立法會 Legislative Council

立法會LS17/01-02號文件

法律事務部參考資料摘要 律政司司長 訴 Tang Bun-案[1999] 3HKC647 的判詞所衍生法律問題的重點摘要

根據《裁判官條例》(第227章)第104條提出覆核程序的訟費

- 若被告人申請覆核裁判官的決定,而裁判官在該覆核中推翻或更改 其決定,裁判官可命令將訟費判給被告人。
- 若被告人申請覆核裁判官的決定,而裁判官在該覆核中確認其將被告人定罪的決定,則裁判官可命令將訟費判給控方。
- 若裁判官主動覆核其決定,而在該覆核中推翻或更改其決定,裁判官可命令將訟費判給被告人。

<u>在根據《裁判官條例》(第227章)第104條提出的覆核程序中,不能在下</u>列情況就訟費作出命令

- 控方就裁判官判被告人無罪的決定提出覆核,而覆核結果是被告人被定罪,裁判官無權將訟費判給控方。
- 控方就裁判官判被告人無罪的決定提出覆核,而裁判官維持其判被告人無罪的決定,裁判官無權將訟費判給被告人。
- 裁判官主動覆核其判被告人無罪的決定,而覆核結果是被告人被定罪,裁判官無權將訟費判給控方。

英國裁判官重開案件的權力

● 法例只容許裁判官重開案件以糾正錯誤等,而並未就訟費作出規 定。

香港裁判法院進行審訊的訟費

● 訟費的判給隨訴訟結果而定。

英國治安法庭進行審訊的訟費

● 訟費的判給隨訴訟結果而定。

對香港裁判法院判案以案件呈述方式提出上訴的訟費

- 若控方以案件呈述方式提出上訴,無論上訴成功與否,法庭均無權命令將訟費判給任何一方。
- 若被告人以案件呈述方式提出上訴,上訴成功時,法庭可命令將訟費判給被告人;若上訴不成功,則只在上訴沒有好的成功機會時, 法庭才會將訟費判給控方。

對英國治安法庭判案以案件呈述方式提出上訴的訟費

● 訟費的判給隨訴訟結果而定。

香港就裁判官的決定提出上訴及就裁判官所判刑罰申請覆核的訟費

- 若控方提出上訴,不論上訴成功與否,法庭均無權命令將訟費判給 任何一方。
- 若被告人提出上訴,法庭可在上訴成功時命令將訟費判給被告人, 但若上訴被駁回,除非上訴沒有好的成功機會,否則法庭無權命令 將訟費判給控方。
- 若控方對刑罰提出的覆核申請成功,上訴法庭無權命令將訟費判給 控方。
- 若控方對刑罰提出的覆核申請失敗,上訴法庭可將訟費判給被告人。

對英國治安法庭判案提出上訴的訟費

- 若巡迴刑事法院駁回針對一項定罪或該項定罪所判處的刑罰而提 出的上訴,法院可命令被告人向檢控人繳付訟費。
- 若巡迴刑事法院判針對一項定罪或該項定罪所判處的刑罰而提出 的上訴得直,法院可作出被告人訟費命令,將訟費判給被告人。

法律事務部參考資料摘要 律政司司長 訴 Tang Bun一案[1999] 3HKC647 的判詞所衍生的法律問題

律政司司長 訴 Tang Bun一案的判詞摘要

答辯人獲裁判法院裁定數項罪名不成立,宣告無罪。控方根據《裁判官條例》(第227章)第104條申請覆核裁判官的無罪決定,裁判官駁回覆核申請,並將覆核聆訊的訟費判給答辯人。

2. 控方根據《裁判官條例》第105條以案件呈述方式提出上訴,原訟法庭裁定,覆核申請若由控方提出,不論成功與否,裁判官均無權根據《刑事案件訟費條例》(第492章)或任何成文法則判給覆核訟費,亦無權將訟費判給控辯任何一方,因而判上訴得直。

<u>對於裁判官在駁回控方提出的覆核申請後有權根據《刑事案件訟費條</u>例》將訟費判給辯方的建議的贊成及反對論據

- 3. 這裏所涉及的法律問題,是裁判官在駁回控方提出的覆核申請後,是否有權根據《刑事案件訟費條例》將訟費判給辯方。
- 4. 《刑事案件訟費條例》中相關的條文如下 ——

"3. 在簡易法律程序中的辯方訟費

- (1) 凡 ——
 - (a) 已有告發或申訴向裁判官提出,但其後並無繼續進行程序;
 - (b) 裁判官在研訊某可公訴罪行後,裁定不將被告人交付審訊;
 - (c) 裁判官在處理任何簡易罪行或以簡易程序處理任何 罪行後,撤銷該告發或申訴或判被告人無罪;或
 - (d) 裁判官根據《裁判官條例》(第227章)第104條應被告 人的申請或主動覆核其決定,並在該覆核中推翻或 更改其決定,

裁判官可命令將訟費判給被告人。

- (2) ...
- (3) ...

11. 在簡易法律程序中的控方訟費

- (1) 凡
 - (a) 裁判官將被告人定罪或裁判官應申訴而根據《裁判官條例》(第227章)就被告人作出命令;或
 - (b) 在裁判官根據該條例或第104條應被告人的申請而 覆核其決定後,確認將被告人定罪的決定,或確認 應申訴而就被告人作出命令的決定,

則該裁判官可命令將訟費判給檢控人。

- (2) ...
- (3) ..." •
- 5. 裁判官裁定,他有權根據《刑事案件訟費條例》第3(1)(d)條,在駁回由控方提出的覆核申請後,將訟費判給辯方。裁判官進一步裁定,他有權根據《刑事案件訟費條例》第3(1)(c)條,在駁回控方提出的覆核申請後(申請覆核的理由之一是被告人獲判無罪),將訟費判給辯方。
- 6. 上訴時,雙方同意《刑事案件訟費條例》第3(1)(a)或3(1)(b) 條均不適用於本案。控方辯稱,若要行使第3(1)(d)條所賦予的權力, 在覆核程序中將訟費判給被告人,必須符合兩個條件 ——
 - (a) 覆核是應被告人的申請或由裁判官主動作出;及
 - (b) 裁判官在該覆核中推翻或更改其決定。

由於覆核申請是由控方提出,故並不符合第3(1)(d)條的第一個條件;而由於裁判官只駁回控方的覆核申請,並未推翻或更改其決定,故也不符合第3(1)(d)條的第二個條件。因此,案件的實情並不屬於第3(1)(d)條的管轄範圍,而根據該條文裁判官並無司法管轄權將訟費判給答辯人。控方進一步辯稱,由於被告人於審訊完結時已獲判無罪,第3(1)(c)條並不適用於由裁判官作出的覆核。

