CACC 378/1998

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO. 378 OF 1998

(ON APPEAL FROM HCCC 219 OF 1997)

BETWEEN

HKSAR Respondent

and

LUI KIN HONG, JERRY Applicant

Before: Hon Stuart-Moore V-P, Mayo V-P & Stock JA

Dates of Hearing: 20-21 March 2001

Date of Judgment: 6 April 2001

J U D G M E N T

Stuart-Moore V-P (delivering the judgment of the Court):

Introduction

On 11 June 1998, the Applicant was convicted of conspiracy to accept advantages, contrary to Common Law and section 9(1)(a) of the

Prevention of Bribery Ordinance, Cap. 201, following a 25-day trial in the Court of First Instance before Yeung J and a jury. The Applicant was sentenced on 25 June 1998 to three years and eight months' imprisonment and fined $500,000. In addition, he was ordered to pay the costs of the prosecution in the sum of $11 million and, after priority had been given to the payment of costs, restitution in the sums of $6 million and $4 million, respectively, in favour of his principals Brown and Williamson Tobacco Corporation and British–American Tobacco Company (HK) Limited (BAT).

Grounds of appeal in relation to conviction and sentence were first lodged by the Applicant's trial counsel, Mr Kevin Egan, on 17 July 1998. These grounds were replaced by Perfected Grounds of Appeal, dated 21 January 1999, which had been settled by counsel appearing for the Applicant in these proceedings. It was accepted by counsel for the Respondent that if the first of those grounds of appeal was decided in favour of the Applicant that the conviction would have to be quashed. In the event, the Court of Appeal quashed the conviction on 5 February 1999, and handed down its reasons for allowing the appeal on 26 February 1999. (See: *HKSAR v Lui Kin-hong* [1999] 1 HKC 748).

In due course, an application was made to this court on behalf of the Secretary for Justice for a certificate to appeal to the Court of Final Appeal. This was granted in March 1999 and leave to appeal was given by the Court of Final Appeal on 18 May 1999. On 14 December 1999, the Court of Final Appeal allowed the prosecution's appeal and the court then remitted the case to the Court of Appeal for consideration of the remaining grounds. (See: *Secretary for Justice v Lui Kin-hong, Jerry* [2000] 1 HKC 95).

The matter then came before the court as an application for leave to appeal against conviction and sentence. Before the hearing commenced, Mr McCoy, SC, on the Applicant's behalf, gave written notice of his intention to abandon all the remaining grounds of appeal relating to conviction apart from two which appeared in the most recently prepared perfected grounds dated 7 March 2001. During the hearing, Mr McCoy received instructions from the Applicant to abandon the second of those grounds.

On 20 March 2001, at the conclusion of the hearing in relation to conviction, we dismissed the application. On the following day, we reserved judgment after hearing submissions relating to sentence. We now give our reasons for dismissing the first application and we shall give judgment on the sentence application.

The offence

A warrant was first issued for the arrest of the Applicant on 13 December 1994. On 23 May 1997, the Applicant was sent back to Hong Kong from the United States of America following extradition proceedings and various appeals. The Applicant's trial commenced on 13 May 1998.

The general circumstances related to the allegation against the Applicant have been dealt with in the previous judgments (above) of this court and the Court of Final Appeal. The particulars of the count on the indictment alleged that the Applicant:

> "… being an agent, namely an officer of Brown and Williamson Tobacco Corporation and British–American Tobacco Company (HK) Limited respectively, both companies being wholly owned subsidiaries of B.A.T. Industries Public Limited Company, between 1st day of June 1988 and 31st day of December 1993, in Hong Kong, conspired with Hung Wing-wah, Chui To-yan, Chong Tsoi-jun, Chen Ying-jen and other persons unknown, without lawful authority or reasonable excuse, to accept advantages namely, gifts, loans, fees, rewards or commissions of sums of money, as an inducement to or reward for or otherwise on account of the said Lui Kin-hong, Jerry doing or having done an act in relation to his principal's affairs or business, namely, ensuring the sale and supply of cigarettes from the said British–American Tobacco Company (HK) Limited to Wing Wah Company and/or Giant Island Limited and/or companies or entities associated thereto."

The Applicant faced the charge on his own. Chui To-yan was murdered in Singapore and Chong Tsoi-jun committed suicide. Hung Wing-wah and Chen Ying-jen (Chen) are, we were informed, still at large.

Trial issues

For the purposes of this application, it is unnecessary to set out in any detail the evidence which was called to support the prosecution's allegation. Suffice it to say, the Applicant was alleged to have conspired with the others named in the conspiracy count to receive payments which amounted to about $21 million together with two loans totalling $10 million as bribes to ensure the sale and supply of cigarettes from BAT to Wing Wah Company and Giant Island Limited (GIL). The Applicant's receipt of these sums was not in issue although the prosecution was put to strict proof of this

element of the offence which added considerably to the length and complexity of the trial.

At the end of the prosecution's case, there were only two real issues for the jury to decide as Mr McCoy, in these proceedings, accepted. The first of these was concerned with the identity of the payers of the $23 million to the Applicant. The second issue was equally straightforward and related to the purpose for which the loans and payments were accepted by the Applicant.

In his defence, the Applicant admitted receiving the payments totalling $23 million and he stated that these were made because he had advised Hung Wing-wah and Chen Ying-jen to sell cigarettes in Taiwan which had been manufactured not by BAT but in Japan. In furtherance of this scheme, he stated that he had provided Chen Ying-jen with a Japanese dealer's contact number which led to massive profits being made on sales of Japanese cigarettes to Taiwan. The Applicant went on to describe how he became a consultant to Chen Ying-jen to whom he was able to give market information and other advice which he had gathered from the senior position he once held with Brown and Williamson when he was based in Taiwan. In real terms, the defence boiled down to a suggestion that the Applicant had been supplying smugglers with cigarettes, in return for substantial payments. Obviously, if the jury had accepted this defence, it would have amounted to a wholly different offence to the one specified in the indictment. As Mr McCoy remarked at one stage, he was not seeking to gain any "moral high-ground" in the advancement of this application, but if the defence was accepted, the Applicant was entitled to be acquitted on the count he faced.

