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FASCIMILE TRANSMISSION

To: The Hon Ms Margaret Ng (Fax: 2801 7134)

Date: 20 December 2000

Page: 10 pages

Re: Prosecutorial Discretion

Dear Margaret,

I note from the newspapers that the LegCo Panel is inviting the Secretary for Justice/DPP to explain its prosecution policy. With the consent of the students for whom I have acted, I enclose copies of the relevant correspondence passing between me and the SJ/DPP regarding our request for an explanation of the prosecutorial policy vis-à-vis unauthorised assembly. We wonder if you would consider seeking an explanation from the SJ/DPP also on this matter.

I confirm that there is no objection to your making copies of the correspondence available to other LegCo members or to the public.

Please feel free to ring me to discuss if you need any further input from me.

Yours sincerely,

Eric TM Cheung

Letterhead of Johnson Stokes & Master

To : The Secretary for Justice/
Director of Public Prosecutions Your Fax no : 2877 3978/2877 0171

From : Eric TM Cheung Direct tel : 2859 2974

Date : 25 October 2000 Fax : 2559 3543

Our ref : ETMC/POO/1 E-mail : etmc@hku.hk

Your ref : Police Ref:
HKI RN00000655/863 Total pages : 2

Dear Madam/Sir,

We refer to our earlier correspondence.

We were informed by the police this morning that you had decided not to prosecute any of our clients (or any other persons arrested) in relation to the unauthorised assembly which took place on 25/26 June 2000.

We have previously been told by the police that they had first received your advice before they proceeded to arrest our clients in relation to both the 20 April and 25/26 June incidents. No reason has however been given to our clients as to why you now change your mind and decide not to prosecute (apart from the vague and general reference that you have taken into account the evidence and all relevant factors). In particular, we believe it is clear from the circumstances that there has been no material change insofar as evidence is concerned.

As mentioned in our earlier letter to you dated 9 October, our clients have made clear to you at the outset that they are not claiming any special privilege to be exempted from the law (if it does not contravene the Basic law and the ICCPR). Our clients believe that everyone should be equal before the law. We believe you would also appreciate the trouble and inconvenience faced by our clients as a result of the arrest and the threat of prosecution over the last 2 months.

More importantly, we believe it is an important aspect of the Rule of Law that the law or its enforcement is predictable so that people know how to

regulate their conduct. It is a fact that Government has chosen not take any actions against any person in relation to over 400 other unauthorised assemblies which have taken place since the legislation was passed by the Provisional Legislature in July 1997. Now that after effecting arrest on our clients selectively in relation to the 20 April and 25/26 June incidents, you then without proper explanation decide not to prosecute, but at the same time maintaining that you may consider prosecuting our clients and other people for engaging in similar activities (i.e. organising or participating in an unauthorised assembly) in future. We believe you owe a duty both to our clients as well as to the public to explain clearly your prosecution policy vis-à-vis the subject activities.

We would therefore demand from you an immediate explanation as to the following:

1. Did you previously advise the police to arrest our clients in relation to the 20 April and 25/26 June incidents? If so, what are the change in circumstances, if any, which lead to the change of your views?
2. What exactly are the factors that you have taken into account in deciding whether to prosecute our clients and what exactly are your reasons for deciding not to prosecute our clients?
3. What is your prosecution policy vis-à-vis the subject activities? In particular, please explain clearly in future under what circumstances would you decide to prosecute a person organising or participating in an unauthorised assembly.

We confirm that our clients have no objection to your disclosing the above-mentioned matters in public and indeed they reserve their rights to disclose all our correspondence with you to the public/media given the public interest at stake. Hence, you need not be concerned with the prejudice that may be suffered by our clients in explaining your exact reasons for not prosecuting our clients (which is one of the main reasons why normally you should not explain your reasons for not prosecuting a person in a particular case).

We look forward to receiving your early reply.

Yours faithfully,

Johnson Stokes & Master

LETTERHEAD OF DEPARTMENT OF JUSTICE
Prosecutions Division Director of Public Prosecutions

Our Ref.: DOJ PRO 6030/1/1/2/5c
Your Ref.: ETMC/POO/1
Tel. No.: 2867 2300

26 October 2000

Messrs. Johnson Stokes & Master
16th-19th Floors Prince's Building
10 Chater Road
Central, Hong Kong

(Attn: Mr. Eric T.M. Cheung)

By Fax: 2559 3543 & by post

Dear Sir,

Your fax of yesterday's date refers.

You should appreciate that arrest action is distinct from prosecution action. It by no means follows that a person whom the police arrest will ultimately be prosecuted by the Department of Justice. Once a police investigation is complete, the case is submitted to the Department, if necessary, for legal advice.