- 另一方面,答辯人的代表律師辯稱,雖然他接受《刑事案件 7. 訟 費 條 例 》 第 3(1)(d)條 的 措 詞 並 未 明 確 涵 蓋 在 裁 判 官 席 前 申 請 覆 核 此 情況,但駁回申請實際上是對答辯人無罪的裁定,因此仍屬第3(1)(c) 條的管轄範圍。當控方提出覆核申請,答辯人便須面對其無罪裁定可 被推翻的風險,或換言之,有可能被定罪。因此,被告人被迫付出法 律費用以反對有關申請;而這次只不過是駁回覆核申請時維持原來的 無罪裁決,裁判官應有權按照第3(1)(c)條將訟費判給答辯人作為補 償。若控方可因辯方申請覆核未獲成功(第11(1)(b)條所述情況)而取回 訟費,辯方理應亦可在控方申請覆核被駁回時取回訟費。此外,根據 《刑事案件訟費條例》,在法庭判給審訊及上訴的訟費方面,控辯雙方 均可享有對等待遇,因此,第3(1)(c)條應以寬鬆及靈活的態度以作詮 釋,使其涵蓋有關覆核的情況。答辯人的代表律師進一步辯稱,由於 第3(1)條理應涵蓋審訊及根據《裁判官條例》第104條所作出的覆核有 關的訟費,故須緊記,在根據該條例第104(6)條作出的覆核中,裁判官 可"推翻、更改或維持"其原先的決定。由於第3(1)(d)條只處理裁判官在 覆核時推翻或更改其決定的情況,在維持原判方面出現了一個明顯缺 漏。基於該原因,第3(1)(c)條應視作並詮釋為已涵蓋在覆核時維持原 先決定的情況。
- 8. 原訟法庭裁定,在《刑事案件訟費條例》中,不論第3或第11條,甚至整條條例,均無就有關由控方申請覆核的情況作出規定。只有在由被告人申請覆核(第3(1)(d)及第11(1)(b)條),以及裁判官主動覆核以推翻或更改其決定(第3(1)(d)條)時,裁判官才獲授權就判給訟費作

出決定。因此,第3(1)(d)條並未授予裁判官權力或司法管轄權,於駁 回控方提出的覆核申請後,把覆核程序的訟費判給答辯人。就第3(1)(c) 條,原訟法庭裁定,駁回控方的覆核申請,只確認了裁判官原先的無 罪決定,卻不能等同於在覆核前已作出的無罪裁定。若以其他方式詮 釋第3(1)(c)條,涵蓋有關控方就一項無罪決定申請覆核而結果是維持 原先決定的情況,同一道理,第11(1)(a)條亦會涵蓋控方就一項無罪決 定申請覆核獲得批准,最後令被告人被定罪,因此授權裁判官將覆核 程序的訟費判給控方的情況。原訟法庭認為以此方式詮釋第3(1)(c)及 第11(1)(a)條,會將條文的措詞引伸過廣。答辯人的代表律師陳詞時表 示,辯方申請覆核失敗,控方可獲判訟費,而控方申請覆核失敗,辯 方卻不能取回訟費,控辯雙方所得待遇不平等。對此,原訟法庭回答 時表示察悉到由控方提出的覆核申請,不論成敗,裁判官都不獲授權 將訟費判給控辯任何一方。雖然正如答辯人的代表律師所述,在法庭 判給審訊訟費方面,控辯雙方均享有對等待遇,但原訟法庭察悉,《刑 事案件訟費條例》第8及第13條所給予控辯雙方在上訴上的待遇有別。 第8條賦權法官在行使其在《裁判官條例》第120條下的權力,判被告 人提出適用於該條例第105或113條的上訴得直時,可命令將訟費判給 被告人。第13條賦權法官,若被告人不服裁判官所作的定罪、命令或 裁定向法官提出的上訴不成功,同時法官信納該上訴是沒有好的成功 機會,可命令將訟費判給控方。第13條並未就控方向法官提出上訴的 情況作出規定。覆核亦有相同情況,若控方提出的覆核成功,根據第 11條,裁判官並無權將訟費判給控方。若控方提出的覆核或上訴遭到 被告人反對,同時亦被裁判官或法官駁回,裁判官或法官均不獲授權 把訟費判給被告人。這未必是不平等待遇:只不過是條例基於某種理 由,對於控方就裁判官之前的決定申請覆核或提出上訴,並未授權裁 判官判給訟費。條例對所有控方提出的覆核,均予平等處理,即一概 不授權裁判官將訟費判給任何一方。原訟法庭認為第3(1)(c)條是為審 訊而設,並無理據要將其延伸至包括覆核的情況。有關特別條文凌駕 一般性條文的原則在此適用。

裁判官根據《刑事案件訟費條例》第3及11條在覆核程序中判給訟費的 權力

- 9. 若被告人根據《裁判官條例》第104條申請覆核裁判官的決定,而裁判官在該覆核中推翻或更改其決定,裁判官可命令將訟費判給被告人(第3(1)(d)條)。基本上,此條文實為裁判官推翻其決定,改判被告人無罪或作出對被告人有利的命令的情況而設。
- 10. 若被告人根據《裁判官條例》第104條申請覆核裁判官的決定,而裁判官在該覆核中確認其將被告人定罪的決定,則裁判官可命令將訟費判給控方(第11(1)(b)條)。
- 11. 若裁判官根據《裁判官條例》第104條主動覆核其決定,而在該覆核中推翻或更改其決定,裁判官可命令將訟費判給被告人(第3(1)(d)條)。基本上,此條文亦為裁判官推翻其決定,改判被告人無罪或作出對被告人有利的命令的情況而設。

制定《刑事案件訟費條例》的背景

- 12. 《刑事案件訟費條例草案》於1995年提交立法局,並於1996年通過成為法例。律政司於1991年成立刑事訴訟案件訟費工作小組("工作小組"),條例草案是根據工作小組的建議擬定,大致上以英國的《1985年罪行檢控法令》為藍本,旨在改革當時有關刑事案件中判給訟費的法律及慣例。
- 13. 《刑事案件訟費條例》制定前,在裁判法院,若裁判官信納有關法律程序不應提出或繼續,可將訟費判給被告人。然而,高等法院及地方法院則採用另一準則,即被告人通常會獲判給訟費,除非有確實理由顯示不應如此,如被告人曾做出令人懷疑的行為,並令控方誤以為在案件中控方勝算較實際為高。因此,在裁判法院,獲判無罪的人須負責證明控方有錯;而在地方法院及高等法院,他通常可獲判訟費,除非錯在其身或該無罪裁決會引起技術問題。
- 14. 對於裁判官在覆核程序中判給訟費的權力,工作小組建議"在根據第227章第104條提出的覆核程序中,裁判官應有酌情權判給訟費"(參考:首次會議的紀要第29段)"(工作小組報告摘錄,載於**附件I**)。
- 15. 工作小組首次會議的紀要第29段載述 ——
 - "29. 委員同意,以下情況須繳付訟費:
 - (1) 當官方提出中止檢控,
 - (2) 當官方撤回檢控,
 - (3) 在覆核程序中(第227章第104條)

