CACC 297/2019

[2021] HKCA 1188

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

criminal appeal no 297 of 2019

(on appeal from HCCC NO 312 of 2017)

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###### BETWEEN

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| HKSAR | Respondent |
| and |  |
| Ma Ka Kin (馬家健) | Appellant |
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Before: Hon Macrae VP, Pang JA and Zervos JA in Court

Date of Hearing: 22 July 2021

Date of Judgment: 22 July 2021

Date of Reasons for Judgment: 11 August 2021

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| R E A S O N S F O R J U D G M E N T |

Hon Macrae VP (giving the Reasons for Judgment of the Court):

1. The appellant was convicted, on 16 April 2019, before Andrew ‍Chan J (“the trial judge”) and a jury of attempting to traffic in 1,715 grammes of a powder and solid containing 1,185 grammes of cocaine, contrary to section **‍**4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134 and section 159G of the Crimes Ordinance, Cap 200. He was subsequently sentenced to 23 years’ imprisonment.
2. On 21 January 2021, having earlier been refused legal aid, the appellant was granted an appeal aid certificate by a Single Judge on the basis that the background to the case, and the trial judge’s concerns about that background, were unusual and warranted closer examination by a lawyer[[1]](#footnote-1). On 26 April 2021, a different Single Judge granted the appellant leave to appeal against conviction on all grounds of appeal against conviction and sentence put forward by Mr Eric Cheung, solicitor advocate, with him Mr Jevons Chan of counsel[[2]](#footnote-2).
3. On 22 July 2021, the Court allowed the appeal, quashed the appellant’s conviction and set aside his sentence. The Court further declined to order a retrial. We indicated that we would hand down the reasons for our decision in due course. These are our reasons.

An overview of the case

1. The case against the appellant, who was 20 years of age and of clear record at the time of his arrest, consisted of the provision of his residential address to another for the purposes of receiving a parcel from abroad. The appellant lived at the time in Lei Muk Shue Estate in Kowloon with his parents and younger sister. On 19 October 2016, a parcel arrived in Hong Kong from São Paulo in Brazil addressed to a “Mr **‍**Lee” of “Kat’s **‍**Beauty Centre” at the appellant’s address. Upon examination, the parcel was found to contain the cocaine particularised in ‍the indictment, the retail value of which was just under HK$1.9 million. Several attempts to make a controlled delivery of the parcel to the appellant’s address were made by Customs **‍**officers, all of which were unsuccessful. Accordingly, on 24 October 2016, a Post **‍**Office notification card (“the **‍**notification card”) was left in the letter box of the appellant’s address. Although the address was correctly stated, there never was a Mr Lee or a Beauty Centre at the said address.
2. The notification card was collected from the letter box by the **‍**appellant’s sister on 24 October 2016 and placed on a table inside **‍**the **‍**appellant’s home. On 25 October 2016, the appellant was instructed **‍**to take the notification card and give it to someone at Tseung **‍**Kwan O MTR **‍**station. The destination was subsequently changed to Po Lam MTR station, while the appellant was on his way to deliver the notification card.
3. There was no suggestion that the appellant had ever sought to collect or possess the parcel himself, or that he had ever come into contact with the parcel or its contents. The case against him was that, by allowing his address to be used for the reception of the notification card and then delivering the notification card to another person, he had done acts which amounted to an attempt to traffic in dangerous drugs, knowing that the parcel to be collected by means of the notification card left at his address contained dangerous drugs.
4. In a video recorded interview conducted on 4 November 2016 by Customs officers at Hong Kong International Airport, the appellant admitted allowing his address to be used by a former colleague at the ramen shop where he worked, whose name was Hung Chi-Him, or “Ah Him” as he called him, sometime in June or July 2016. He also claimed to have collected the notification card from the letter box; although, in fact, CCTV **‍**evidence showed that the appellant’s sister had collected it. The appellant said he trusted Ah Him and did not think that he was being asked to do anything which might be problematic or illegal; although he did suspect that the shipment might involve “parallel **‍**goods”. Ah Him had made it clear to the appellant that he did not need to collect the parcel himself: all he was required to do was give the notification card to Ah Him when it arrived. He further disclosed that he was given HK$1,000 by the person who collected the notification card from him on Ah **‍**Him’s behalf; which the prosecution characterised as a “reward”, but the appellant said was in fact the settlement of a pre-existing gambling debt owed to him by Ah Him. In essence, the appellant’s defence was that he was an innocent agent who had been duped by Ah **‍**Him.
5. The appellant had been arrested by Customs officers on **‍**3 **‍**November 2016. Following his video recorded interview on 4 **‍**November, Customs officers made a telephone call to the ramen shop where the appellant worked and spoke to Hung Chi-him’s brother, the owner and manager of the premises, who duly supplied them with Hung **‍**Chi-him’s residential address. The officers immediately proceeded to that address and discovered 20 packets of cocaine weighing less than 10 **‍**grammes of narcotic. Accordingly, on 5 November 2016, both the appellant and Hung Chi-him were charged with a joint charge in respect of the cocaine found in the parcel; while Hung Chi-him was also charged with a further charge of trafficking in the cocaine found in his premises.
6. On the question of the notification card and his dealings with Hung Chi-him, the appellant testified at trial in line with his account in his video recorded interview. At no stage, either during his video recorded interview or his evidence, did he ever concede that he knew, or even suspected, that the parcel might have contained dangerous drugs. However, there was a further aspect of his evidence which has given rise to this appeal.
7. As we have noted, the appellant was originally charged, together with Hung Chi-him, with a joint charge of trafficking in the dangerous drugs contained in the parcel. However, that charge was subsequently amended by removing Hung **‍**Chi-**‍**him’s name and leaving the appellant to face the charge alone. On 28 **‍**August **‍**2017, the appellant pleaded guilty before a magistrate and was duly committed to the High **‍**Court for sentence. When the matter duly came before a deputy judge of the High Court for sentence on 21 November 2017, the appellant indicated that he wished to withdraw his plea of guilty. The case was therefore adjourned for the appellant to make his application formally, supported by evidence on affirmation.