So far as the loan was concerned, the Applicant said that this had nothing to do with the supply of cigarettes by BAT to GIL or its associated companies. This was said to have been a loan from Hung Wing-wah in order to trade in shares for the purposes of obtaining money to cover the initial expenses of a business venture at Subic Bay in the Philippines.

Conviction

Ground 1: Judicial interventions

It was submitted by Mr McCoy, in the only ground of appeal that he pursued, that the trial judge had interrupted the Applicant's evidence in all its stages with "an inordinate number of questions". He contended that the "timing, nature and tone" of the questions asked by the judge "transgressed the acceptable limits of judicial intervention" in that these would have left the jury with an indication that the judge disbelieved the Applicant's evidence.

By way of background to the criticisms Mr McCoy levelled at the judge, which he emphasised in no sense amounted to a suggestion of deliberate bias against the Applicant, he pointed out that at various stages of the trial the courtroom "temperature" may have been raised somewhat by the unacceptable antics of the Applicant's trial counsel, Mr Egan. These were aptly described by Mr McCoy as having amounted to the kind of "courtroom etiquette" to which he would not expect other practitioners to resort. We were shown examples, amongst others, of sarcasm directed at the judge and

of inappropriate interventions in the jury's presence, raising matters which, as any experienced advocate would be all too well aware, could only properly have been made in the absence of the jury. Mr Egan's behaviour, in seeking to gain some advantage for his client by the tactics he employed, was very properly and roundly condemned by Mr McCoy.

This being said, Mr McCoy argued that the jury may well have gained the impression that there had been sustained conflict between the judge and Mr Egan so that when the judge questioned the Applicant, he may have appeared to the jury to have formed an adverse impression of the Applicant's testimony. Mr McCoy submitted that the combined effect of the judge's questions and the answers given by the Applicant was to "severely dent" the Applicant's credibility. He also suggested that the judge had taken over the prosecutor's role by the "crisp style" in which the Applicant was "nailed down and effectively destroyed".

This submission depended in large measure upon the questions which were asked by the judge after the Applicant had been re-examined by Mr Egan. It was pointed out that there were about seventy-six questions, occupying seven pages of transcript between pages 784 and 790. At one stage, Mr Egan had objected to the number of questions, saying that he had so far counted fifty-one. He continued, in the presence of the jury, by reminding the judge of a decision of the Court of Appeal. The judge interrupted what Mr Egan was saying by informing him that he was well aware of the decision. Mr Egan was not deterred by this and continued, still in the jury's presence, by saying:

> "MR EGAN: 'Excessive questioning by a judge…'

COURT: I'm well aware …

MR EGAN: '… may show the judge has taken sides …'

COURT: Mr Egan, I said that I'm well aware of that decision. You would, no doubt, if you read the judgment, you'd know that this is appealed against my decision.

MR EGAN: Yes. It says that …

COURT: Yes.

MR EGAN: … the trial must be conducted in such a way as to show that the judge has remained impartial throughout.

COURT: Of course. I'm trying to be impartial. Of course; there's no doubt about it.

MR EGAN: Well, my Lord, we've placed our objection on the record.

COURT: You've made your point." (Tr. pp.788-789)

It is unnecessary to set out the details of the questions which the judge asked at the end of the Applicant's re-examination. It is apparent from these, as the judge stated before he embarked on them, that there were two areas on which he needed clarification in order to be sure that he had correctly understood the Applicant's evidence about the loans he had received. In any event, as Mr Reading, SC, who prosecuted at trial and now appears for the Respondent, was able to demonstrate, there were in reality only about thirty questions on the two areas of concern raised by the judge. Mr McCoy had arrived at a total of seventy-six questions by adding up the

number of times the letter ‘Q’ appeared in the margin of the transcript even though the judge was often recorded as saying little more than “yes” or “alright” while the Applicant was delivering long answers. A number of other so-called “questions” amounted to a rehearsal of some of the Applicant’s earlier evidence in order to make sense of the questions the judge was then addressing.

It is apparent from reading the transcript that the judge was, as he had stated, concerned to gain further clarification over aspects of the Applicant’s evidence which were as yet far from clear. Certainly no prejudice flowed from the questions in themselves although it may be, that by removing the ambiguities which had existed until they were asked, the Applicant’s replies may not have been helpful to his case. It does not, however, follow that the questions should not have been asked. Bearing in mind that the judge had to sum up the case, these were important questions which, in the circumstances, needed to be asked.

There were a number of occasions when the judge found it necessary to interrupt the Applicant’s evidence in-chief and in cross-examination. It has to be said, in this context, that the Applicant often gave convoluted answers which, when analysed, were far from clear. On other occasions, he appeared to have contradicted himself or to have made obvious mistakes. All of these matters, in a case of some complexity, required clarification for the judge to gain a proper understanding of the Applicant’s evidence. The Applicant was entitled to expect a fair summing up to the jury, based on what the Applicant was saying rather than on what the judge thought he might have been saying. In this regard, it is not without

significance that the summing up itself has not been criticised in any way. On the contrary, it was a model of conciseness and accuracy.

One other interruption was concerned with an answer given by the Applicant to the effect that a prosecution witness, Mr Tull Chu, had lied in his evidence. This led to another regrettable episode in Mr Egan's handling of the situation which appears in the transcript at page 638:

> "COURT: I'm sorry. Perhaps you can ask this witness to elaborate as to which part of his evidence is lying. I don't remember Mr Tull being …
>
> MR EGAN: It was never put to the witness …
>
> COURT: ... accused of lying.
>
> MR EGAN: … that he was lying, my Lord. Well, my Lord, the very simple matter is, every time I got anywhere near suggesting to Mr Tull CHU that Japanese tobacco industry product were being smuggled into or sent illicitly into Taiwan market during the period where they weren't supposed to be there, he disclaimed any knowledge whatsoever that this was going on. Now, really, my Lord, I can't put anything more specific than that. He was shy about the subject and I think that's the best way to put it.
>
> COURT: But I don't think he denied it as such. He simply tried to say …
>
> MR EGAN: What Mr LUI is saying, my Lord, …
>
> COURT: … that he did not have personal knowledge.
>
> MR EGAN: … is that, in refusing to acknowledge that he was lying, …

COURT: Well, perhaps you will ask this witness to elaborate on what he meant by saying that Mr CHU is lying.