而訟費事宜應由裁判官行使酌情權決定。"(會議紀要摘錄,載於**附件II**)。

- 16. 《刑事案件訟費條例草案》第3(1)(c)及(d)條與《刑事案件訟費條例》第3(1)(c)及(d)條相同。《刑事案件訟費條例草案》第11條亦與《刑事案件訟費條例》第11條相同。
- 17. 《刑事案件訟費條例草案》委員會的檔案中,並無紀錄顯示條例草案委員會曾就裁判官於覆核程序中判給訟費的權力作何特別討論。但在條例案委員會1996年3月25日會議的紀要中,政府當局在回應條例草案委員會的法律顧問對條例草案第3(1)(d)條(等同條例第3(1)(d)條)的提問時澄清,如裁判官應控方就其決定提出覆核的申請而裁定被告人有罪,則辯方無須承擔訟費(會議紀要摘錄,載於附件III)。委員亦可參閱條例草案委員會報告中有關"控方訟費及辯方訟費"的摘錄,以了解有關的背景資料(附件IV),亦可參閱條例草案委員會1996年2月6日會議的紀要摘錄(附件V)。

判給訟費的一般準則

18. 在任何刑事法律程序中,可憑藉命令判給的訟費不得為懲罰性,但法院或法官須覺得訟費的數額是合理地足夠補償法律程序中任

何一方在該法律程序過程中(包括任何屬該法律程序的初步法律程序或該法律程序附帶引起的法律程序)恰當地招致的開支:《刑事案件訟費條例》第15(a)條。此原則在工作小組的報告內亦有提述(**附件VI**)。

英國裁判官重開案件的權力

19. 在英國,《1980年治安法庭法令》第142(1)條授予治安法庭重開案件以糾正錯誤等的權力,在某方面而言與《裁判官條例》第104條中對覆核裁判官決定的規定相若。第142(1)條規定 ——

"若法庭認為有利於司法公正,治安法庭可更改或撤銷其在處理某罪犯時所判處的刑罰或作出的其他命令;並在此宣布,此項權力可引伸至以法庭有權判處的刑罰或作出的命令,取代另一項基於任何理由似乎無效的刑罰或命令的權力。"。

《罪行檢控法令》似乎並無條文就由裁判官重開案件的訟費作出規定。

20. 第142(1)條和第104條除有明顯相若之處外,亦有多項差異。第一,第142(1)條所述的法律程序,只可由裁判官主動提出,而法官只有權在被告人已被定罪的案件中,為糾正本身的錯誤而重開案件:Rv. Gravesend JJ., ex p. Dexter [1997] Crim.L.R.298, D.C. (附件VII);但根據第104條,法律程序可由控方、被告人或裁判官本身主動提出。第二,根據第142(1)條,只有在法庭認為裁判官覆核其決定有利於司法公正,裁判官才可作出覆核;但根據第104條,在裁判官對他有權循簡易程序裁定的任何事項作出裁定後,控方或被告人均可向有關裁判官申請覆核其已就該事項作出的決定。此外,裁判官根據第104(1)條作出覆核的權力,只限於其有權循簡易程序裁定的事項,這包括所有簡易罪行,以及根據《裁判官條例》第94A條檢控人同意可循簡易程序審訊的可公訴罪行。由於交付審訊事宜不會循簡易程序裁定,故不包括在內。

律政司司長 訴 Tang Bun一案判詞中提述的"空隙"所衍生的問題

- 21. 上文第9至11段中提述裁判官根據《刑事案件訟費條例》第3 及11條在覆核程序中判給訟費的權力。在該項權力的前提下,委員或 希望考慮在覆核程序中,現行條文是否有給予控方及被告人平等待 遇,尤其是第3及11條並未涵蓋下列情況 ——
 - (a) 控方根據《裁判官條例》第104條就裁判官判被告人無罪的決定提出覆核,而覆核結果是被告人被定罪,裁判官無權把訟費判給控方。
 - (b) 控方根據《裁判官條例》第104條就裁判官判被告人無罪的決定提出覆核,而裁判官維持其判被告人無罪的決定,裁判官無權把訟費判給被告人。
 - (c) 裁判官根據《裁判官條例》第104條主動覆核其判被告人無罪的決定,而覆核結果是被告人被定罪,裁判官無權把訟費判 給控方。