The application to change plea

1. In due course, the application to change plea came on before Barnes J, who took evidence from a number of witnesses over the course of two days. In essence, it was the appellant’s case that his guilty plea had been entered involuntarily under circumstances of duress, undue influence and/or misrepresentation by virtue of the wrongful and misleading “legal advice” of a solicitor’s clerk and his then legal team. It was alleged that the advice he had been given was tainted and motivated by a conflict of interest, since his legal fees were being paid by Hung **‍**Chi-**‍**him, or those related to, or connected with, him. As a result of the conflict of interest inherent in the arrangement, the loyalty of his then legal team to render unbiased, fair and independent legal advice to the appellant and to act in his best interests had been seriously compromised, resulting in the appellant being left to face a serious charge of trafficking, which he did not commit, on his own.
2. What emerged from the evidence before Barnes J was that Hung Chi-him’s brother, who as owner and manager of the ramen shop was the appellant’s boss, had approached the appellant’s father and introduced him to a firm of solicitors, in which a solicitor’s clerk, by the name of Paul **‍**Chan, was working at the time. After the father had agreed to the representation, Paul Chan together with a young junior counsel (not, of course, Mr Cheung or Mr Chan, nor the counsel who eventually conducted the appellant’s trial in the High **‍**Court, Mr Geoffrey Chang) then met with the appellant on a number of occasions in **‍**custody. Following a **‍**conference **‍**with Paul Chan and counsel in the cells of West **‍**Kowloon **‍**Magistrates’ **‍**Court on 3 March 2017, the appellant signed a typed declaration to the effect that, as a result of the legal advice he had received, he had decided to plead guilty to the charge against him, provided that “all **‍**charges” against Hung Chi-him were dropped[[3]](#footnote-3).
3. On 9 March 2017, at Pik Uk Correctional Institute, the appellant wrote in his own hand a note to the solicitor in charge of his case in the following words (as translated)[[4]](#footnote-4):

“I, Ma Ka Kin, upon explanation given by my counsel in this case and the solicitor of your esteemed firm, now instruct your esteemed firm to request for giving supplementary statements to the Department of Justice and the C & E department regarding my statements given to the C & E department in November 2016, for the purpose of clarifying that no one instructed me to receive the parcel involved in this case. I also confirm that I am aware of and understand the legal consequences of the above instruction. I gave the above instruction voluntarily.”

The note, which was subsequently introduced at trial as Exhibit D3, was further signed and dated by the appellant.

1. On 13 March 2017, the appellant’s then counsel wrote to the prosecution in the following terms[[5]](#footnote-5):

“We are instructed that our client will plead guilty to all the charges laid against him on the above date. Our client is fully explained of his situation and would like to express his willingness to assist the 2nd **‍**Defendant Hung Chi Him as he was innocent of the charges against him.

Our client and the 2nd Defendant were acquainted at a noodle bar where they worked together before. They have remained in contact since the 2nd Defendant left the job. At the time of arrest by the Customs and Excise Department, our client was in a confused state. He admitted that he had made some errors in stating his case against the 2nd Defendant in his witness statement. Our client also confirmed that the 2nd Defendant was innocent and had never asked him to receive any parcel.

Finally, we are instructed that if your good office would drop the charges against the 2nd Defendant, our client will plead guilty to all the charges against him.”

1. To this offer, the prosecution responded, on 16 March 2017, that the appellant would be proceeded against in the High Court in respect of the dangerous drugs found in the parcel, while Hung Chi-him would only be proceeded against in the District Court in respect of the dangerous drugs found in his bedroom.
2. When, in the course of being advised by counsel and Paul **‍**Chan, the appellant queried how Hung Chi-him could escape when he had been implicated and named in his video recorded interview, Paul **‍**Chan told him that another statement would be prepared for him. In due course, a new statement was typed up and given to the appellant for him to memorise in case Customs or Police officers came to take a further statement from him. This statement, which was referred to at trial as “the **‍**long story”, was also produced by the defence at trial as Exhibit D4. Like Exhibit D3, it is relevant to note the contents (again, in translation) of this document for the purposes of this appeal[[6]](#footnote-6):

“This syndicate its mode of operation is that it orders dangerous drugs from overseas, then delivers them back to Hong Kong, every time a different person would be asked to collect the parcel, to be subsequently passed to another for it to be directly brought to the nest, but during such process someone else must have been asked to monitor from afar the delivery person to check if there is any problem, when those at the nest receive the parcel, they would then process the cocaine and turn them into cooked cocaine, i.e. turning the original cocaine into crack cocaine, followed by distribution to others.

The reason why I know about such operation, is that I used to be the one who monitors from afar the delivery person, in the beginning I did not know those were dangerous drugs, at first ‘Keung Gor’ told me, they illegally import electronic parts, but they are worried about someone (the delivery person) would play tricks, so I was asked to follow them, if I find the delivery person suspicious on the way, e.g. not directly delivering to the destinated place but to another, or coming into contact with someone, bringing the parcel to somewhere unknown, or being arrested by the Police, I would immediately notify ‘Keung Gor’, every time ‘Keung Gor’ would give me a mobile phone, in the mobile phone there has been already set a mobile number, all I need to do is to long press a certain word and I can directly call ‘Keung **‍**Gor’, when this has been done I would have to return the mobile phone to ‘Keung Gor’, I would then have $1,000 as salary, I did this twice, I therefore in total got $2,000.

Committing this current offence, actually it is my third time helping ‘Keung Gor’, ‘Keung Gor’ told me that, recently those collecting parcels are playing tricks, therefore they are being fired by ‘Keung Gor’, ‘Keung Gor’ said that I helped him twice and therefore he trusts me, so he asked me if I would be interested in helping him collect parcels, he said if I collect the parcel myself I would have $5,000, I therefore said yes to him.

As said in my (VRI) statement, the matter had already been dragged on for some time, a few months later ‘Keung Gor’ informed me that I could collect the parcel, and later on I was arrested by you guys the police officers.

Actually, I originally said in my statement, that it was Ah Him who told me to do so, it was actually ‘Keung Gor’ who told me to do so. I said it was Ah Him because Ah Him refused to pay me, and therefore I decided to drag him into this matter, afterwards I knew it was not right to do so, so I told my lawyers that Ah Him was innocent, I was trying to set him up as ‘Keung **‍**Gor’.

I knew that ‘Keung Gor’ actually distributed the goods on Thursdays or Fridays, but I did not know to whom and which district he would distribute the goods. I actually met ‘Keung **‍**Gor’ ten times eight times, usually inside a restaurant when we yum-cha and chat.”