If people are suspected to have been involved in criminal offences they are sometimes arrested by police and sometimes questioned. Although that may cause concern to those involved, this may be unavoidable if the matter is to be properly investigated. Although no one wants to see people inconvenienced unnecessarily, no one, equally, wants to see suspected criminality go uninvestigated. Indeed, police are under a positive duty to investigate suspected offences of which they are aware.

Since, as you say, all are equal before the law, no one should assume that the law in relation to unauthorised assembly will not be enforced. Those who breach that law, or any other law, render themselves liable to prosecution, no matter who they are. If the Department of Justice is asked to consider a prosecution in any such case, it will treat the case as it would any other case referred for possible prosecution. The Department, that is, as I have explained to you previously, will proceed in accordance with its established prosecution policy, without fear or favour.

It would be a mistake for anyone to consider that they are above the law, or that they can flout the law with impunity. It would equally be a mistake to confuse restraint with weakness. The better course by far is for all to observe the law at all times, and you, as a lawyer, will undoubtedly wish to convey that message.

You will be well aware that there has been firmly in place for many years in Hong Kong, as in England and Wales, and elsewhere in the common law world, a prosecutorial policy of not disclosing in detail the reasons for prosecution decisions. Instead, the general criteria applicable to the taking of such decisions are revealed. Since we believe that all suspects should be treated equally, I do not propose to approach the position of your clients any differently from that of others, or to bend established policy in the way you suggest. What I can say, however, is that this Department reviewed all the evidence, and considered all the circumstances, and concluded that it was not appropriate to initiate a prosecution of any of the suspects.

So that you can better understand prosecution policy, I am forwarding to you a copy of the prosecution policy booklet. I would urge you to read it carefully this time, and to explain its contents to your clients.

Yours faithfully,

(I. Grenville Cross QC, SC)
Director of Public Prosecutions

Letterhead of Johnson Stokes & Master

To	: I. Grenville Cross QC, SC II. Director of Public Prosecutions	Your Fax no	: 2877 0171
cc	: The Secretary for Justice	Your Fax no	: 2877 3978
From	: Eric TM Cheung	Direct tel	: 2859 2974
Date	: 27 October 2000	Fax	: 2559 3543
Our ref	: ETMC/POO/1	E-mail	: etmc@hku.hk
Your ref	: DOJ PRO 6030/1/1/2/5c	Total pages	: 3

Dear Sir,

We refer to your reply letter dated 26 October.

We are of course well aware of the normal distinction between arrest action and prosecution action. However, in our present case the police have already studied and collated the relevant evidence in their possession for months before sending the files to you for advice as to whether to proceed with the arrest. Presumably, in advising the police to proceed with the arrest, you should have satisfied yourself that there was prima facie evidence and you should have already considered the public interest factors and formed the view that prosecution should proceed unless the evidence (upon conclusion of further investigations) turned out to be insufficient. Since the arrest, we believe it is clear that there has not been any material change insofar as evidence is concerned. Hence your eventual decision not to prosecute must have been based primarily on your change in attitude vis-à-vis the public interest factors.

Kindly confirm whether our understanding is correct and if so, what is the change in circumstances, if any, which leads to the change of your attitude? If now you are to say to us that you have not considered the public interest factors at all in your initial advice to the police, we believe our clients would have justifiable grievance and complaint over the unnecessary trouble and inconvenience faced by them as a result of the arrest and the threat of prosecution over the last 2 months.

We regret to note that you refuse to address the specific questions raised by us in our earlier letter of 25 October by trying to shield yourself behind the

alleged "prosecutorial policy of not disclosing in detail the reasons for prosecution decisions". What you now say is clearly contradictory to your own views publicly expressed in an article in the Hong Kong Law Journal entitled "The DPP and the Exercise of Prosecutorial Discretion" Vol 28 Part 3 (1998) HKLJ pp400-406. You said at p 402 that "the practice of the Attorney General has, certainly in more recent times, been to provide the legislature with explanations to demonstrate that all relevant legal and policy considerations have been given due weight in a particular case and to describe the way in which any such case has been handled." You then cited a number of examples where the Attorney General did explain the reasons for prosecution decisions. Indeed subsequent to your article, the Secretary for Justice decided to explain in public the detailed reasons for not prosecuting Sally Aw.

In your article, you also referred to the former Attorney General's statement that "there were good reasons why an AG did not normally explain in public a decision not to prosecute in a particular case." You then immediately explained that by that statement you took it to mean that "the policy of not disclosing particular reasons was designed in large part out of the need to be fair to the suspect who ought not to have his identity and guilt made the subject of public debate." This primary reason for non-disclosure is clearly inapplicable to our present case as our clients' identities have already been made known widely in public. More importantly, we have made clear in our earlier letter that "our clients have no objection to your disclosing the above-mentioned matters in public and indeed they reserve their rights to disclose all our correspondence with you to the public/media given the public interest at stake." Hence, you need not be concerned with the prejudice that may be suffered by our clients in explaining your exact reasons for not prosecuting our clients.