律政司司長 訴 Tang Bun一案判詞所衍生的其他法律問題

- 22. 在律政司司長 訴 Tang Bun一案中,審理該案的法庭在考慮有關對裁判官決定的覆核程序的訟費問題時,亦曾簡略提及在裁判法院進行審訊的訟費及對裁判法院的判案提出上訴的訟費問題。闡釋上訴的訟費問題可有助委員商議《刑事案件訟費條例》第3及11條是否有授予裁判官足夠權力判給覆核程序的訟費。
- 23. 在香港,就裁判法院的審訊而言,《刑事案件訟費條例》第 3(1)(a)、(b)(交付審訊程序)及(c)條已授權裁判官將訟費判給被告人; 另第11(1)(a)條亦授予裁判官將訟費判給控方的相應權力。一般效果是訟費的判給隨訴訟結果而定。在英國,就治安法庭的審訊而言,《1985年罪行檢控法令》第16(1)(a)、(b)及(c)條(附件VIII)亦授予裁判官相若權力,可從中央基金提取款項作為判給被告人的訟費;另第18(1)(a)條(附件IX)則授權裁判官將訟費判給控方。一般效果亦是訟費的判給隨訴訟結果而定。委員可參考載於附件X的對照表。
- 24. 在香港,《刑事案件訟費條例》第8及13條已規定了就裁判法院的判案向原訟法庭法官提出上訴的訟費。審理律政司司長 訴 Tang Bun一案的法庭在判詞第656頁中指出:"雖欠明文規定,第8(b)條提述的上訴定必與刑罰提出的上訴有關,而上訴乃由被告人而非控方提出,原因為控方無權就刑罰提出上訴。再者,雖欠明文規定,第8(a)條提述的上訴亦定必與由被告人提出的上訴有關;若非如此,控方根據《裁判官條例》第105條以案件呈述方式上訴,一如本案,法官即使判決控方上訴得直,仍可命令將訟費判給被告人。此外,控方並無權就無罪裁定提出上訴。"。
- 25. 法庭對第8(b)條管轄範圍的評析是正確的。可以察悉,律政司司長經上訴法庭許可,可就上訴法庭以外任何法庭所判處的刑罰(法律所固定的刑罰除外),基於該刑罰並非經法律認可、原則上錯誤、或明顯過重或明顯不足的理由,向上訴法庭申請覆核:《刑事訴訟程序條例》(第221章)第81A(1)條。但第81A(1)條關乎覆核而非上訴的申請。上訴法庭如拒絕申請,可判令律政司司長支付上訴法庭所裁定的訟費款額,但如答辯人獲得法律援助,該款額不得超逾答辯人所須支付的分擔費用的總額(附件XI)。
- 26. 法庭對於第8(a)條管轄範圍的評析亦屬正確。根據《裁判官條例》第105條,在裁判官聆訊及裁定任何他有權循簡易程序裁定的申訴、告發、控罪或其他法律程序後,程序所牽涉的任何一方均可以案件呈述方式,就定罪、命令、裁定或其他程序提出上訴。根據第113條,任何一方均可就裁判官有權循簡易程序裁定的申訴或其他法律程序(與罪行有關的裁決或法律程序(如沒收案法律程序等)則除外)提出上訴,或任何人因任何定罪、命令或裁定而感到受屈,亦可提出上訴。《裁判官條例》第120條規定,法官如判決該條例第105條或113條所適用的上訴得直,可就訟費作出命令;惟第120條並未訂明可向哪一方作此命令。因此,可假設此命令可向控方或被告人作出。然而,《刑事案件訟費條例》第8(a)條似乎要將訟費只限判給被告人。由於第8(a)條比《裁

判官條例》第120(1)條較後制定,因而推定第120(1)條的管轄範圍為第8(a)條所局限,以致法官在判決《裁判官條例》第105條或113條所適用的上訴得直時,只能將訟費判給被告人。因此,就法庭的評析,基於《裁判官條例》第120條及《刑事案件訟費條例》第8(a)條的綜合結果,第8(a)條定必與由被告人提出的上訴有關的結論是正確的;而正如法庭所評析,控方上訴成功卻將訟費判給被告人,似乎並不合乎邏輯。不過,似乎控方仍可根據《裁判官條例》第105條以案件呈述方式上訴,反對裁判官的無罪裁定(《香港刑事訴訟程序》,Gary N HEILBRONN,第3版,第319頁:見附件XII),雖然即使上訴成功,法庭也無權將訟費判給控方。此外,雖然控方無權根據《裁判官條例》第113條就無罪裁定提出上訴,但根據第113(3)條,裁判官在聆訊或裁定任何申訴或其他法律程序後(與罪行有關的裁決或法律程序(如沒收案法律程序等)則除外),控方有權就該裁判官作出的有關命令或裁定提出上訴,雖然無論上訴成功與否,法庭也無權將訟費判給任何一方。

總括而言,有關對裁判法院判案提出上訴的訟費情況如下。 27. 若由控方以案件呈述方式提出上訴,無論上訴成功與否,法庭均無權 命令將訟費判給任何一方。若由被告人以案件呈述方式提出上訴,則 法庭可在上訴成功時命令將訟費判給被告人:《刑事案件訟費條例》 第8條。至於若被告人以案件呈述方式提出上訴而上訴不成功,則訟費 是否判給控方,情況卻不大清晰。似乎單是上訴不成功,並未有足夠 理據讓法庭就訟費的判決作出命令,上訴必須確實"沒有好的成功機 會", 法庭才會將訟費判給控方: 《刑事案件訟費條例》第13(a)條(見 附件XIII)。似乎法例條文中"上訴"一詞,亦包括《裁判官條例》第105 及113條所述以案件呈述方式提出的上訴。委員可參閱**附件XIV**一覽表 所載關於以案件呈述方式上訴的訟費。若由控方提出上訴,不論上訴 成功與否,法庭均無權命令將訟費判給任何一方。若由被告人提出上 訴,則法庭可在上訴成功時命令將訟費判給被告人:《刑事案件訟費 條例》第8條,但若上訴被駁回,除非上訴沒有好的成功機會,否則法 庭無權命令將訟費判給控方:《刑事案件訟費條例》第13(a)條。若控 方對刑罰提出的覆核申請成功,上訴法庭無權命令將訟費判給控方。 若控方對刑罰提出的覆核申請失敗,上訴法庭可把訟費判給被告人。 委員可參閱**附件XV**一覽表所載關於對裁判官的決定提出上訴和對裁 判官所判處的刑罰提出覆核申請的訟費。

28. 在英國,在治安法庭進行的法律程序中的任何一方,如因有關的定罪、命令或其他裁定而感到受屈,可以法律有錯誤或超越司法管轄權為理由,向組成法庭的法官要求作出案件呈述,藉以徵詢高等法院對所牽涉的法律或司法管轄權問題的意見,質疑有關法律程序:《治安法庭法令》第111條。但有關人士不可就一項其有權向高等法院上訴的決定(此項上訴權的例子之一,是由《1978年家事法律程序及治安法庭法令》第29(1)條所授予的權利),或根據任何在1879年12月31日後通過的成文法則已屬最終的決定,根據第111條提出上述要求。該案件會由高等法院王座法庭所屬分庭,或在若干情況下由家事法庭所屬分庭聆訊。分庭在處理有關上訴時,可"推翻、維持或修改"裁判官的決定,或提出本身的意見後將案件發還治安法庭審理,又或作出其認

為切合有關事項的其他命令,包括有關訟費的命令:《1981年最高法院法令》第28A條。法庭可由中央基金提取款項作為判給被告人的訟費:《罪行檢控法令》第16(5)條。法庭亦有權命令敗訴的一方支付另一方的訟費;但除非案件屬私人檢控,否則法庭無權從中央基金提取款項賠償控方的訟費:《罪行檢控法令》第17(2)條。

29. 在英國,《治安法庭法令》第108條管轄對治安法庭判案的上訴,並規定 ——

"被治安法庭定罪的人可就下列事項向巡迴刑事法院上訴 ——

- (a) 刑罰,若其承認指控;
- (b) 定罪或刑罰,若其並不承認指控。"。

《罪行檢控法令》第18(1)(b)及16(3)條管轄上訴訟費的情況。《罪行檢控法令》第18(1)(b)條規定:"若巡迴刑事法院駁回因有關定罪或對有關定罪所判處刑罰而提出的上訴,法院可按其認為公平合理的情況,命令被告人向檢控人繳付訟費。"。第16(3)條則規定——