1. In due course, on 28 August 2017, the appellant pleaded guilty before a magistrate to the amended charge and admitted a Summary of Facts in which the full name of Hung Chi-him had been removed and reference made simply to “Ah Him”[[7]](#footnote-7). However, on 21 November 2017, upon his arrival at the High **‍**Court for sentence, the appellant discharged his entire legal team and indicated his wish to change his plea. The matter was then adjourned by a deputy judge of the High Court, who also made orders for the filing of evidence. And so it was that the matter in due course came before Barnes J.
2. It should be stated that there were conflicting accounts among the witnesses at the hearing before Barnes J, who, in addition to receiving evidence by way of affirmation, also heard live testimony. On 11 **‍**December 2018, Barnes J delivered a considered written judgment[[8]](#footnote-8), by which she found that the appellant’s guilty plea had been entered involuntarily; and duly granted his application to change his plea. In the course of her ruling, she made certain findings which, it must be said, do not reflect well on the appellant’s original legal team. Fundamentally, she found that the solicitors’ firm and Paul Chan “had the interest of Hung **‍**Chi-him at heart rather than the interest of the applicant”[[9]](#footnote-9). She found that the appellant had come to sign the typed declaration of 3 **‍**March **‍**2017 in the way the appellant had testified, rather than in the way Paul Chan and his then counsel had testified[[10]](#footnote-10). And she did not accept counsel’s evidence on a number of issues; including the claim that the appellant had used his own words to write Exhibit D3[[11]](#footnote-11). Indeed, on a number of important issues, it is clear that Barnes J preferred the appellant’s version of events to that of his previous legal team.

The trial

1. The present trial before the trial judge commenced on 9 **‍**April **‍**2019. He was clearly familiar with Barnes **‍**J’s decision for, upon the close of the prosecution case on 10 **‍**April **‍**2019, he raised his own concerns with counsel prosecuting on fiat, Mr Philip Chau, that “given the background of the withdrawal of the plea and the reversal of plea, etc and, in my view, the strength of your evidence, I am actually thinking of withdrawing the case from the jury”[[12]](#footnote-12). Describing the **‍**prosecution as “not a straightforward case”, which had “dubious background facts”, he raised the question of whether the second limb of *R* ***‍****v Galbraith*[[13]](#footnote-13) might come into play, meriting a ruling of ‘no case to answer’[[14]](#footnote-14). In the course of his subsequent exchange with prosecuting counsel, the trial judge expressed himself in strong terms to explain his concerns about the case. He commented that the prosecution “doesn’t seem right to me”[[15]](#footnote-15), and that he would not permit the prosecution to “shift all the responsibility” to his court[[16]](#footnote-16). He then adjourned the matter until 11 April 2019 for the prosecution to consider its position[[17]](#footnote-17). Before the court adjourned, it is perhaps also pertinent to note that Mr Chang, the appellant’s new defence counsel, invited the prosecution to take a non‑prejudicial witness statement from the appellant with a view to his becoming a witness against Hung **‍**Chi-**‍**him[[18]](#footnote-18).
2. On the following day, 11 April 2019, after further argument, the judge was nevertheless persuaded to find ‘a case to answer’ and the case immediately proceeded with the appellant electing to give evidence. However, that did not dispose of the trial judge’s concerns. At the end of the appellant’s examination-in-chief, the trial judge again addressed prosecuting counsel in strong terms, saying “I am not very comfortable with this case actually. I’m sure you understand why”[[19]](#footnote-19), to which Mr **‍**Chau responded, “Yes, of course”[[20]](#footnote-20). He then spoke of his “unease” about the prosecution; and that since Paul Chan was evidently trying to put all the blame onto the appellant in order to exonerate his client, Hung **‍**Chi-**‍**him, a conviction would necessarily play into his hands[[21]](#footnote-21). He considered that it “would be absurd”[[22]](#footnote-22) if the jury came back with a guilty verdict in these circumstances. Describing Paul Chan’s evidence before Barnes J as “absolutely incredible”[[23]](#footnote-23), he suggested that a non-prejudicial statement should be taken from the appellant in relation to Hung Chi-him’s involvement; and also in respect of an offence of perversion of the course of public justice by Paul Chan[[24]](#footnote-24). He asked prosecuting counsel, “… how can I allow … a miscarriage of justice in my court?”[[25]](#footnote-25). Finally, he expressed his concern that in a decade of sitting on the High Court Bench, he had never come across a case which “causes me so much unease”[[26]](#footnote-26).
3. The matter was left on 11 April 2019 with the judge inviting Mr Chau to familiarise the Department of Justice overnight with the relevant background, the evidence and exhibits, as well as his already stated concerns[[27]](#footnote-27).
4. On the following day, 12 April 2019, Mr Chau informed the court that the judge’s concerns had been “relayed” within the Department of Justice to supervising counsel, who had apparently taken instructions from the Director of Public Prosecutions himself[[28]](#footnote-28). However, he had been instructed to continue with the case[[29]](#footnote-29). The judge accepted the position and the case continued with the cross-examination of the appellant.
5. At the conclusion of the appellant’s evidence, his father gave evidence on his behalf[[30]](#footnote-30). He explained how he had been contacted by a Mr **‍**Hung Chi-kan, the boss of the ramen shop, who offered to hire a lawyer for his son. He was confused by the offer, but accepted it. A few days later, he was taken to a solicitors’ firm in Mong Kok, Kowloon, where he met Paul Chan for the first time. The appellant’s father was told that he (Paul Chan) had been engaged to help his son and he need not worry about his son’s legal fees. However, the father was concerned enough to speak to another barrister, whom he knew from his previous work as a messenger in a set of barristers’ chambers, and was advised to apply for legal aid and terminate the appellant’s then legal representation. He said he had also received some HK$4,000 or HK$5,000 from Hung Chi-kan.
6. The importance of the father’s evidence, apart from describing the background to his son’s original plea of guilty and the involvement of those connected with Hung Chi-him, was his description of his son as an “obedient and innocent, simple-minded boy”[[31]](#footnote-31). This characterisation was said by the defence to be consistent with the appellant’s unwitting involvement in providing an address for the parcel delivery and his subsequently being tricked by international drug traffickers into assuming sole responsibility for the parcel of cocaine[[32]](#footnote-32).

Grounds of appeal

1. The three grounds of appeal put forward by Mr Cheung, on which leave has been granted, may be summarised as follows:
2. The judge gave prejudicial directions in respect of the “legal advice” given to the appellant by Paul Chan, which had the effect of undermining the appellant’s case that he had been duped into accepting blame for an offence he had never committed (Ground **‍**1);
3. The judge gave no directions as to what use the jury could or could not make of various defence exhibits, in particular, Exhibits D3 and D4, or how they should approach the previous guilty plea of the appellant (Ground **‍**2);
4. There was a lurking doubt about the correctness of the verdict (Ground 3).
5. The complaint in Ground 1 arises from the judge’s directions to the jury when summarising the appellant’s case, namely[[33]](#footnote-33):

“After his arrest, he was brought to court. On 27 January 2017 he was represented by a solicitors’ firm (name given). A solicitor’s clerk, Paul **‍**Chan, of that firm and a barrister, (name **‍**given), came to see the defendant in the detention room of West Kowloon Magistrates Court. They informed the defendant that they were hired by his father. The defendant was asked to authorise them to represent him.

At the time, the defendant was not on legal aid. During the meeting Paul Chan did most of the talking. Paul Chan said that they would look at all the documents first.