We hope you would now accept that we are not asking you to "bend established policy in the way we suggest". Rather we are asking you to follow your own policy as explained in your article in the HKLJ (unless you now seek to draw an, in our view, unwarranted distinction between explaining your reasons to the legislature and to our clients, in which event our clients may consider disclosing our correspondence to the LegCo and ask the LegCo members to pursue the matter).

In particular, as explained in our earlier letter, it is an important aspect of the Rule of Law that the law or its enforcement is predictable so that people know how to regulate their conduct. **Kindly confirm whether you agree with this statement.** If so, we believe that for the reasons we explain in our earlier letter you owe a duty both to our clients as well as to the public to explain clearly your prosecution policy vis-à-vis the subject activities (i.e. organising or participating in an unauthorised assembly).

We note in your last paragraph that you are to send us yet another copy of the prosecution policy booklet. As explained in our earlier letter dated 11 October, we are well aware of your policy as set out in your prosecution policy booklet and there is no need for you to send us any further copy. Indeed we have already had a few copies of such booklet. We have read it over and over again but still cannot figure out the exact reasons for your eventual decision not to prosecute our clients.

Lastly, for your ease of reference, we set out below the specific questions raised in our earlier letter of 25 October and would appreciate your early answers thereto:

1. Did you previously advise the police to arrest our clients in relation to the 20 April and 25/26 June incidents? If so, what is the change in circumstances, if any, which leads to the change of your views?
2. What exactly are the factors that you have taken into account in deciding whether to prosecute our clients and what exactly are your reasons for deciding not to prosecute our clients?
3. What is your prosecution policy vis-à-vis the subject activities? In particular, please explain clearly in future under what circumstances would you decide to prosecute a person organising or participating in an unauthorised assembly.

As explained in our earlier letter, our clients reserve their rights to disclose all our correspondence with you to the public/media given the public interest at stake. Unless we hear from you to the contrary, we would take it that you have no objection to our disclosing your correspondence to us to the LegCo members/public/media (if and when our clients consider appropriate).

Yours faithfully,

Johnson Stokes & Master

LETTERHEAD OF DEPARTMENT OF JUSTICE
Prosecutions Division Director of Public Prosecutions

Our Ref.: DOJ PRO 6030/1/1/2/5c
Your Ref.: ETMC/POO/1
Tel. No.: 2867 2300

27 October 2000

Messrs. Johnson Stokes & Master
16th-19th Floors Prince's Building
10 Chater Road
Central, Hong Kong

(Attn: Mr. Eric T.M. Cheung)

By Fax: 2559 3543

Dear Sir,

Your fax of today's date refers.

The legal advice which this Department provides to law enforcement agencies is, of course, privileged. That apart, the issue of whether or not to arrest a suspect is one for the law enforcement agency, not this Department.

As explained, it is the established policy of this Department - and other prosecuting agencies in the common law world - not to disclose in detail the basis for prosecutorial decisions. Since you have read my article in HKLJ Vol 28 Part 3 (1998) 400, you will have seen, at 402, that, on 14 July 1986, the Attorney General of England and Wales told Parliament that *'I propose to continue my existing practice, as a general rule, of confining answers to the basis of the decision in a particular case, without giving details of the evidence or other considerations which have led me to a particular decision'*. That is the practice not only in England and Wales, but, as I indicated in the article, in Hong Kong as well.

Since you refer to the Sally Aw case, you are presumably aware that, when the Secretary for Justice disclosed in detail her reasons for not prosecuting, she indicated that the policy of non-disclosure '*exists to safeguard the integrity of the criminal justice system*'. She added that, in departing from the usual policy, '*I must emphasise that I am not setting a precedent for the future*'. That being so, I have nothing to add to that which I told you yesterday.

As regards future prosecution policy towards those suspected of breaches of the criminal law, I wrote this to you yesterday:

Since, as you say, all are equal before the law, no one should assume that the law in relation to unauthorised assembly will not be enforced. Those who breach that law, or any other law, render themselves liable to prosecution, no matter who they are. If the Department of Justice is asked to consider a prosecution in any such case, it will treat the case as it would any other case referred for possible prosecution. The Department, that is, as I have explained to you previously, will proceed in accordance with its established prosecution policy, without fear or favour.

It would be a mistake for anyone to consider that they are above the law, or that they can flout the law with impunity. It would equally be a mistake to confuse restraint with weakness. The better course by far is for all to observe the law at all times, and you, as a lawyer, will undoubtedly wish to convey that message.

Nothing could be clearer. I have no more to add.

This correspondence is becoming repetitive and circular, and it is now closed.

Yours faithfully,

(I. Grenville Cross QC, SC)
Director of Public Prosecutions