MR EGAN: Pleased to …

COURT: That's what I want to know.

MR EGAN: … to make his Honour happy – his Lordship happy.

MR READING: Well, with great respect to my learned …

COURT: It's not to make me happy, Mr Egan. We are talking about evidence. It's not to make me happy at all. I find that rather…

MR READING: Yes.

COURT: … insulting." (Tr. pp.638-639)

It could be said that the judge might have waited a little longer to see how the Applicant's evidence developed before making his interruption but we are unable to see that any prejudice was caused to the defence when, in any event, the matter required clarification.

For the reasons we have given, we dismissed the application for leave to appeal against conviction. However, before we turn to the matters which relate to sentence, we should say that this application has provided a prime example of the importance of the judge's role at trial in ensuring that members of the jury are not left with ambiguities in their minds on central issues in the trial. All too often in this court we have seen situations where ambiguities have arisen on the evidence which have cried out for some explanation to be given. It may be that counsel have not thought it wise to

ask a particular question or, through inexperience, or forgetfulness or for some other reason, it has not been asked. In such situations, whether sitting alone or with a jury, it will more often than not be advisable for the judge to make the enquiry that counsel have left untouched.

In *HKSAR v Mohammad Jahangir & Ors* [1998] 1 HKC 455, where this court reviewed the law relating to where the line must be drawn between permissible and impermissible interventions made by a trial judge, reference was made at 464 to a passage taken from *R v Saville* (Crim App 4181/91, 17 March 1992, unreported). The Court of Appeal in England stated what, to most experienced judges, will seem obvious but, in view of the number of times it has continued to be honoured in the breach, we consider it worth repeating here:

> "If the presiding judge perceives the risk of a case going off on a wholly wrong basis, whether because of some legal technicality which has been overlooked, or because of some lacuna in the evidence, it is not incumbent on him to grit his teeth, remain silent and watch justice miscarry – for it is no less a miscarriage of justice when an accused person escapes conviction through inefficiency or carelessness on the part of the Crown, than when he is convicted as a result of a comparable error on the part of the defence. Rather it is the duty of the judge to ensure that criminal proceedings are tried fairly and efficiently, and to intervene as necessary to ensure that that goal is achieved."

Clearly, a judge must never descend into the arena. If that occurs, the judge loses the mantle of an arbiter and becomes a combatant. However, applying the wisdom in *Saville,* it is the positive duty of a judge not to sit silently in court where intervention is required. In the present case,

Yeung J carried out this duty in a way which we consider to have been above reproach.

Sentence

I. Imprisonment after "dashed hopes"

The notice of application for leave to appeal was dated 18 July 1998. Under the particulars of sentence appealed against, the term of imprisonment, the fine, the costs, and the restitution order were stated. Grounds were appended to the notice, and the grounds of appeal against sentence began with the phrase:

> "The totality of the sentence imposed is both wrong in principle and manifestly excessive as follows …."

It was asserted in what followed that the custodial sentence was not challenged but that the fine, the compensation order, and the order for costs each were, and the complaints in respect of each of those orders were stipulated. Those grounds were settled by Mr Egan.

Much more recently, an application was made for leave to appeal against sentence out of time, and written grounds were produced in support of that application. (The format of that application is a matter to which we shall return). The attack in this instance was against the term of imprisonment. The basis of the attack was that, whilst the original term was not wrong in principle or manifestly excessive when it was imposed, it would now be unduly harsh and burdensome to reinstate it. That is because

upon the quashing of the conviction in February 1999, the Applicant was released; two years have since passed; and the Applicant is the victim of "dashed hopes", in that he was released in February 1999, and his conviction was reinstated as a result of the prosecution's success in its appeal to the Court of Final Appeal. The situation is all the more unjust, it was said, because the appeal by the prosecution to the Court of Final Appeal was out of time, by which stage the Applicant was entitled to believe, and was advised, that he was no longer in jeopardy.

After we had disposed of the application for leave to appeal against conviction on the first day of this hearing, Mr McCoy argued in detail the merits of the sentence application in all its aspects. He drew to our attention a number of cases in which the "dashed hopes" argument has resulted in a reduction of sentence. They are *R v Wong Muk Ping* (Crim App 92/84, 2 April 1987 (unreported)); *R v Yip Kai Foon* [1988] HKC 134; and *HKSAR v Li Li Mua* FACC 7/2000, 6 March 2001 (unreported). It is not necessary to refer to their detail, for there is no issue before us as to the applicable general principle, namely, that due regard is to be given "to the doubts and anxieties experienced by [an] applicant between the time his appeal against conviction was allowed and the time he came back before the court after the conviction had been restored." (per Kempster JA in *Yip Kai Foon*, above, at p.136C). So, too, in this Applicant's case, we are of the view that the Applicant's dashed hopes would, if looked at in isolation, warrant some reduction in the term of imprisonment, though we are unimpressed by the contention that he suffered additional stress because the Respondent went before the Appeal Committee of the Court of Final Appeal to seek leave to appeal out of time. The Applicant knew full well, within the time allowed for the Respondent to launch an appeal, that an appeal was intended, and was

effectively underway, because on 27 February 1999 the Secretary for Justice applied for a certificate, the application was listed for hearing, and heard on 5 March, when the certificate was granted. The Applicant and his advisers had notice of, and appeared at, that hearing. They knew, in other words, before the expiration of the 28-day period from the quashing of the conviction, that the Respondent intended to appeal, and it ought to have been obvious that an application for a certificate would be difficult to pursue in the absence of the Court of Appeal's written reasons, which were handed down on 26 February 1999. If the Applicant was told that he was no longer in jeopardy, then that is advice which ought not to have been given, and it is a factor which cannot be prayed in aid of some further reduction. Still, the dashed hopes point, unaided by this suggested additional factor, survives in the Applicant's favour.