On 2 March 2017 the second meeting, Paul Chan and (counsel) came to see the defendant again. Paul Chan then told the defendant that his case was difficult to fight, namely the parcel was addressed to the defendant and that there was no evidence pointing at Ah Him.

Perhaps I ought to say this. Because this Paul Chan had been telling the defendant that the case was difficult to fight, namely the parcel was addressed to the defendant, we all know that the parcel was addressed to the defendant’s address and that there was no evidence pointing at Ah Him. You remember in the video interview the defendant actually pointed his finger at Ah **‍**Him extensively. But in our criminal justice system what a defendant says to a law enforcement agency in a record of interview cannot be used to implicate the other accused. So it cannot be used to implicate Ah Him. The rationale is this, once a person, say a defendant, is arrested, of course, he wants to shift the blame, so he would have shifted all the blame to A, B, C and D.

Now, in the law of evidence, that statement, say for example, I am shifting all my blame to Mr Chau, Mr So and So, etc, that can be used against me because that implicates me working with Mr **‍**Chau and you and you and you, but cannot be used to implicate Mr Chau unless Mr Chau admits in his own video interview that he is part of the, say, a member of the syndicate etc. Do you not see my point? So Mr Paul Chan actually was giving the correct legal advice in this instance. There was no evidence pointing at Ah Him. I mean, if you think about that there was no evidence pointing at Ah Him, save and except what this defendant said in his interview. But in a criminal court that cannot be used as evidence against Ah Him.

Mr Paul Chan also said that in addition, there were contradictions in the defendant’s statement such as Ah Him did not travel abroad. Paul Chan told the defendant that if more people were involved in the case, the offence became more serious. Because of his ignorance of the law, the defendant stated that he took what Paul Chan said. To a certain extent that piece of legal advice is also true, because the more people are involved, that means the syndicate is much more complicated, is much bigger. So the criminality is increased. …

Again, Paul Chan is giving the correct legal advice and, again, to the detriment of the defendant. According to the defendant, he was frustrated and was of the view that he was surely dead this time.

Paul Chan also said that if he were going down, it would not do any good to drag Ah Him into it.

The defendant questioned Paul Chan’s statement by stating that he had pointed his finger at Ah Him, so there was evidence against Ah Him. Then Paul Chan assured the defendant by stating that he would send someone over to amend the statement.

At the end of the meeting, the defendant signed on a form stating his intention. At that time, the defendant also decided to plead guilty as Paul Chan had told him that it was hopeless to fight the case. The defendant was also told that the earlier that he tendered his plea, the more discount he would receive in his sentence.”

The judge went on immediately to explain that this latter advice in respect of discounts for pleading guilty at different stages of proceedings was also correct.

1. Mr Cheung’s complaint is that the effect, if not the intention, of these directions was to present Paul Chan and the appellant’s then counsel in a favourable light as giving correct and appropriate advice, yet the whole defence case was that there was a concerted effort by his then legal team to dupe the appellant into taking the blame for a crime he did not commit so that the real villain, Hung Chi-him, could be exonerated. Worse than that, Mr Cheung argued that the directions would have suggested to the jury that the appellant’s case was indeed hopeless, and that he was rightly advised to plead guilty.
2. Mr Cheung’s concern in Ground 2 was that, without a clear direction that the jury could not rely on anything said in Exhibit P3 or P4 *against* the interests of the appellant, the jury may well have thought, in particular when reading “the long story” in Exhibit P4, that he was indeed part of a drug syndicate, and had not only participated in trafficking on this occasion but on two other occasions as well. He pointed out that prosecuting counsel’s position, in his closing address to the jury, was inconsistent and contradictory inasmuch as, whilst he accepted “he’s been very poorly treated by his legal team”[[34]](#footnote-34), the “the long story” in Exhibit D4 was yet another lie told by the appellant, who was not worthy of belief[[35]](#footnote-35). Yet, as Mr Cheung pointed out, Exhibit D4 was a lie written not by the appellant but by the very legal team who had treated him so poorly.
3. By Ground 3, Mr Cheung argued that such were the extraordinary circumstances of the case, in which two judges of the High **‍**Court had made unusually strong comments about the way the appellant had been served by his previous legal team, that there must be a lurking doubt about the correctness of a verdict which was, in any event, only achieved by a bare majority.

The respondent’s reply

1. Ms Hermina Ng, on behalf of the respondent, submitted in respect of Ground 1 that the correctness or otherwise of Paul Chan’s legal **‍**advice was not an issue at trial, and she appeared to accept that it did not call for specific directions from the judge. The issue for the defence was whether the appellant was a pliable individual who could be easily manipulated. However, she maintained that what the judge actually said about Paul Chan’s legal advice was correct and, as such, could not have harmed the appellant’s case. It was, she said, important to differentiate between the collateral issue of the way the appellant was advised by his previous lawyers and the ultimate issue of whether or not he was knowingly attempting to traffic in dangerous drugs.
2. In respect of Ground 2, Ms Ng acknowledged that the judge had not warned the jury about the contents of the defence exhibits, nor had he given a direction in respect of the previous plea of guilty. However, she submitted that these were issues introduced by the defence and it would have been obvious to the jury that the only purpose they were being relied upon was to demonstrate that the appellant was a simple-minded individual who could be easily manipulated. The introduction of Barnes J’s judgment, on which there was also no direction from the judge, could only have been read in the appellant’s favour.
3. On the question of a lurking doubt (Ground 3), Ms Ng again emphasised the distinction between the involuntary plea, and the circumstances which had led to it, and the ultimate issue for the jury, which was whether they could be sure the appellant had attempted to traffic in dangerous drugs. The evidence and issues had been summed up in a fair and balanced way and, clearly, the jury must have rejected the defence case on the ultimate issue and found the prosecution case proved beyond reasonable doubt. In the circumstances, there was no scope for entertaining a lurking doubt about the safety of the conviction.