"若有人被治安法庭裁定觸犯某項罪行,該人根據《1980年治安法庭法令》第108條(對定罪或刑罰的上訴權)向巡迴刑事法院上訴,而該上訴決定的結果是——

- (a) 其刑罰獲撤銷;或
- (b) 獲判較輕刑罰;

巡迴刑事法院可作出被告人訟費命令,將訟費判給被告人。"。

因此,上訴人上訴得直,可獲法庭從中央基金提取款項賠償其訟費。 公費資助的檢控人不能獲判從中央基金提取款項賠償其訟費,但私人 檢控人則可獲法庭命令賠償其訟費:《罪行檢控法令》第17(1)及(2)條。

在英國,只有被告人才可對定罪或刑罰提出上訴。

連附件

立法會秘書處 法律事務部 2001年11月12日

EXTRACT

THE REPORT OF THE WORKING GROUP ON COSTS IN CRIMINAL PROCEEDINGS

- 4 -

(In so recommending, members took due account of the <u>Nolle Prosequi</u>, <u>Administration of Justice</u>, <u>Miscellaneous Provisions Bill</u>, expected shortly to be enacted, and recognised that this recommendation would be subject to the costs provisions there provided for).

- (3) Rule 3 of the Costs in Criminal Cases (General) Regulations, 1986, allows for costs to be awarded either way on adjournments, at <u>all</u> levels of courts, where costs have been incurred as a result of an unnecessary or improper act or omission. Members agreed that this offered a useful precedent for Hong Kong as it embraced all tiers. At present there is only provision for this in the magistracy. (Ref : Paragraph 15 and 20, first meeting; paragraph 7, second meeting).
- (4) Members agreed that magistrates should have a discretion to reserve the question of costs until the conclusion of the trial at present, that question cannot in law be so reserved. (Ref : Paragraph 21, first meeting).
- (5) Magistrates should be empowered to order costs not exceeding \$10,000. (The present ceiling of \$5,000 is no longer realistic). If the estimated costs exceed that limit, the costs should fall to be taxed if not agreed. (Ref : Paragraph 25, first meeting; paragraph 4(5), fifth meeting).
- (6) Magistrates should have a discretionary power to award costs in review proceedings initiated under s. 104, Cap. 227. (Ref : Paragraph 29, first meeting).
- (7) The same guiding principles for the awarding of costs should apply in all courts Section 69, Cap. 227 was unduly restrictive, and all courts should have

EXTRACT

WORKING GROUP ON COSTS IN CRIMINAL PROCEEDINGS Minutes of the First Meting held on 10-10-1991 in Q.G.O., 5th floor at 5:00 p.m.

- 8 -

scheme were not high, only \$3160 per day. The <u>Secretary</u> reported that in magistrate's courts fiat the amounts were \$4000 per brief and \$2000 per refresher.

VII. <u>Item 7 Additions and/or Amendments Required:</u>

- 29. <u>Members agreed</u> that there should be costs:
 - (1) When the Crown entered a nolle prosequi,
 - (2) When the Crown withdrew a charge,
 - (3) in review proceedings (S.104, Cap.227)

and costs should be in the discretion of magistrates.

- 30. Mr Booth said S.69, Cap.227, unnecessarily fetters a magistrate's discretion, and that the basis for the award of costs in the magistrate's court should be the same as in the higher courts, i.e., the court had a complete discretion as to whether to make an order for the payment of the costs of a successful defendant, but the discretion would normally be exercised in his favour unless there were positive reasons for not doing so. The Chairman said that this was the effect of Annex J, the Prosecution of Offences Act, 1985. Members agreed that the same principles should apply in all courts.
- 31. Mr Rowse pointed out that there might be enforcement problems against the defendant.
- 32. <u>Mr Booth</u> said that there was no prosecution for malicious complaint and it would not be fair if costs were awarded against the Crown and not against the malicious complainant personally. <u>Mrs Pritchard</u> said that there were

<u>摘</u> 錄

立法局 95-96 年度第 CB(2)1304 號文件 (此份會議紀要業經當局審閱)

檔號: CB2/BC/6/95

刑事案件訟費條例草案審議委員會 會議紀要

日期:一九九六年三月二十五日(星期一)

時 間 : 上午八時四十五分 地 點 : 立法局大樓會議室 B

IV. 逐條審議條例草案的條文

草案第1條

- 15. <u>黄繼兒先生</u>表示,爲了統一根據條例草案而訂立的規則的實施日 當局期,律政司將以憲報公告指定條例草案的生效日期。<u>林少明先生</u>表示,草擬有關規則的工作約需三個月,惟此項資料尚待確定。
- 16. <u>議員</u>察悉,該等規則將由有關的立法局事務委員會或小組委員會審議。

草案第2條

- 17. 按高級助理法律顧問的建議,當局同意刪除中文文本內「虛耗訟 當局費」的定義條文(b)項第二行的「該」字。
- 18. <u>議員</u>察悉,「Ridehalgh」一案的原則如要納入條例草案內,則可加在第 15 或 18 條。

草案第3條

- 19. <u>議員</u>察悉,當局會就有關判給訟費上限的第(2)款,動議委員會審 當局 議階段修正案。
- 20 <u>當局</u>回應高級助理法律顧問有關第(1)(d)款的詢問時澄清,如裁判官是應控方提出覆核決定的申請而裁定被告人有罪,則辯方無需承擔有關費用。
- 21. 關於該條文的中文文本,當局同意按<u>高級助理法律顧問</u>的提議, 當局刪除第(1)款最末一句「訟費」之前的「該」字,並把第(1)(b)款"determines" 一詞譯爲「裁定」而非「決定」。

摘 錄

立法局 95-96 年度第 CB(2)1035 號文件

檔號: CB2/BC/6/95

一九九六年四月十九日 內務委員會會議文件

刑事案件訟費條例草案 審議委員會報告

控方訟費及辯方訟費

- 20. 條例草案第 3(2)及 11(2)條規定,除非訟費需由法庭的職員評估或控辯雙方已有協議, 否則裁判法院所審理案件的訟費不得超渝 15,000 元。
- 21. 據當局解釋,現時的 5,000 元訟費上限是在一九八一年訂定,經大幅調整後增至建議的 15,000 元。工作小組在一九九二年曾建議將該上限提高至 10,000 元。如計算過去三年的通 脹率,並顧及司法機構政務長的建議,15,000 元此數額可算合理。
- 22. 律師會認爲,在裁判法院的法律程序中可判給被告人或檢控人 15,000 元訟費的擬議上限偏低。該會提議將上限提高至 30,000 元。審議委員會亦贊同律師會的意見。
- 23. 當局應審議委員會的建議,同意將訟費限額提高至 30,000 元,並規定日後首席大法官 在獲得立法局批准後,可藉命令修訂該款額。當局同意動議委員會審議階段修正案,以達致 此目的。

