FACC No. 1/2018

IN THE COURT OF FINAL APPEAL OF
THE HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO. 1 OF 2018 (CRIMINAL)
(ON APPEAL FROM CACC 226/2013)

BETWEEN

HKSAR Respondent

And

CHAN KA CHUN Appellant

SUPPLEMENTAL CASE FOR THE APPELLANT

Page reference at the margin herein inside [ ] is the page number of the Record

1. This Supplemental Case is to reply to the Respondent's Printed Case ("**RPC**"), and will adopt the abbreviations in the Case for the Appellant and the RPC.

2. In reply to paragraph 9(1) of RPC, other than knowledge of the drugs, the possession of the drugs was also the key issue of the case. The issues to be

determined by the jury were turned on solely on credibility.

3. Even the Respondent termed the adverse comment as "**impugned remarks**" in paragraph 14 of PRC and agreed in paragraph 28 of RPC that the impugned remarks was first appeared once at the outset and once in the middle of the summing-up.

4. As to paragraphs 10 to 13 of the RPC concerning the reasoning given by the Court of Appeal, it is submitted that the impugned remarks were directed to the state of the car, the reason why the Appellant was at the scene and the person called "Hak Chai". The impugned remarks were specifically commenting variation/different answers given by the Appellant in the VRI for the above mentioned issues at different stages.

5. With respect to the Court of Appeal, the impugned remarks were not commenting the Appellant not with clear communication; disregard of proper sentence construction; answered questions in piecemeal and not all in one go. Whether the Appellant could provide eloquent answer is completely different from giving "different answers". The views expressed by the Court of Appeal was not the basis for the impugned remarks.

6. The Appellant would further refer to paragraphs 31 to 34 of the Appellant's Case filed herein.

7. Paragraphs 17 and 18 of the RPC was the presumption of the Respondent only, as the trial and summing-up were conducted in English, there was a high likelihood that the jury may regard to the wrongly English translated transcript in their deliberation. More importantly, before the deliberation, the jury has been received the summing-up with the impugned remarks which have the effect in destroying the credibility of the Appellant. In no way that the summing-up containing the impugned remarks could be said as balanced and adequate as claimed by the Respondent.

8. As to paragraph 21 of the RPC, unlike the impugned remarks which directing to the incidents happened on the material date concerning the Charge, item 70 was just concerning a past incident happened before. Moreover, even the Trial Judge could give the comment for item 70 as she did, it does not mean that Trial Judge could make the impugned remarks.

9. As to paragraph 22 of the RPC, it is submitted that the

impugned remarks would certainly has the effect that the Trial Judge expressed that the Appellant was telling lies/inconsistent answers in the VRI concerning the main issues (i.e. reason why he was at the scene and the state of the car which drugs found). Not to mention that what a judge says to the jury in the summing-up is very often the last word that before they retire and carries more weight than the closing submission of counsel.

10. The impugned remarks touched upon the reason why the Appellant was at the scene and whether the car has been repaired and paid or not. Common sense and experience would tell that if the car has already been repaired and paid for the work, it would be driven away by the car owner/Appellant and would not be driven away by the garage/Hak Chai, and in that case the possibility of Hak Chai who was also a drug dealer would still leave the valuable drugs inside the car when the same is going to hand back to the owner/Appellant.

11. In item 312, the Appellant already stated that he wouldn't drive the car away as Hak Chai still needed to help him take the car for fixing which nit yet fixed. In any event, in a while he would go upstairs to visit his mother. ***[p.116]***

12. The impugned remarks which resulted by the Misinterpretations obviously deprived the jury to fully understand and to consider the true gist of the VRI, the defence's case and undermined the credibility of the Appellant. The impugned remarks should not be given at all or there is no basis for such impugned remarks.

13. As to paragraph 23 of RPC, the Respondent must mixed up themselves to the answers given by the Appellant in the VRI for the incident happened on the material date and past "incident".

14. Item 104 was referring to the incident happened on the material date while item 118 and 120 were referring to past incident happened before. Therefore, it could not be said as a "slightly different version of the account" as to the central issue or as suggested by the Respondent that the impugned remarks were based on this "different basis" as submitted by the Respondent in paragraph 24 of RPC. ***[pp.80-81]*** ***[pp.83-84]***

15. It is submitted that a summing-up with impugned remarks which based on inaccurate evidence cannot be said as balanced and adequate in any sense and is a departure of the accepted norm.

16. While the Respondent accepts in paragraph 27 of the RPC that “an unbalanced summing-up would not be cured by the repetition of the phrase “it is a matter for you” to the jury”, on the other hand, the Respondent submits self-contradictory submission from paragraphs 25 to 30 of the RPC by submitting that the effect of the impugned remarks has been cured by presuming that the jury had regard to the VRI themselves.

17. The Appellant further refers to paragraphs 26 to 35 of the Case for the Appellant. It is submitted that the impugned remarks has compelling effect which influenced the mind of the jury as it was first given at the very beginning when referring to the evidence of the Appellant (i.e. VRI) and again appeared in the middle of the summing-up in regarding the VRI.

18. It is submitted that summing-up in a jury trial is one of the most important part of our criminal legal system as all juror is layman. It is the fundamental right of any defendant to have a fair and balanced summing-up. The well-established norm in regarding summing-up is that the evidence mentioned should be accurate and fairly to the jury. Views on the evidence by the trial judge must be based on accurate account of the evidence,

particularly comments adverse to the accused. Summing-up is the last word that heard by jury before their deliberation of the evidence and a summing-up carries more weight than what counsel says in a closing submission. The repetition of the formula that "it is a matter for you (i.e. jury) to decide" will not save unfair comments.

19. Therefore, by reasons of the aforesaid and the submission in the Case for the Appellant, no doubt, the Appellant has suffered a substantial and grave injustice which resulted by the impugned remarks upon the Misinterpretations which deprived the Appellant a fair trial.

Dated this 18th May 2018

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