Discussion

1. There were clearly some extraordinary, if not unprecedented, features to this case. The trial judge himself spoke of his considerable unease[[36]](#footnote-36) and discomfort[[37]](#footnote-37) about the case with its dubious factual background[[38]](#footnote-38), and at one stage went so far as to voice his concern that an eventual conviction would be absurd[[39]](#footnote-39). The full extent of what occurred and why between the appellant’s former legal team and the appellant and the prosecution have not been placed before the Court and it does seem to us, with respect, that there has not been much desire on the respondent’s part to find out what really happened. That is particularly surprising in light of the findings of Barnes **‍**J on the application of the appellant to change his plea and the subsequent comments of the trial judge about his then legal team. Barnes **‍**J was obviously highly critical of the evidence and conduct of the previous legal team and was persuaded by the appellant’s evidence, which had “a **‍**ring of truth” about it[[40]](#footnote-40).
2. Whatever happened in this case does not reflect well on the legal profession or the legal system. Not only does the appellant seem to have been badly advised by his first team of lawyers to plead guilty to an extremely serious offence in the High Court when the evidence against him was hardly very strong, but the prosecution appears to have traded the opportunity to pursue a case which it could and should have followed up against the organiser of the offence, for a conviction of someone who was minimally involved and may have been innocent.
3. If the argument is that there was little or no evidence against Hung Chi-him, the prosecution could always have approached the appellant, who had been persuaded to supply his address in order to receive the parcel, and whose text messages from Hung Chi-him supported that arrangement, to give evidence against him. It should be remembered that it was the appellant’s unsolicited disclosure of the involvement of Hung **‍**Chi-him in his video recorded interview of 4 November 2016 which had led to Hung Chi-him’s arrest and the discovery of 20 packets of cocaine at his home address. The prosecution were certainly invited by the appellant’s new legal team to approach the appellant with a view to his giving a non-prejudicial witness statement on 20 **‍**February 2019, which was after Barnes J’s decision but before his trial; and again during the trial, on 10 April 2019, after the trial judge had expressed his own strong concerns about the case[[41]](#footnote-41). On 11 April 2019, even the judge himself suggested that a non-prejudicial statement should be taken from the appellant[[42]](#footnote-42). Moreover, it must have been obvious after the finding of the 20 **‍**packets of cocaine at Hung **‍**Chi-him’s home that he was clearly more involved in this matter than the appellant, who was of good character. Yet, the prosecution seems to have been far more interested in getting a plea of guilty, wherever it came from, and whatever the respective culpability of those involved.
4. As we have pointed out, even after Barnes J’s decision, in which, having listened to evidence, she accepted the appellant’s version of events and, more pertinently, found that “Paul Chan and his firm had the interest of Hung ‍Chi-him at heart rather than the interest of the (appellant)”, the prosecution rebuffed the appellant’s offer to give evidence for the prosecution against Hung Chi-him. This alacrity to accept a plea from anyone, so that someone whom the prosecution must have realised was far more involved in the drug-trafficking hierarchy was not then proceeded against, is not an attractive feature of this case, and does not reflect well on our prosecutorial system. It can lead to manifest injustice and that is what we think has happened in this case. When, following Barnes J’s decision, another experienced trial judge voiced his own considerable reservations about continuing with the case, reservations which prosecuting counsel at times during the argument appeared to acknowledge[[43]](#footnote-43), then one of the safety valves designed to protect the courts from oppressive prosecutions was not functioning properly. The mantra “let the court decide” is not always the answer and risks, as the judge himself expressed it, being “the easy way to do it”[[44]](#footnote-44), by absolving everybody of the responsibility to ensure that justice is properly done.
5. Having made these comments, which are as applicable in general terms to appeals as they are to trials, we turn to the specific grounds of appeal argued before us. It is contended by Mr Cheung under Ground **‍**1 that the trial judge’s directions recited above in full[[45]](#footnote-45), were erroneous and unfair because they would have instructed the jury that the advice of the appellant’s previous legal team was correct and that the appellant’s case was indeed hopeless, for which he was right to have pleaded guilty. However, given the trial judge’s earlier strong comments about the prosecution, we consider that there may be two ways of interpreting his remarks. What we think the trial judge was perhaps trying to convey in this passage was that, since some of the legal advice Paul Chan and counsel gave to the appellant was correct, the appellant may well have found their advice plausible and reasonable and more readily followed the advice that he should plead guilty and not drag Hung Chi-him down with him. We note that of the issue of whether there was sufficient evidence against Hung **‍**Chi-**‍**him, the judge qualified his endorsement of the legal advice given to the appellant when he said that “Paul Chan was actually giving the correct legal advice *in this instance*”[[46]](#footnote-46); while of the advice that the more people who were involved, the more serious the case, he said “*to a certain extent*, that piece of legal advice is also true”[[47]](#footnote-47). This qualified endorsement of the legal advice given would explain why the trial judge concluded this section of his summing-up by saying, “Again, Paul **‍**Chan is giving the correct legal advice and, *again to the detriment of the defendant*”, which led the appellant to “the view that he was surely dead this time”[[48]](#footnote-48).
6. Although Ms Ng characterised the way the trial judge dealt with the advice of the appellant’s previous legal team as “helpful” to the defence case, our view is that while that could well have been the intention behind his directions, unfortunately that may not have been their effect. The most direct way to make the point to the jury was to tell them that, by being offered some advice that may have appeared reasonable and plausible to the appellant, he may have been more prepared to do as he was being encouraged to do, which was to exonerate Hung Chi-him by assuming the entire blame for the offence; and the sooner he pleaded guilty, the better. We have carefully considered these passages and in context and, whilst we do not think they could be understood as endorsing the view that the appellant’s case was hopeless and he should plead guilty, we are concerned that the jury might have thought that the judge was endorsing the advice of the previous legal team as actually sound and proper. If that was the impression the jury received from these directions, then it had a tendency to undermine the whole basis of the appellant’s case that he was being improperly advised, when the case against him was not very strong at all.
7. Accordingly, we have concluded that Ground 1 is made out. This was an extremely unusual set of circumstances where the manipulation of the appellant by his previous legal team was an integral part of his defence. The trial judge’s comments also gave inappropriate credence to the status of Paul Chan, who was not a lawyer but a solicitor’s clerk. What the judge said about the “legal advice” given to the appellant was not necessarily incorrect: but having said it, it would have been much better if he had made the point somewhere in his summing-up that because the appellant was being given advice that was on the face of it plausible and reasonable, albeit with an impure motive, he was more likely to be duped into accepting it; which in turn supported the defence case that he was a simple-minded and obedient individual, who could be easily manipulated into accepting the blame for a crime he did not commit.
8. In relation to Ground 2, it is accepted that nowhere in the summing-up did the trial judge tell the jury that they could only use Exhibits **‍**D3 and D4 for a limited purpose, nor did he warn them that they were not to rely on the contents of either document in proof of the count against the appellant; particularly when the prosecution were not relying upon either exhibit and **‍**when prosecuting counsel asked no questions of the appellant in cross‑examination about the exhibits, accepting in his closing address to the jury that “he’s been very poorly treated by his legal team”[[49]](#footnote-49), but contending that it was irrelevant to the issue of knowledge[[50]](#footnote-50). Nor did the trial judge give any specific direction as to how the jury were to regard (or rather, not regard) the appellant’s original plea of guilty.
9. We are not troubled by the latter matter: it must have been obvious to the jury that the original plea was “involuntary”, as prosecuting counsel again accepted in his address to the jury[[51]](#footnote-51). We are more concerned by the lack of any warning as to how to regard the contents of Exhibits D3 and D4, whatever the jury made of the purity of the advice he received from his previous legal team. When viewed together with our concerns on Ground 1, we consider that this ground is undoubtedly strengthened: for, if the jury got the impression that the advice rendered to the appellant was correct (Ground 1) or, even if it was not, that it had nothing to do with the issue of knowledge (as contended by prosecuting counsel), then the lack of any directions as to how to view the appellant’s admissions of knowledge implicit in Exhibit D3, and explicit in Exhibit D4, would be more serious.
10. The contents of Exhibit D4 were obviously highly prejudicial and damaging to the appellant. This document was prepared for the appellant by his previous legal team. It gratuitously discusses in detail the operation of a drug syndicate involved in the importation and distribution of cocaine and crack cocaine in Hong Kong, of which the appellant was said to be an important member. It purportedly explained why the appellant “wrongly” implicated “Ah Him”, when the real culprit was said to be “Keung Gor”.
11. Furthermore, the absence of any directions as to the contents of Exhibits **‍**D3 and D4 was exacerbated by prosecuting counsel’s closing remarks to the jury that the contents of these documents were all lies according to the appellant and yet in his evidence he was telling a different story[[52]](#footnote-52).
12. We come, therefore, to Ground 3. The acceptance by an appellate court of a “lurking doubt” as to the correctness of a verdict is necessarily a very rare occurrence indeed; for the simple reason that this Court does not readily substitute its view of the facts for those of a properly directed jury. On the very rare occasions that an appellate court has found a “lurking doubt”, there is usually something extraordinary about the facts or evidence in the case before it. Furthermore, the case against the appellant is invariably a weak one. In *HKSAR v Cheung Mei Ching, Tina*[[53]](#footnote-53), for example, the appellant, who was of good character, was arrested for trafficking in 839.35 **‍**grammes of ketamine across the border with the Mainland in a bag she was carrying. She denied knowledge of any dangerous drugs in the bag. At her trial, the defence called a witness who, some months after the appellant’s arrest, had voluntarily given himself up to the police and admitted that it was he who had been wholly to blame for trafficking in this particular consignment of ketamine, which he had placed in the appellant’s bag without telling her what he had done. The witness, who was not of good character, had been part of a tour group, which included the appellant, returning from the Mainland when the incident took place. Of the evidence against the appellant, this Court said[[54]](#footnote-54):