That is, however, not the end of the matter in relation to the term of imprisonment. It is of course open to an applicant to draw to the court's attention factors not taken into account at the time of sentence either because they were then overlooked or because they have since occurred. But if that is done, the court is not to be blinkered in its approach, so as to shut out other factors material to sentence, or to restrict itself simply to the one factor which happens to lie in an applicant's favour. This court is only empowered to alter a sentence if it considers that an applicant "should be sentenced differently for the offence for which he was dealt with by the court below" (see section 83I(3) Criminal Procedure Ordinance, Cap. 221). In addressing that issue, *all* factors relevant to sentence must necessarily come into play. This court does not ignore the fact that there will be cases which will warrant an adjustment of a sentence to compensate for a legitimate sense of grievance arising, for example, from some irregularity in the proceedings. The duty of

this court is to achieve a sentence which is correct in all the circumstances, and whilst an isolated factor on appeal may have real merit, there may yet be counterbalancing factors which weigh against a reduction in the sentence. This is such a case. This is so because the term of imprisonment originally imposed upon this Applicant was in our opinion manifestly inadequate. The Applicant and his advisers must, we perceive, at all times have been fully aware that he had been lucky in the term imposed. It is not surprising that the grounds of application, and the argument, have been careful to stress that the one aspect about which no complaint was made was the term of imprisonment. But the Applicant cannot, in our judgment, come to this court pocketing his luck whilst flourishing his grievance.

We say that the sentence was manifestly inadequate because this was a case in which advantages totalling over $30 million were accepted over a three-year period by a mature and educated man, who occupied a senior position in a major industry, who showed no remorse (even after conviction, when he continued to maintain his innocence), and in respect of whom there was simply no mitigation. He had fled the jurisdiction, pleaded not guilty, and had offered to pay back not one cent of the cash bribes he had received. The judge took a starting point of five years' imprisonment. In our judgment that was clearly too low. A starting point of not less than six years was called for. He deducted six months for his previous good character. Given the length and scale of the offence, and his own evidence that he had been involved for years in smuggling cigarettes, that might be viewed as a generous deduction. The judge then reduced the term of imprisonment by a further 10 months to give some credit to the Applicant for the fact that he had spent 17 months in custody in the USA pending extradition. In our judgment that was too generous and, but for one matter, the Applicant deserved no

reduction at all for that factor. He fled from Hong Kong when he knew full well that an investigation was underway. He fought the extradition largely on the basis that he could not obtain a fair trial in Hong Kong, and whilst he is not to be penalised for adopting that fashionable line, neither should he be permitted to pray in aid the period of custody which he thereby brought upon himself. Nor is there shown any conduct on the part of the prosecuting authorities, or by the authorities of the USA which unnecessarily prolonged his detention. The one factor that might properly be taken into account is that probable cause for extradition was not established in relation to one of the charges.

In the circumstances we have described, we could not properly say that the Applicant should, notwithstanding the dashed hopes factor, be sentenced differently for the offence, by a reduction of sentence. A reduction would result in a sentence which, even taking that factor into account, would be a travesty.

Indeed we have given anxious consideration to the question whether we should exercise our power given by section 83I(3) to increase the term of imprisonment. Section 83I(3) is as follows:

> "(3) On an appeal against sentence the Court of Appeal, if it considers that the appellant should be sentenced differently for an offence for which he was dealt with by the court below, may –
>
> (a) quash any sentence or order which is the subject of the appeal; and
>
> (b) in place of it pass such sentence or make such order as it thinks appropriate for the case (whether more or less severe) and as the court below had power to pass or make when dealing with him for the offence."

In the event, we have decided that, given the passage of time since sentence, the fact that two years have passed since the Applicant's release, and the merit of the dashed hopes argument, it would be inappropriate to increase the term of imprisonment.

This decision renders academic for practical purposes an argument which raged before us about the right of the Applicant to abandon that part of his appeal directed at the term of imprisonment, but we deal with it shortly nonetheless in order to explain why, despite that purported abandonment, we have addressed the merits of this part of the application.

Soon after Mr McCoy appreciated that this court was not minded to examine the "dashed hopes" argument in isolation, taking the view that the sentence of imprisonment originally imposed was wholly inadequate, he purported to abandon the application for leave to appeal against sentence out of time or, if the application was not out of time, to abandon the application itself in so far as it related to imprisonment. There was, in our judgment, no question of the application being out of time, for an application to appeal against sentence was made in 1998, well within the required time limit. Further, that original application itself, not only because of the terms of the notice, but also because of the terms of the grounds filed in support, necessarily engaged this court in addressing the question of the term of imprisonment as part of the entire package which the Applicant was attacking. (We note, incidentally, a written notice was never filed to apply out of time. Only grounds were presented in writing, the application itself being made orally to the court).

Putting aside the question whether an appeal against sentence can be compartmentalised in the way Mr McCoy suggested, taking out of the court's purview those parts which an Applicant approves but leaving in those he does not – a proposition which has only to be stated for its weakness to be revealed and which, in our opinion, sits ill with the terms and scheme of those statutory provisions relevant to this aspect of the appeal (in particular sections 80(1), 83G and 83I, and section 72(1) (now repealed) of the Criminal Procedure Ordinance) – he was not, in our judgment, entitled to do so without this court's leave (See *R v de Courcy* [1964] 1 WLR 1245; *R v. Spicer* [1988] 87 Crim App R 297). The reasoning adopted in those cases applies equally to this case. Here the Applicant had complained in open court through counsel, and at length, that his client had been hard done by, adding, for good measure, that the prosecuting authorities had, through neglect, added to his stress. We were told, in further mitigation, that the Applicant had paid the fine imposed by the trial judge, though it was left to us to ascertain that the fine was paid only a few days before this appeal. It is a mere game if all of that can be abandoned, unanswered, without the court's leave, the moment the court hints that the arguments ignore significant features of the case and that the Applicant is in peril of an adjustment which will, albeit against his interests, reflect the justice of the matter.