上訴案件判給訟費的準則

- 24. 根據條例草案第 8 條,如大法官作出的判處與裁判官的判處「有很大的差異」,則可命令將訟費判給上訴人。鑑於法院的一般做法,是只有在判案時應用了錯誤的原則或判刑太重時,才會批准進行上訴,故審議委員會認爲不宜訂下「有很大的差異」此項擬議準則。審議委員會建議以英國的法令第 16(3)(b)條爲藍本,規定大法官如判處「較輕的懲罰」,則可命令被告人獲付訟費。
- 25. 當局接納此項建議,並會動議具此效力的委員會審議階段修正案。

過渡性條文的需要

26. 一如審議委員會所建議,當局認同有需要制訂過渡性條文。當局會動議委員會審議階段修正案,藉以訂明本條例草案不適用於就在條例草案實施前所犯的罪行而進行的刑事法律程序。

委員會審議階段修正案

27. 除在上文各段提述的委員會審議階段修正案外,當局將動議若干技術上的修訂,包括修正本條例草案的中文文本。將由當局動議的整套委員會審議階段修正案的擬稿載於**附錄** Π 。

摘錄

立法局 95-96 年度第 HB757 號文件 (此份會議紀錄業經當局審閱)

檔號: HB/C/6/95

刑事案件訟費條例草案審議委員會 會議紀錄

日期:一九九六年二月六日(星期二)

時 間 : 上午八時四十五分 地 點 : 立法局大樓會議室 A

控方訟費及辯方訟費

- 8. <u>議員</u>得出的意見是較宜在條例草案中制定簡單的準則,而非按新西蘭《1967 年 刑事案件訟費法令》的做法,列明判給訟費的詳細指引。在此方面,議員接納現時條 例草案的擬本。
- 9. 關於裁判官作出的訟費命令上限,<u>議員</u>認為擬議的 15,000 元限額偏低。律師會提議的 30,000 元限額則較切合實際情況,亦涵蓋由裁判法院審理的大部分案件。<u>鄭家富議員</u>建議以 50,000 元為限額。主席表示,鑑於訟費未必一定判給辯方,故在決定適當上限時必須考慮被告人的經濟能力。議員因此決定以 30,000 元為上限。為方便日後調整此上限,<u>議員</u>提議由立法局藉決議或公職人員藉命令,以附屬法例形式修訂該金額。

上訴案件判給訟費的準則

- 10. <u>議員</u>察悉高級助理法律顧問的意見,即草案第13條規定如被告人沒有好的成功機會的上訴案件遭駁回,則控方會獲判給訟費。此條文不適用於控方上訴得直的案件;在此等情況下,控方一般不會獲判給訟費。
- 11. 議員會要求當局澄清,對於被告人自行提出的上訴案件,現時有否任何關乎被告人獲判給訟費或須繳付訟費的條文。
- 12. 就草案第 8 條,<u>議員</u>認爲建議中凡上訴法院大法官所作的判處與裁判官的判處「有很大的差異」,則辯方會獲判給訟費的準則並不恰當。<u>議員</u>提議以英國的《1985年罪行檢控法令》第 16(3)(b)條爲藍本,該條文規定凡法官判處「較輕的刑罰」,被告人可獲判給訟費。

EXTRACT

THE REPORT OF THE WORKING GROUP ON COSTS IN CRIMINAL PROCEEDINGS

- 7 -

this right of appeal should be extended to cover costs orders made in the High Court and the District Court. (Ref : Paragraph 10, fourth meeting).

- (19) Where the. Crown succeeds in an appeal under (18), there should be no power to make an order detrimental to the defendant in respect of the costs of the appeal. (Ref : Paragraph 10, fourth meeting).
- (20) Recommendation A(3) applies equally to the Courts of Appeal.

C. General

- (21) Members agreed that all costs provisions should be consolidated in one ordinance. (Ref: Paragraph 16, first meeting).
- (22) The principle that costs are intended to be compensatory, not punitive, should be clearly spelled out in the Ordinance. A defendant seeking costs should give an assessment to the court. (Ref. : Paragraph 26, first meeting).
- (23) The Working Group, having been unable to reach an agreement as to whether both the Crown and the defendant ought to have a right of appeal against a refusal of costs, decided that it was preferable, rather than solely to give this to the defendant, to adhere to the status quo under which neither side can appeal. (Members noted, in discussing (23), and without formally taking positions, that the wider questions of social policy involved in the Crown seeking to challenge, either on appeal or review, decisions taken by lower courts which were advantageous to a defendant, and which might conflict with the Bill of Rights, Section 8, Article 11(6), did

of the defence under section 40 (6); on not being satisfied that the vehicle had been correctly weighed at the council's weighbridge they were entitled to find the defendants not guilty. Even assuming that the information referred to the tractor, the justices had found that the composite vehicle was weighed as one unit Although the method of weighing adopted might be the only possible way of weighing the tractor unit, that did not appear from the case since the justices had stated that they could see no reason why the tractor and trailer should not have been separately weighed. (*Per* Lord Widgery C.J.) The information was unsatisfactory since its plain terms indicated that the vehicle was the composite articulated vehicle. Whether or not the information was open to technical objection it was misleading. In such a complicated subject justices were entitled to more help than they had received. [*Reported by L. Norman Williams, Barrister.*]

MAGISTRATES

Criminal Justice Act 1972, s. 41—power to reopen case—whether available where defendant acquitted

R. v. Gravesend Justices, ex p. Dexter

Queen's Bench Divisional Court: Lord Widgery C.J., Ackner and Parker JJ,: January 19, 1977. 18

The applicant was served with a summons to answer an information that he had failed to comply with an order of the justices. At the hearing ha pleaded guilty. The clerk to the justices intervened and informed the justices that the applicants should have been brought to court by means of a com-plaint and not by information, and as a result the justices dismissed the summons and information. The clerk later recognised that he had been mistaken. The justices, employing section 41 of the Criminal Justice Act 1972, which provided that they could vary or rescind a sentence or order made by them when dealing with an offender, purported to withdraw their dismissal of the summons and information. The applicant applied to the Divisional Court of the Queen's Bench Division for an order of certiorari to quash the justices' decision.