“There is no doubt that a *prima facie* case was established and **‍**that she was caught in highly suspicious circumstances. Nevertheless, when put at its highest, there was, in our opinion, no single point, standing alone or in combination with others, which could be said to establish an irresistible inference of guilt.”

1. The Court went on to describe the case as “one of those rare and exceptional cases in which, although properly left to the jury, a distinct feeling of unease is left behind as to the correctness of this verdict”[[55]](#footnote-55).
2. It is not surprising that the other two “lurking doubt” authorities relied upon by Mr Cheung, namely *R v Cooper (Sean)*[[56]](#footnote-56) and *R* ***‍****v Tang Wai-tong & Anor*[[57]](#footnote-57), were cases involving weak and unsatisfactory identification evidence, a particular area of concern for the courts. One of the unusual features in *Cooper (Sean)* was that the Court of Appeal, having been supplied with photographic evidence, itself found that there was “unquestionably a close physical similarity between the defendant and Burke”, who was present at the assault and whom the appellant had said **‍**was the real assailant. It found that “the physical resemblance (between **‍**the two men) is really quite striking”[[58]](#footnote-58). We were not assisted by the *obiter dicta* observations of the Court in *HKSAR v Chang* ***‍****Che Wei*[[59]](#footnote-59), which was not strictly a “lurking doubt” decision, since the Court had already allowed the appeal on an error of law.
3. The classic statement of what constitutes a “lurking doubt” was given by Widgery LJ in *Cooper (Sean)*[[60]](#footnote-60):

“That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the court experiences it.”

However, we wish to make clear that the term “lurking doubt” is not an alternative test, but rather an aspect of the statutory test of “unsafe and unsatisfactory”. This was made clear in the Privy Council decision emanating from Hong Kong of *Kwong Kin Hung v The Queen*[[61]](#footnote-61) by Lord **‍**Steyn who, after referring to the above passage from Widgery LJ’s judgment in *Cooper (Sean)*, held[[62]](#footnote-62):

“This guidance has, of course, been repeatedly recited and applied in the Courts of Appeal in England and Hong Kong. Pressed to explain, however, whether it poses a test different from the question whether the conviction is ‘unsafe or unsatisfactory’ within the meaning of the statute, Lord Thomas rightly conceded that the ‘lurking doubt’ test is simply a different and vivid way of expressing exactly the same idea. Thus in *Stafford v Director of Public Prosecutions* [1974] AC 878, at p.912, Lord Kilbrandon summarised the test to be applied by each member of the appellate court as follows:

Have I a reasonable doubt, or perhaps even a lurking doubt, that this conviction may be unsafe or unsatisfactory?

Ultimately, their Lordships conclude, the words of the statute must govern the position.”

1. Appellate courts must approach the question of a “lurking doubt” in a particular case with great caution. As was held by this Court in *Tang* ***‍****Wai-tong & Anor*, the term means “not an insubstantial doubt but a substantial remaining doubt”[[63]](#footnote-63) about the propriety of the conviction. On the suitably rare occasion when this Court may invoke the notion of a “lurking doubt”, the Court must be left with a distinct feeling of unease as to the correctness of the conviction or find there is a real danger that an injustice may have been done.
2. In the present case, the circumstances were extraordinary, if not unique. The circumstances of the change of plea and the findings of Barnes J clearly suggested that the appellant had been manipulated by his previous legal team with an ulterior and impure motive. The ensuing comments and concerns of the trial judge were in our experience, as well as his, unparalleled and ought to have resulted in this case being anxiously considered by the highest level within the Department of Justice, if necessary with a transcript of the trial judge’s comments. In our view, simply conveying the trial judge’s remarks to someone in the **‍**Department of Justice for them to convey to the Director of Public **‍**Prosecutions overnight (if that is what happened) was not in these circumstances an effective discharge of counsel’s duty as prosecutor. This was an extremely serious High Court case and, with respect, prosecuting counsel should himself have sought an audience with the Director of Public Prosecutions to familiarise him with the history of the matter and convey the trial judge’s manifest concerns, which he appeared to acknowledge, as well as Barnes **‍**J’s important findings.
3. It is very easy to say that the trial judge could and should have obviated the problem by ruling ‘no case to answer’. And it is true that he was alive to the second limb of *Galbraith* and the ensuing statement of that Court that[[64]](#footnote-64):

“There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.”