Mr McCoy then asserted that there was nothing for him to abandon, for the appeal against the term of imprisonment had already been abandoned by reason of the way the grounds of appeal had from time to time been framed by counsel acting for the Applicant. That argument, too, was untenable. The notice of application for leave to appeal was an application to appeal against sentence, including the term of imprisonment; and the grounds in support then filed asserted that the *totality* of the sentence was

wrong in principle and manifestly excessive, although making it clear that on its own the sentence of imprisonment was not an issue. The sentence was a package and, particularly since it was said to be wholly excessive, each part fell for consideration. The suggestion that the appeal had already been abandoned by grounds of appeal filed at various stages ignores the requirements of rule 39 of the Criminal Appeal Rules; confuses the concept of an application, on the one hand, with the grounds in support of it, on the other; and sits ill with the contention that had also been advanced, that the appeal against the term of imprisonment was an appeal out of time.

In the event, we do not grant the Applicant leave to abandon that part of the application relating to the term of imprisonment, even assuming such compartmentalisation were permissible. This is a case of which, in relation to the term of imprisonment, this court is seized, in which complaints have been aired, a case of considerable public interest, and a case of bribery on a large scale. Furthermore, there remain alive aspects of the appeal which have merit (costs), and a consequential aspect (restitution). We perceive it to be our duty to address all the questions raised and to decide them.

For the reasons we have given, the argument that the term of imprisonment should be decreased fails.

II. Costs

There is no question but that the order for costs was the subject of complaint in the notice of application for leave to appeal against sentence,

and at all subsequent stages. It should be noted, too, that it was the subject of complaint in an appeal against sentence under section 83G, Cap. 221 and not, as is now permissible, by virtue of section 19 of the Costs in Criminal Cases Ordinance, Cap. 492.

The judge ordered the Applicant to pay "to the prosecution costs of the proceedings in the sum of $11,000,000." There are three attacks now levelled against that order:

(1) that the judge ought not to have made a fixed sum order, but should rather have ordered costs to be taxed;

(2) that, in any event, the sum is excessive as including costs for which no person convicted upon indictment was liable in law under the relevant statutory provision, namely, section 72 of the Criminal Procedure Ordinance (which section has been repealed but which governed the power to order costs in relation to this trial); and

(3) that in ordering the costs to take priority over the order for restitution, the judge acted without lawful authority.

(1) The hearing

On 11 June 1998, the day upon which the jury delivered its verdict, the prosecution asked for costs, to which Mr Egan's response included a comment that the defence team had not yet researched the applicant's capacity to pay.

On 15 June 1998, when questions relating to sentence were canvassed, the trial judge asked for a breakdown of costs which were sought by the prosecution – "pertaining" he said, "to the costs of the prosecution, not the cost of the investigation. The costs of the prosecution in Hong Kong as well as the costs of the extradition proceedings in USA."

The next sentencing hearing was on 25 June. There was read to the court a letter from the tobacco companies which said that they did not wish to compete with any order for costs, did not wish to benefit from the Applicant's crimes, but that "any recovery [the companies] might achieve would be donated to charitable and worthy causes." It was suggested that any restitution order should be made as to 40% in favour of British America Tobacco (Hong Kong) Limited and 60% in favour of Brown and Williamson Tobacco Company, to reflect the proportion of bribes received by the Applicant when working for each company.

Counsel for the prosecution presented to the judge a "summary of prosecution costs," totalling $11.25 million, saying that he had included in the summary costs of the investigation, and argued that such investigation costs might properly be included. There was a discussion about the Applicant's ability to meet a costs order and reference to his assets.

The summary of costs presented was quite detailed. It referred to investigation costs, letters of request, extradition proceedings, pre-trial reviews, and trial; and within each category the cost attributable to the work of named law enforcement officers, counsel, and accountants, was stipulated, with reference to rates, air fares, accommodation, and so on. The summary was dated 24 June 1998 and had only been sent to counsel for the Applicant on that day, that is, one day before the sentencing hearing. In addressing the court as to costs, counsel for the Applicant, Mr Cahill said that if, contrary to the Applicant's contention there was to be an order for costs, then "we would ask that the costs be taxed." He then moved on to tackle other issues relevant to costs, and the question of taxation was never again mentioned by either counsel or by the court.

In addressing the question of costs and restitution the judge said:

> "In this regard, I also bear in mind that it is a well-established principle that no criminal should be allowed to be benefit from his crime. Hence, this $23 million obtained by the accused must be repaid.
>
> This case clearly has attracted a very long and expensive proceedings, both in Hong Kong and abroad, and the prosecution have clearly incurred very substantial expenses in connection with this case. The public purse must be compensated. I bear in mind that there is a possibility that the accused's assets may not be adequate to meet both the costs and the full restitution of this $23 million. I bear in mind that, as between the accused and the tobacco companies, the accused is clearly more culpable. I also bear in mind the costs of the prosecution as set out in the skeleton bill submitted by the prosecution.
>
> I make the following orders. I order that the accused is to pay to the prosecution costs of the proceeding in the sum of $11 million. I order that the accused is to pay to Brown & Williamson in restitution a sum of $6 million and that he has to pay British

> American Tobacco (Hong Kong) Limited in restitution a sum of $4 million.
>
> As the ordinance entitles me to decide the manner as to how such payment should be made, pursuant to that power, I order that the payment of the costs of the prosecution is to have priority over the order of restitution in favour of the two tobacco companies."
> (Tr. p.146)

(2) Taxation

Quite why the question of taxation was not again addressed, after Mr Cahill raised it, is not clear. The matter was not pressed, and Mr Cahill did not seek an adjournment to consider the summary of costs. We accept that there is a clear advantage in making an order at trial, namely, the avoidance of expense, and there is much to be said for the making of a fixed sum order in a straightforward case, or even in a complex one where particulars have been given to the defence and the matter can properly be resolved. But in the circumstances we have described, given the large sum involved and the intimation by counsel that he was unhappy with the costs proposed, we are satisfied that there should have been an order for taxation. We should say that whilst we think that this was the course to take, the judge was not assisted by the absence of any complaint by counsel for the Applicant at the time that he had not had time to study the summary, by the absence of any application for an adjournment, or by the absence of any argument in support of the passing request for costs to be taxed. We have the advantage of knowing, as the judge did not, how much is in dispute and, with that advantage, we shall set aside the costs order and order it to be taxed. This is an order made with the concurrence of counsel for the Respondent who accepts that this must be the appropriate course.