Held, granting the application, that the word "offender" in section 41 clearly indicated that the justices only had power to re-open a case for the purpose of rectifying their own mistake where the dafendant was found guilty, and they had no such power where, as in the present case, he had been acquitted.

[Reported by Rachel Davies, Barrister.]

¹⁸ For the applicant: *Andrew Collins* (instructed by Hatten, Wyatt & Co., Gravesend). For the prosecution; *Seddon Cripps* (instructed by A. C. Staples, Maidstone).

- (5) For the purposes of section 5 of this Act, proceedings begun by summons issued under section 3 of the Obscene Publications Act 1959 (forfeiture of obscene articles) shall be taken to be criminal proceedings.
- (6) The functions which become functions of the Director by virtue of this Part shall [not be treated as transferred functions] for the purposes of paragraph 1(2) of Schedule 3 to the Pensions (Increase) Act 1971 (meaning of "last employing authority").
- (7) The person who, immediately before the commencement of section 2 of this Act, holds the office of Director shall be treated on the commencement of that section as holding that office in pursuance of an appointment made by the Attorney General.

NOTES

The definition of "legal representative" was inserted, and the definition of "solicitor" and the word "and" preceding it were repealed, by the Courts and Legal Services Act 1990, s 125(3), (7), Sch 18, para 52(2), Sch 20

The words in square brackets in sub-s (6) were substituted by the Employment Rights Act 1996, s 240, Sch 1, para 25(1), (3).

Sub-s (1): This Part. Ie Pt I (ss 1-15) of this Act.

Magistrates' court. See the note to s 3 ante.

Crown Prosecution Service. As to the constitution and functions of the Service, see s 1 ante.

Sub-s (2): Justice of the peace. See the note to s 7 ante.

Sub-s (7): Attorney General. See the note to s 2 ante.

Magistrates' Courts Act 1980, ss 1, 115. See Vol 27, title Magistrates.

Courts and Legal Services Act 1990, s 119(1). See Vol 11, title Courts and Legal Services.

Administration of Justice (Miscellaneous Provisions) Act 1933, s 2; Obscene Publications Act 1959, s 3. See this title ante.

Pensions (Increase) Act 1971, Sch 3, para 1(2). See Vol 33, title Pensions and Superannuation.

PART II COSTS IN CRIMINAL CASES

Award of costs out of central funds

16 Defence costs

- (1) Where—
 - (a) an information laid before a justice of the peace for any area, charging any person with an offence, is not proceeded with;
 - (b) a magistrates' court inquiring into an indictable offence as examining justices determines not to commit the accused for trial;
 - (c) a magistrates' court dealing summarily with an offence dismisses the information;

that court or, in a case falling within paragraph (a) above, a magistrates' court for that area, may make an order in favour of the accused for a payment to be made out of central funds in respect of his costs (a "defendant's costs order").

- (2) Where—
 - (a) any person is not tried for an offence for which he has been indicted or committed for trial; or
 - [(aa) a notice of transfer is given under [a relevant transfer provision] but a person in relation to whose case it is given is not tried on a charge to which it relates; or]
- (b) any person is tried on indictment and acquitted on any count in the indictment; the Crown Court may make a defendant's costs order in favour of the accused.

- (ii) carrying on under national ownership any industry or undertaking or part of an industry or undertaking; or
- (d) any other authority or body whose members are appointed by Her Majesty or by any Minister of the Crown or government department or whose revenue consist wholly or mainly of money provided by Parliament.

NOTES

Sub-s (1): Indictable offence; central funds. See the notes to s 16 ante.

Divisional Court of the Queen's Bench Division. See the note to s 3 ante.

Summary offence. For meaning, see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes.

Sub-s (5): Crown Prosecution Service. As to the constitution and functions of the Service, see ss 1-7 ante.

Further provisions. Cf the note to s 16 ante.

Application to other proceedings. See the note to s 16 ante.

Definitions. For "proceedings", see s 21(1) post; as to "the costs of any party to proceedings", see s 21(4), (5) post.

Regulations. See s 20 post and the note "Regulations under this section" thereto.

Award of costs against accused

18 Award of costs against accused

- (1) Where—
 - (a) any person is convicted of an offence before a magistrates' court;
 - (b) the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction; or
 - (c) any person is convicted of an offence before the Crown Court;

the court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable.

- (2) Where the Court of Appeal dismisses—
 - (a) an appeal or application for leave to appeal under Part I of the Criminal Appeal Act 1968; or
 - (b) an application by the accused for leave to appeal to the House of Lords under Part II of that Act; [or
 - (c) an appeal or application for leave to appeal under section 9(11) of the Criminal Justice Act 1987;]

it may make such order as to the costs to be paid by the accused, to such person as may be named in the order, as it considers just and reasonable.

- (3) The amount to be paid by the accused in pursuance of an order under this section shall be specified in the order.
 - (4) Where any person is convicted of an offence before a magistrates' court and—
 - (a) under the conviction the court orders payment of any sum as a fine, penalty, forfeiture or compensation; and
 - (b) the sum so ordered to be paid does not exceed £5;

the court shall not order the accused to pay any costs under this section unless in the particular circumstances of the case it considers it right to do so.

(5) Where any person under [the age of eighteen] is convicted of an offence before a magistrates' court, the amount of any costs ordered to be paid by the accused under this section shall not exceed the amount of any fine imposed on him.

裁判法院進行審訊的訟費

	法例條文	訟 費
香港	已有告發或申訴向裁判官提出,但其後並無繼續進行程序:《刑事案件訟費條例》第3(1)(a)條。	裁判官可命令將訟費判給被告人。
	裁判官在研訊某可公訴罪 行後,裁定不將被告人交付 審訊:《刑事案件訟費條例》 第3(1)(b)條。	裁判官可命令將訟費判給 被告人。
	裁判官在處理任何簡易罪行或以簡易程序處理任何 罪行後,撤銷該告發或申訴或判被告人無罪:《刑事案 件訟費條例》第3(1)(c)條。	裁判官可命令將訟費判給被告人。
	裁判官將被告人定罪或裁判官應申訴而根據《裁判官條例》就被告人作出命令:《刑事案件訟費條例》第11(1)(a)條。	裁判官可命令將訟費判給檢控人。
英國	已有告發向任何地區的太平紳士提出,指控某人干犯某罪行,但其後並無繼續進行程序:《罪行檢控法令》第16(1)(a)條。	該地區的治安法庭可命令 從中央基金提取款項賠償 被告人的訟費。

