the future when they were dealing with such cases.

Result - Appeal dismissed.

MA 888/2004 SO Chi-lung

Fung DJ

(24.9.2004)

*June Cheung

#I/P

Drug Addiction Treatment Centre/Defendant serving term of imprisonment/Combination of sentences wrong in principle
戒毒所 – 被告人正被囚禁 – 將兩種刑罰合併屬原則上錯誤

The Appellant pleaded guilty to an offence of possession of a dangerous drug, namely, two tablets containing 0.02 gramme of Midazolam. He was sentenced to the Drug Addiction Treatment Centre.

At the time of the making of the DATC order, the Appellant was serving 4 months' imprisonment for offences of theft and attempted theft. The magistrate noted that the DATC report concluded that the Appellant was a drug dependant and suitable for admission to the DATC.

The Appellant, aged 27, had abused drugs since he was 18. Despite various orders of probation, DATC and imprisonment, he had never seriously attempted to quit drugs. Hence the magistrate agreed that the Appellant might benefit from a further period of

treatment.

On appeal

Held :

(1) The making of a DATC order against a defendant who was already serving a term of imprisonment was wrong in principle: *HKSAR v Man Wai-shing* [2004] 2 HKC 465;

(2) The usual sentence for possession of a small quantities of Midazolam was up to 6 months' imprisonment. Taking a starting point of 3 months' imprisonment, a sentence of 2 months after plea would be appropriate.

Result - Appeal allowed. Sentence of 2 months' imprisonment substituted. Sentence to run consecutively to the pre-existing term of 4 months.

[See also *Sentencing in Hong Kong*, 4th ed., at p 201: Ed]

H. PRACTICE AND PROCEDURE
常規與程序

HCAL 74/2004

Hartmann J

(5.10.2004)

Applicant: H Pun

Respondent:
K Zervos SC &
Ho May-yu

Bar Assoc:
P Harris

OWEN
John Inglis
v
LOH
Lai-kuen, Eda
(Permanent
Magistrate)

Magistrates Court/Absent accused represented by counsel/ Effect of s 18 of Magistrates Ordinance/Legal representative entitled to enter plea in summary case on behalf of accused/ Magistrate in error in refusing to accept plea entered through counsel

裁判法院 – 被告缺席由代表律師代表 – 《裁判官條例》第18條的效力– 法律代表有權在簡易程序罪行的案件中代表被告作出答辯 – 裁判官拒絕接納被告透過代表律師作出答辯是錯誤的

This application for judicial review arose out of summary proceedings taken against the Applicant for an offence of speeding.

On 1 June 2004, the Applicant's legal representative, a solicitor, appeared before the Respondent at the Shatin Court in order to plead guilty to the offence on behalf of the Applicant, who was absent. The solicitor sought to enter a plea for the Applicant pursuant to s 18 of the Magistrates Ordinance, Cap 227 ('*the Ordinance*'), which, in respect of summary proceedings, stated:

> *At the hearing of a complaint or information, a party may be represented by counsel; and an absent party so represented shall be deemed not to be absent. Provided that appearance of a party by counsel shall not satisfy any provision in any enactment or any condition of a recognizance expressly requiring the appearance of the party.*

The Respondent was not satisfied that s 18 of the Ordinance permitted a plea to be taken in the absence of the Applicant. She adjourned the case so that arrangements could be made for the Applicant to make his plea personally. She wrote '*… if the defendant is not here to take plea, plea can't be taken*'.

That ruling was challenged by the Applicant, who sought an order of *certiorari* to bring up and quash the decision. It was submitted that the decision was contrary to law as the magistrate had refused to hear and determine the summons served on the Applicant without the Applicant appearing personally in court. A further order was sought in terms of O.53, r.3(10)(a) of the Rules of the High Court remitting the matter to the principal magistrate or a different magistrate of the Shatin Court to determine the Applicant's summons in accordance with law.

Held :

(1) In *Chain Chi-woo, David v Lo Polly* (special magistrate) [1996] 4 HKC 466, Sears J held that in summary proceedings, s 18 of the Ordinance, if the proviso did not apply, constituted a statutory exception to the general rule that an accused in criminal proceedings must render his plea personally. The magistrate was bound by that judgment, which stated in unambiguous terms that, read in the context of Part II of the Ordinance, s 18 did permit a legal representative to enter a plea on behalf of an absent accused provided that the proviso in that section did not apply;

(2) Even if it could be said that *Chain Chi-woo* was not binding on the magistrate, the judgment correctly stated the law. Section 18 was a section unto itself. In summary proceedings conducted under Part II of the Ordinance, subject always to the proviso contained within the section not being applicable, an accused person might decline to attend court in person and should not be subject to sanction provided his legal representative, as defined in s 2 of the Ordinance, appeared in his place;

(3) Although serious and less serious crimes were all of the same genus, this did not mean that they could not be treated differently procedurally. The Ordinance, for example, provided in respect of certain petty offences for pleas of guilty to be submitted by post;

(4) The interpretation of s 18 made in this case and by Sears J in *Chain Chi*-woo accorded with long-established practice. The headnote to *R v Thompson* [1909] 2 KB 614, read '*where in answer to a summons issued by a Court of summary jurisdiction the defendant has appeared by counsel there is no obligation upon him to appear personally, and the justices, have no jurisdiction to compel his personal appearance by warrant*' ;

(5) Section 18 was a deeming provision. If an accused's counsel was in court duly instructed to make a plea it was as if the accused himself was there and the plea was to come from the accused's own mouth. Although s 18 stated that an absent party represented by counsel should be deemed '*not to be absent*', in direct English that could only be read to mean that the party was therefore deemed '*to be present*'. Section 18 did not therefore allow for the exercise of a discretion by a magistrate to refuse to receive a plea from the mouth of counsel and to direct the personal attendance of an accused at court in order to give that plea. In terms of s 18, the accused was already deemed to be before the court;

(6) The proviso to s 18 stated that the deeming provision of the

section should not satisfy any provision '*in any enactment*' which expressly required the personal appearance of a party. The reference to '*any enactment*' could not apply to Part II of the Ordinance itself. If that was the case, s 18 would again be rendered otiose;

(7) The magistrate was wrong in law to refuse to accept the Applicant's plea of guilty given through his counsel when the Applicant himself was absent.

Result - (a) Order of *certiorari* granted to bring up and quash the decision;

(b) Order granted remitting the case to the principal magistrate, or a different magistrate than the Respondent, in order to determine the Applicant's summons in accordance with law;

(c) Order of costs in favour of the Applicant.