We shall, accordingly, grant leave to the Applicant to appeal against sentence, treat the hearing before us as the appeal, set aside the order as to costs, and substitute the following order: that the Applicant shall pay the costs and expenses incurred in and about the prosecution and conviction for the offence of which he is convicted, such costs and expenses to be taxed if not agreed.

No difficult question arises as to the Applicant's ability to meet such order as to costs as may result from taxation. At trial, a schedule showing the Applicant to be seized (so far as the prosecution knew) of assets worth almost $31 million was presented to the court, including a property in his sole name then worth $16.5 million, a property in respect of which a restraining order is in force. Some of the monies, including a sum of $5.46 million was in one of the banks into which the bribes were secreted. There was some suggestion by Mr McCoy in these proceedings that the schedule thus presented was worthless, and a suggestion, when the restitution order was under discussion, that his client did not accept he was worth that amount. We note that, despite the fact that an application for costs was made on 11 June 1998, and the question of a restitution order was then raised, and despite the fact that an intention to make a costs order and a restitution order was "flagged" by the court on 15 June 1998, no evidence whatsoever was placed before the court by the Applicant as to his assets. This remains the case to this day. In other words, there was evidence from the defence on 11 June; no evidence on 15 June or on 25 June, despite Mr Egan's reference on 11 June that he had not yet researched the Applicant's ability to pay, and no evidence before us either, whether as to his means in 1998 or as to what has become of them, including the very substantial interest accruable on the monies corruptly taken. On 25 June Mr Cahill, though not in a position to

deal with each item on the schedule, did say that two deposits totalling almost $4.75 million had been expended on legal costs, but no evidence as to that was presented.

It is not for a defendant in the face of an application for costs to fold his arms and require the prosecution to prove what assets he has. If he seeks to pray in aid limited means, it is for him to disclose to the court proper and credible information about his assets, but for which a court is entitled to draw reasonable inferences (See *R v Northallerton Magistrates' Court, ex p. Dove* [2000] 1 Crim App R (S) 136).

(3) Categories covered

The terms of the costs order which we have made reflect the provisions of section 72(1) of the Criminal Procedure Ordinance which, when in force, provided as follows:

> "(1) It shall be lawful for the court, on the conviction of any person for an indictable offence, in addition to such sentence as may otherwise by law be passed, to condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted."

Section 72 is in terms different from those found in the Costs in Criminal Cases Ordinance, Cap. 492, an Ordinance enacted in January 1997 and which, by reason of section 25, did "not apply to criminal proceedings in respect of offences committed before the coming into operation of [that]

Ordinance." Accordingly, the new Ordinance does not apply to the present case, which is why we have to examine section 72, and determine its width.

Despite this court's decision to order taxation, there remains at large an argument between Applicant and Respondent as to the categories of expenditure embraced by section 72. We do not think that it is appropriate to leave that argument for later resolution by the taxing master or single judge to whom the master might well refer such a question. Such a course only spells further delay and further expenditure, both of which are undesirable.

The Applicant contends that the terms of section 72(1) do not permit the recovery of:

(a) any investigation costs; alternatively, costs of investigation carried out prior to the laying of the information;

(b) the cost of letters of request; or

(c) the costs of the extradition proceedings.

(a) Investigation costs

We have been taken to a series of cases, one from Hong Kong (*Attorney General v Covo Knitters Ltd* [1993] 2 HKC 571); several from England (*Maher* [1983] 5 Crim App R (S) 39; *Neville v Gardner Merchant Ltd* [1983] 5 Crim App R (S) 349; *R v Associated Octel Ltd* [1971] Crim App R (S) 435); and one from Northern Island (*Re Caffrey's Application for*

Judicial Review [2000] NI QBD 17), each of which determines the width of the particular statutory provision empowering a court to condemn a convicted defendant to pay prosecution costs. *Maher* was concerned with a provision (section 4(1) of the Costs in Criminal Cases Act 1973) close in its terms to section 72(1) of the Criminal Procedure Ordinance, and in that case jury expenses and items such as overtime payment to investigating officers were held to be outside the power conferred by the provision, and further that only such items as, under another provision of the same statute, were payable out of central funds, could be made the subject of a section 4(1) order. In other cases, such as *Neville*, a provision in less restricted terms, empowering magistrates to order a defendant to pay such costs "as they think just and reasonable", was held to embrace the costs of investigation leading to prosecution.

In their utility to an interpretation of section 72, these cases must be read with care, for the statutory provisions with which they dealt did not stand in isolation, and were addressed in the context of other provisions, and of the particular prosecutorial setting in their respective jurisdictions.

We think that section 72 speaks largely for itself. Section 72 does not permit an award of costs simply in any or all circumstances which a court might deem just. The words of limitation that are vital are the words "incurred in and about the prosecution and conviction for the offence of which he is convicted." There is, we believe, a distinction to be drawn between, on the one hand, the prosecution of the case and, on the other, steps leading, or taken with a view, to the institution of a prosecution (a distinction highlighted by a reading of *Neville*, and *Associated Octel*).

A person prosecutes a charge "… who lays information before a magistrate accusing of an offence … or in taking any active part in a prosecution at any stage … including preferring a Bill before a Grand Jury." (Stroud's Judicial Dictionary, 5th edition, Vol. 4 p. 2068), and in our judgment it is from the time of the laying of the information that section 72 takes effect, excluding from its ambit investigations carried out before that date, but including such costs and expenses as were incurred by the Hong Kong Government, or the HKSAR, through such work of the Department of Justice, the ICAC, and experts engaged on their behalf, as was reasonably necessary to carry the case forward to trial, and effectively to conduct the proceedings themselves. In this is included, for example, such work as preparatory work by counsel and the ICAC; advices on evidence; such investigations as counsel advised should be carried out with a view to bringing the case to trial and to a successful conclusion; the collation of expert evidence; and court appearances both by counsel and by those ICAC officers assisting them – provided in each instance the work was reasonably necessary. We do not propose to say whether each item presented to us in a list by the Respondent is or is not permissible, for our function in this judgment is to delineate in terms sufficiently helpful, we hope, to the taxing master, the width of section 72.