This, however, was not an easy decision for the trial judge. Whilst we consider that some judges might have ruled ‘no case to answer’ in the present case, and their decisions could not have been assailed on appeal, other judges would not have so ruled and could not be criticised either for their decision. When we asked Mr Cheung during argument whether he would have made a submission of ‘no case to answer’ in the present case, had he been representing the appellant at trial, he was somewhat diffident about the matter; which perhaps explains why there is no ground of appeal before us that the judge should have ruled ‘no case to answer’. Obviously, the answer is not clear cut. It should also be remembered that in neither *Cooper (Sean)*, *Tang Wai-tong & Anor* nor *Cheung Mei Ching, Tina* was it suggested by the respective Court that there was not a *prima facie* case to answer in each case. On the contrary, in both of the two latter cases from this jurisdiction, the Court expressly said that there was[[65]](#footnote-65).

1. There are of course several safety mechanisms built into our system apart from the trial judge to ensure that miscarriages of justice do not occur: one is the prosecution; the other is the appellate courts. In an extreme case, there is the ultimate petitioning of the Chief Executive, which should not be necessary if the other mechanisms are functioning properly. What concerns us about this particular prosecution is the way in which the case against Hung Chi-him, who was obviously involved at a much higher level than the appellant, was dropped in favour of a plea by the appellant, against whom the evidence was minimal and whose involvement was minor at most. Ms Ng has argued, like the prosecution at trial, that the issue of the appellant’s involuntary plea at the hands of his previous legal team was a distinct and separate issue from the question of knowledge of the contents of the parcel, which he had never seen or touched, nor was he ever intended to see or touch. Strictly speaking, Ms **‍**Ng may be correct that they are different issues; but, with respect, it is a wholly unrealistic, and rather blinkered, position to say that they are unrelated in the circumstances of the present case.
2. The appellant was a 20-year-old young man of good character, who was prevailed upon by a former workmate, the brother of his boss, some months before its arrival into supplying his address as the destination for a parcel from abroad. He never received, or came into contact with, the parcel: indeed, his instructions were not to receive the parcel but only to pass the notification card to Hung **‍**Chi-him when it arrived at his address; which he did. There does not seem to have been any quarrel at trial with **‍**the father’s description of his son as an obedient, innocent and simple‑minded boy.
3. The judge, in his final concluding remarks about the defence case, put the matter in this way[[66]](#footnote-66):

“So it is the defence case that he had no idea of the presence of the drugs. His case is that he was tricked by a cunning gang of people involved in the international drug trade and he was just an innocent agent for the gang. So this is his case.”

If that was his case, then the fact that the appellant was successfully duped into assuming full and exclusive responsibility for the offence and, indeed, expressly exonerating one of the principals of the gang through the machinations of his previous legal team is surely a very relevant issue on the question of what the appellant, as a simple-minded young man with no previous convictions, really knew about the contents of the parcel. We cannot accept Ms Ng’s position, which was the same as Mr Chau’s submission to the jury, that the two issues are unrelated.

1. In our judgment, this is a case where each member of this Court was left with a lurking but distinct doubt about the correctness of the jury’s verdict, which was itself arrived at by a majority of 5:2. That being so, the conviction was overturned and the sentence set aside. In the circumstances, it did not become necessary to deal with the appellant’s appeal against sentence.

Application for retrial

1. Ms Ng made an immediate application for the retrial of the appellant. We found Ms Ng’s application in the circumstances extraordinary and, with respect, rather disappointing. Obviously, the strong comments made by two very experienced judges of the High Court, as well as the obvious concerns expressed throughout this appeal by all three members of this Court, have still not registered with the respondent as the prosecuting authority responsible for prosecuting this case. Sadly, this appears to be a continuing feature of this unfortunate saga. We note with dismay that, at the hearing of the leave application before Zervos JA, the respondent had further objected to the inclusion of the material and evidence before Barnes J in the Appeal Bundle “on the grounds that they would not be of value to the Court of Appeal for its consideration, nor could they properly be before the Court of Appeal because they were not evidence at the trial[[67]](#footnote-67). At one stage, Ms Ng argued that it would not be in the interests of justice for this material to be before the Court of Appeal”[[68]](#footnote-68).
2. Zervos JA’s response to this submission was this[[69]](#footnote-69):

“The subject of the reversal of the guilty plea was an issue at trial and the decision of Barnes J was adduced into evidence without objection from the prosecution. More importantly, the evidence presented to Barnes J is relevant to the consideration of whether there has been a miscarriage of justice. Nothing is achieved by the court closing its eyes to information or material that it knows exists and that would provide a full and complete picture of what has taken place. Indeed, where there is concern that the interests of justice have not been properly served, the Court of Appeal will exercise its power to order the production of a document or thing that it thinks necessary in order to determine the case. The power to do so is governed by section ‍83V(1)(a) of the Criminal Procedure Ordinance, Cap ‍221, which reads:

‘**Evidence**

1. For the purposes of this Part, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice –
2. order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;

…’ ”

We entirely endorse Zervos JA’s answer to this objection.

1. We did not find it necessary to call upon Mr **‍**Cheung to respond to Ms Ng and refused the application. Not only was the evidence against the appellant weak, the whole background to the case was more than “dubious” (to borrow the trial judge’s word) and did not reflect well on either the prosecution or the original defence team.

Post-script

1. Regrettably, this appeal has raised more questions than it has been able to answer and, as we have said, there does not seem to have been any great enthusiasm to provide those answers. The questions which cry out for explanation are these:
2. How was a person with convictions, *inter alia*, for rape, attempted rape, robbery, burglary, blackmail and escape from lawful custody able to secure employment as a clerk[[70]](#footnote-70) with a firm of solicitors;
3. How was a solicitor’s clerk with such a criminal record able to visit, let alone “advise”, a client in custody;
4. Why was the case against Hung Chi-him dropped and was any consideration ever properly given, or effort made, by the prosecution to calling the appellant to give evidence against him, either as an immunised or non-immunised witness;
5. Has there ever been any investigation by any prosecuting or professional authority into the conduct of the appellant’s previous firm of solicitors, including the said solicitor’s clerk;
6. To whom in the Department of Justice was the case referred when the trial judge adjourned the matter on 11 April 2019, and were the trial judge’s concerns about the propriety of the continued prosecution properly and fully conveyed to an appropriate person of sufficient seniority in the Department?
7. These are serious questions which require to be answered if miscarriages of justice are to be averted in the future. We trust that they will be properly addressed by the authorities concerned.