It was suggested that nothing prior to the laying of the indictment was permissible, and that the cost of the committal proceedings and preparation for those proceedings was excluded. We fail to see the rationale for that contention. The Magistrates Ordinance contains no provision by reason of which the prosecution might recover costs of committal proceedings, and there is nothing in principle, given the compensatory intent of any costs provision, which would suggest that the

authorities should not be compensated for the costs of, and relating to, the committal proceedings, a condition precedent to the effective conclusion of the prosecution process. We note the provisions of section 4 of the Costs in Criminal Cases Act 1973 which enables a court to order a defendant upon conviction in the Crown Court "to pay the whole or any part of the costs incurred in or about the prosecution and conviction, including any proceedings before the examining magistrate." This is to illustrate that committal proceedings are but part and parcel of the prosecution process, and the words emphasised are there, we perceive, for the avoidance of doubt; they are not phrased as a deeming provision, and their omission from section 72 is of no significance.

(b) Letters of Request

Mr McCoy argued that the costs incurred in the various letter of request proceedings were not recoverable. Those proceedings, he submitted, were separate High Court Miscellaneous Proceedings, and self-evidently not part of High Court Case No. 219 of 1997 (the trial on indictment); that many of the letter of request proceedings were *ex parte*; and that the Applicant should not be liable to pay compensation for proceedings before foreign courts and tribunals.

It seems to us to matter not one jot that the proceedings were entitled "Miscellaneous Proceedings" within the High Court's civil jurisdiction. That is merely a product of the prescribed procedure. The sole question to be asked is whether these were costs incurred in or about the

prosecution of this Applicant, and it is difficult to see in or about what else they were incurred.

Section 77 E(1) and (2) of the Evidence Ordinance, Cap. 8 provides as follows:

> "(1) Where it appears to the Court of First Instance that any criminal proceedings-
>
> (a) have been instituted in Hong Kong; or
>
> (b) are likely to be instituted in Hong Kong if evidence is obtained for the purposes of those criminal proceedings by virtue of an order made under this section,
>
> the Court of First Instance may order that a letter of request shall be issued and transmitted in such manner as the Court of First Instance may direct to a court or tribunal specified in the order and exercising jurisdiction in a place outside Hong Kong, requesting such court or tribunal to assist in obtaining evidence for the purposes of those criminal proceedings.
>
> (2) An order under this section shall specify the evidence to be obtained and, in the case of evidence to be obtained-
>
> (a) by the examination of any person as a witness, the name and particulars of such person or such other particulars by reference to his office or employment as may be sufficient to ascertain his identity; or
>
> (b) by the production of any document or thing, the nature of such document or thing or a description thereof."

We understand that the letters of request in this case were sought under section 77E(1)(a), in other words, once the criminal proceedings had been started.

Now, by reason of section 77F of the same Ordinance, any depositions or documents received by the Registrar of the High Court pursuant to a letter of request issued under section 77E shall, subject to

certain conditions, be admitted in evidence in the criminal proceedings in respect of which the letter of request was issued. If the cost of collation and preparation of evidence for production at trial is a cost "incurred in or about the prosecution" – which it clearly is – then we fail to see how it matters whether the collation and preparation of the evidence takes case within Hong Kong or abroad. Whether a particular exercise was or was not reasonably necessary is another matter. But we are satisfied that, *prima facie*, the cost of seeking letters of request and obtaining the evidence pursuant to them is a cost incurred in or about the prosecution of a person charged with a criminal offence in this jurisdiction.

(c) Extradition costs

The argument here was that the extradition proceedings in the USA were not part of the "prosecution and conviction" process described in section 72(1). The purpose of those extradition proceedings were, it is said, merely to determine whether the Applicant was or was not to be extradited. The further point was made that by virtue of the terms of the relevant bilateral agreement, the costs of the extradition fall, in any event, upon the authorities in the requested jurisdiction, namely, the USA.

As a matter of principle, it is difficult to see why the cost of bringing back to the jurisdiction for trial a defendant who seeks to avoid trial and is then convicted is a cost which should fall on the public purse. The question, again, is whether these costs fall outside the meaning of the phrase "incurred in and about the prosecution and conviction for the offence."

Extradition proceedings are proceedings lodged at the request of the executive of a requesting jurisdiction, after the issue of a warrant of arrest, in an attempt to secure the presence at committal and trial of a fugitive offender. It is a step, a vital step, to ensure that the prosecution might be carried to a successful conclusion. The fugitive's return is requested not for some investigation preliminary to a decision whether to prosecute, not to "assist the authorities", nor for some ill-defined or generic offence; but to answer for the very crimes in respect of which the information has been laid and for which, by the laying of the information and the issue of the arrest warrant, the prosecution has already been launched. The papers sent to the requested jurisdiction will contain the testimony in support of that specific prosecution, testimony sent to a jurisdiction, in the present case, which will determine whether there is probable cause shown in respect of the specific offences of which the fugitive stands accused, and upon his return, Hong Kong's domestic law precludes trial in respect of any offence other than those upon which his return has been granted. We do not, in the circumstances, see why this process is a process other than one which is in or about the prosecution and conviction of the (alleged) offender. Art. XIV of the international agreement relevant to this case, the provisions of which were applied to Hong Kong, prescribes that the requested party (the USA) is "to meet the cost of representation of the requesting party in any proceedings arising out of a request for extradition," though the cost of transporting the fugitive offender is to be borne by the requesting party. This does not assist in the determination of the meaning of section 72(1) of the Ordinance. It so happens, in this case, that the USA, pursuant to agreement, will pay certain costs. But the Respondent seeks other costs in connection with the extradition; for example, the cost of sending legal advisers to the USA to

assist their counterparts in the collation and presentation of the case. Such costs are, in our judgment, covered by section 72(1).

(d) The priority order

In so far as the judge ordered that payment of costs takes priority over the order of restitution, we have had some difficulty in finding, and have not been taken to, the power he had to make such an order. We do not think that there is such a power, and we set aside that particular order.

III. The Restitution Order

Section 12(1) of the Prevention of Bribery Ordinance, Cap. 201 is, in so far as is relevant, in these terms:

> "(1) Any person guilty of an offence under this part … shall be liable –
>
> (a) on conviction on indictment
>
> (i) ….
>
> (ii) ….
>
> (iii) … to a fine of $500,000 and to imprisonment for seven years;
>
> (b) …
>
> and shall be ordered to pay to such personal or public body and in such manner as the court directs, the amount or value of any advantage received by him, or such part thereof as the court may specify."

The trial judge ordered the payment of restitution in the sum of $10 million in the proportions we have described. He limited the amount of the restitution order because, he said:

> "… there is a possibility that the accused's assets may not be adequate to meet both the costs and the full restitution of $23 million." (Tr. p.146)

The total sum with which the judge "worked" was $21 million, to give effect to the fact that the offences in respect of which the Applicant was committed for extradition by the American courts excluded a charge or allegation of a substantive offence of receiving $1.95 million in October 1988.

In the course of argument before us on the issue of costs, Mr McCoy was quite content with the idea that if the costs were reduced as a result of taxation, there should be a corresponding increase in restitution to bring the total to about $21 million. There was no suggestion then that our power under section 83I of Cap. 221 could not be invoked to increase the amount of the restitution. Indeed, Mr McCoy said that it was not part of his case to make such a suggestion.

It did cross our minds that the question of restitution was not one that particularly bothered the Applicant, perhaps because it was thought that there was no real intention on the part of the tobacco companies to enforce the orders. We found disturbing any notion that an agent who receives secret profits in the form of bribes in massive amounts should not be required to account for them to his principals . We were interested to learn what was the intention of the companies, and we asked counsel for the Respondent to make enquiries overnight. He did so, but only BAT could provide an answer in the short time available; and the answer was that no

decision had been made, and that the position had not changed. This was, perhaps, not as unqualified a reply as might have been hoped. Although this court does not have the power to enforce the restitution order, we can but express the view, which the companies might well share, that it is contrary to any notion of what is right that the Applicant should retain the benefit of the enormous criminal gains he made whilst in their employ.

We fail to see in the circumstances of this case why the Applicant should not be ordered to pay full restitution, an order limited to the advantages charged, without regard to such substantial interest or capital gains as may since have accrued. We made it clear to Mr McCoy that we were minded to order restitution in the full sum.

On the day following conclusion of argument, this court received a memorandum from Mr McCoy, copied of course to the Respondent, in which he sought to withdraw the concession as to the court's jurisdiction to alter the restitution order. Of course, if this court has no such jurisdiction, then a concession is neither here nor there.

We have considered the memorandum and its contents. The memorandum stated that the restitution order was never the subject of an application for leave to appeal and that the mere appeal against one consequential order (costs) did not give the court any jurisdiction in respect of another (restitution), so that section 83I could be utilized in relation to the restitution order.

The contention is fundamentally flawed. In the first place, the restitution order is expressly the subject of an application for leave to appeal

against sentence. The notice of application for leave to appeal against sentence says so and if, in this instance, Mr McCoy wished to qualify the notice by the terms of the original grounds of appeal (as he sought to do in relation to the question of imprisonment), that too would not avail him, for the grounds most specifically railed against the making of the restitution order itself. It is, in any event, in our judgment, not open to the Applicant to pick and choose in this way. Section 83 does not permit him to do so and, in any event, a reading of the judge's approach in this particular case shows how closely he tied the quantum of the costs order to the amount of the restitution order.

Mr McCoy contended that before increasing the restitution order the court should first be satisfied as to the Applicant's means, though adding that he had no instructions as to what they were. We agree with the editors of *Cross and Cheung "Sentencing in Hong Kong"* 3rd ed. p. 379 that "it is not necessary for the court considering restitution to take into account the means of the accused". That certainly applies to an order under section 12. In this case of corruption, it is not open to an offender who has quite clearly benefited in sums over $30 million to say that he ought not to make restitution because he has spirited away or spent the proceeds of that corruption. At common law, the agent who accepts bribes is liable to his principal for the full amount of the bribes. Indeed, he is also liable to pay interest on the amount received from the date when it was received and, in addition, for any loss sustained as a result of his breach of duty (see *Halsbury's Laws of England*, 4th ed. Vol. 1(2) para. 108). In the application of that law, there is no room for a defence which says that the corrupt agent cannot afford to pay. Where then is there room for this court, when the liability to pay has been established to a standard higher than that required in

civil proceedings, to diminish the amount payable because of some suggested, (and unsubstantiated,) inability to pay, leaving it to then to the principals to institute proceedings for the balance? There is, in our judgment, no such room. We are satisfied that restitution should be in the full amount, and we set aside the restitution order made by the judge and order the Applicant to pay restitution under section 12 of the Prevention of Bribery Ordinance in the sum of $21.25 million (the advantages received less the loans and the October 1988 receipt of $1.95 million), in the following proportions: $12.75 million to Brown & Williamson Tobacco Company, and $8.5 million to British American Tobacco (Hong Kong) Limited.

Result

1. The application for leave to appeal against conviction is dismissed.

2. As to sentence, leave to appeal against sentence is granted. We treat the hearing before us as the appeal, and we

   (1) set aside the order as to costs, and order the Applicant to pay the costs and expenses in or about the prosecution and conviction for the offence of which he is convicted, such costs and expenses to be taxed, if not agreed;

   (2) set aside the order whereby priority was granted in favour of the costs order;

(3) set aside the restitution order and, in place of it, order the Applicant to pay restitution to Brown and Williamson Tobacco Company in the sum of $12.75 million, and to British American Tobacco (Hong Kong) Limited in the sum of $8.5 million. In so far as it might be suggested that we ought to make some corresponding adjustment to the ceiling for costs, we see no basis on the evidence, either here or below, for making such a reduction;

(4) reject the application to interfere with the term of imprisonment. The orders as to imprisonment and fine are unaffected.

(M. Stuart-Moore)	(Simon Mayo)	(Frank Stock)
Vice-President	Vice-President	Justice of Appeal

Mr John Reading, SC, DDPP, Mr Joseph To, SGC, and Mr David Leung, SGC of the Department of Justice, for the Respondent.

Mr Gerard McCoy, SC, Mr Raymond Pierce instructed by Messrs C L Chow & Lam, for the Applicant.