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| (Andrew Macrae)Vice President | (Derek Pang)Justice of Appeal | (Kevin Zervos)Justice of Appeal |

Ms Hermina Ng SPP, of the Department of Justice, for the Respondent

Mr Eric TM Cheung, solicitor advocate and Mr Jevons CH Chan, instructed by ONC Lawyers, assigned by the Director of Legal Aid, for the Appellant

1. *HKSAR v Ma Ka Kin* (Unrep., [2021] HKCA 101, 21 January 2021), *per* Macrae VP. [↑](#footnote-ref-1)
2. *HKSAR v Ma Ka Kin* (Unrep., [2021] HKCA 524, 26 April 2021), *per* Zervos JA. [↑](#footnote-ref-2)
3. Appeal Bundle (“AB”) Bundle B, p 140 and 140-1. [↑](#footnote-ref-3)
4. AB, Bundle B, p 141 (the Chinese original); p 142 (the English translation) [↑](#footnote-ref-4)
5. AB, Bundle B, pp 146-147. [↑](#footnote-ref-5)
6. AB, Bundle B, p 194 (the Chinese original); p 193 (the English translation). [↑](#footnote-ref-6)
7. AB, Bundle B, pp 150-153. [↑](#footnote-ref-7)
8. *HKSAR v Ma Ka Kin* (Unrep., [2018] HKCFI 2711, 11 December 2018). [↑](#footnote-ref-8)
9. *Ibid.*, at [30]. [↑](#footnote-ref-9)
10. *Ibid.*, at [31]. [↑](#footnote-ref-10)
11. *Ibid.*, at [33]. [↑](#footnote-ref-11)
12. AB, Bundle A, p 50L-M. [↑](#footnote-ref-12)
13. *R v Galbraith* [1981] 1 WLR 1039. [↑](#footnote-ref-13)
14. AB, Bundle A, p 53N-O. [↑](#footnote-ref-14)
15. AB, Bundle A, p 53Q-R. [↑](#footnote-ref-15)
16. AB, Bundle A, p 54N-P. [↑](#footnote-ref-16)
17. AB, Bundle A, p 55J-K. [↑](#footnote-ref-17)
18. AB, Bundle A, p 56J-K. [↑](#footnote-ref-18)
19. AB, Bundle A, p 95Q-R. [↑](#footnote-ref-19)
20. AB, Bundle A, p 95R-S. [↑](#footnote-ref-20)
21. AB, Bundle A, p 96K-O. [↑](#footnote-ref-21)
22. AB, Bundle A, p 98K-L. [↑](#footnote-ref-22)
23. AB, Bundle A, p 98M. [↑](#footnote-ref-23)
24. AB, Bundle A, p 96M-O. [↑](#footnote-ref-24)
25. AB, Bundle A, p 97K. [↑](#footnote-ref-25)
26. AB, Bundle A, p 99B-E. [↑](#footnote-ref-26)
27. AB, Bundle A, pp 99M-100I. [↑](#footnote-ref-27)
28. AB, Bundle A, p 101E-I. [↑](#footnote-ref-28)
29. AB, Bundle A, p 101J. [↑](#footnote-ref-29)
30. AB, Bundle A, pp 37T-38P. [↑](#footnote-ref-30)
31. AB, Bundle A, p 38M. [↑](#footnote-ref-31)
32. AB, Bundle A, p 38Q-R. [↑](#footnote-ref-32)
33. AB, Bundle A, pp 34K-36L. [↑](#footnote-ref-33)
34. AB, Bundle A, p 126D. [↑](#footnote-ref-34)
35. AB, Bundle A, p 126F-J. [↑](#footnote-ref-35)
36. AB, Bundle A, p 99C-D [↑](#footnote-ref-36)
37. AB, Bundle A, p 95Q-R. [↑](#footnote-ref-37)
38. AB, Bundle A, p 50N-O; p 53N-O. [↑](#footnote-ref-38)
39. AB, Bundle A, p 98K-L. [↑](#footnote-ref-39)
40. AB, Bundle B, p 346, at [27]. [↑](#footnote-ref-40)
41. See [19] *supra*. [↑](#footnote-ref-41)
42. AB, Bundle A, p 96M-O. [↑](#footnote-ref-42)
43. AB, Bundle A, p 95Q-R; p 96O; p 97H. [↑](#footnote-ref-43)
44. AB, Bundle A, p 97C-D; p 98J-K. [↑](#footnote-ref-44)
45. At [26] *supra*. [↑](#footnote-ref-45)
46. AB, Bundle A, p 35J-K. [↑](#footnote-ref-46)
47. AB, Bundle A, p 35Q-R. [↑](#footnote-ref-47)
48. AB, Bundle A, p 36D-F. [↑](#footnote-ref-48)
49. AB, Bundle A, p 126C-D. [↑](#footnote-ref-49)
50. AB, Bundle A, p 126E-F. [↑](#footnote-ref-50)
51. AB, Bundle A, p 126E-F. [↑](#footnote-ref-51)
52. AB, Bundle A, p 126F-J. [↑](#footnote-ref-52)
53. *HKSAR v Cheung Mei Ching, Tina* (Unrep., CACC 349/2007, 29 April 2009). [↑](#footnote-ref-53)
54. *Ibid.*, at [37]. [↑](#footnote-ref-54)
55. *Ibid.*, at [38]. [↑](#footnote-ref-55)
56. *R v Cooper (Sean)* [1969] 1 QB 267. [↑](#footnote-ref-56)
57. *R v Tang Wai-tong & Anor* [1979] HKLR 479. [↑](#footnote-ref-57)
58. *Cooper (Sean)*, at 270G. [↑](#footnote-ref-58)
59. *HKSAR v Chang Che Wei* [2012] 2 HKLRD 1151. [↑](#footnote-ref-59)
60. *Cooper (Sean)*, at 271F-G. [↑](#footnote-ref-60)
61. *Kwong Kin Hung v The Queen* [1997] HKLRD 15. [↑](#footnote-ref-61)
62. *Ibid.*, at 19D-F [↑](#footnote-ref-62)
63. *Tang Wai-tong & Anor*, at 487. [↑](#footnote-ref-63)
64. *Galbraith*, at 1042E. [↑](#footnote-ref-64)
65. *Tang Wai-tong & Anor*, at 490; *Cheung Mei Ching, Tina*, at [37]. [↑](#footnote-ref-65)
66. AB, Bundle A, p 38P-R. [↑](#footnote-ref-66)
67. See letter from Ms Hermina Ng, dated 22 April 2021. [↑](#footnote-ref-67)
68. [2021] HKCA 524, at [41]. [↑](#footnote-ref-68)
69. *Ibid.*, at [42]. [↑](#footnote-ref-69)
70. The name card of the person concerned describes his job function as “Criminal Litigation Manager”. [↑](#footnote-ref-70)