	法例條文	費用
英國	治安法庭以預審法院的身份在研訊某可公訴罪行後,裁定不將被告人交付審訊:《罪行檢控法令》第16(1)(b)條。	法庭可命令從中央基金提 取款項賠償被告人的訟 費。
	治安法官在以簡易程序處理某罪行後,撤銷有關告發:《罪行檢控法令》第16(1)(c)條。	法庭可命令從中央基金提 取款項賠償被告人的訟 費。
	任何人被治安法庭定罪: 《罪行檢控法令》第18(1)(a) 條。	法庭若認為公平合理,可命令被告人向檢控人支付訟 費。

Criminal Procedure

- 確認或撤銷該項定罪或命令重新審訊; 及
- 作出爲實施其決定所需的其他命令:

但如上訴法庭認爲實際上並無司法不公,則即使上訴法庭認爲就如此保留的法 律問題或會作出對被定罪的人有利的決定,上訴法庭仍可確認該項定罪。

(由1972年第34號第15條代替。由1998年第25號第2條修訂)

應律政司司長的申請覆核刑罰

81A. 由律政司司長申請覆核刑罰

- 律政司司長經上訴法庭許可,可就上訴法庭以外任何法庭所判處的刑罰 (法律所固定的刑罰除外),基於該刑罰並非經法律認可、原則上錯誤、或明顯過重或 明顯不足的理由,向上訴法庭申請覆核。(由1997年第362號法律公告修訂)
 - 根據第(1)款提出的申請-
 - (a) 須以書面提出並由律政司司長簽署;(由1997年第362號法律公告
 - 須附有第(2A)款所指明的文件或文件的副本;
 - 須於判處刑罰之日後21天內或上訴法庭所容許的更長時間內,或根 據《裁判官條例》(第227章)第104條就覆核刑罰或覆核所判處刑 罰的定罪而進行的任何法律程序被撤回或獲處置之日後 21 天內或 上訴法庭所容許的更長時間內, 送交司法常務官存檔。(由 1979 年 第20 號第4 條修訂)
 - (2A) 就第(2)(b)款而言,所指明的文件如下——
 - (a) 如屬裁判官判處刑罰的案件,一份裁判官所裁斷的或在其席前承認 的事實和判處該刑罰的理由的陳述書;
 - 如屬區域法院法官判處刑罰的案件,按照《區域法院條例》(第336 章)第80條載於紀錄的裁決理由陳述書,以及一份判處該刑罰的理 由的陳述書;
 - 如屬高等法院法官判處刑罰的案件,在法官席前進行的全部法律程 序的紀錄,但在該等法律程序中進行的任何審訊中所提供的證據除 外;

- (a) affirm or quash the conviction or order a new trial; and
- make such other orders as may be necessary to give effect to its decision:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the question so reserved might be decided in favour of the convicted person, affirm the conviction if it considers that no miscarriage of justice has actually occurred.

(Replaced 34 of 1972 s. 15)

Review of sentence on the application of the Secretary for Justice

81A. Application by Secretary for Justice for review of sentence

- (1) The Secretary for Justice may, with the leave of the Court of Appeal, apply to the Court of Appeal for the review of any sentence (other than a sentence which is fixed by law) passed by any court, other than the Court of Appeal, on the grounds that the sentence is not authorized by law, is wrong in principle or is manifestly excessive or manifestly inadequate. (Amended L.N. 362 of 1997)
 - (2) An application under subsection (1) shall—
 - (a) be in writing signed by the Secretary for Justice; (Amended L.N. 362 of
 - be accompanied by the documents, or copies of the documents, specified in subsection (2A):
 - be filed with the Registrar within 21 days, or within such further time as the Court of Appeal may allow, after the date on which the sentence was passed or any proceedings for the review, under section 104 of the Magistrates Ordinance (Cap. 227), of the sentence or of the conviction on which the sentence was passed, were withdrawn or disposed of. (Amended 20 of 1979 s, 4)
 - (2A) The following documents are specified for the purpose of subsection (2)(b)
 - in the case of a sentence passed by a magistrate, a statement of the facts found by him or admitted before him and of the reasons for the sentence;
 - in the case of a sentence passed by a District Judge, the statement of the reasons for the verdict placed on record in accordance with section 80 of the District Court Ordinance (Cap. 336) and a statement of the reasons for the sentence:
 - in the case of a sentence passed by a judge of the High Court, the record of the whole of the proceedings before him other than the evidence given in any trial that took place in those proceedings: (Amended 25 of 1998 s. 2)

- (d) 在任何案件中,任何關於答辯人而又在判處刑罰的法庭席前呈交的報告。(由1979年第20號第4條增補)
- (2B) 第(2A)款所指明的文件或文件的副本,須在爲此以書面向判處刑罰的裁判官或區域法院法官提出要求後7天內,或如該刑罰是由高等法院法官判處的,則須在爲此以書面向司法常務官提出要求後7天內,交付律政司司長。(由1979年第20號第4條增補。由1997年第362號法律公告修訂)
 - (3) 上訴法庭可命令將答辯人羈留扣押,直至根據第81B(1)條作出命令爲止。
- (4) 上訴法庭如覺得適合,可應答辯人的申請,准予答辯人保釋,以聽候申請的聆訊。
- (5) 上訴法庭如拒絕申請,可判令律政司司長支付上訴法庭所裁定的訟費款額,但如答辯人獲得法律援助,該款額不得超逾答辯人所須支付的分擔費用的總額。(由1997年第362號法律公告修訂)
 - (6) 在本條以及第 81B 及 81C 條中—
- "答辯人" (respondent)指已被判處刑罰的人。

(由1972年第18號第2條增補。由1979年第20號第4條修訂;由1998年第25號第2條修訂)

[片照 N.Z. Crimes Act 1961 s. 383]

81B. 上訴法庭對刑罰的覆核

第18期

- (1) 上訴法庭在聆訊申請時一
 - (a) 如認爲刑罰並非法律所認可、原則上錯誤、或明顯過重或明顯不足, 可藉命令撤銷法庭所判處的刑罰,並依法判處上訴法庭認爲本應判 處的其他刑罰(不論是較嚴或較寬)以作取代;
 - (b) 在任何其他情況下,可藉命令拒絕更改刑罰。
- (2) 律政司司長及答辯人在覆核刑罰的聆訊中均有權獲得聆聽。(由1997年第362號法律公告修訂)
- (2A) 如答辯人已獲送達申請書或申請的通知,則即使答辯人沒有出庭,上訴法庭仍可聆訊和裁定覆核刑罰的申請。(由1979年第20號第5條增補)
 - (3) 為施行本條,上訴法庭可行使第83V條所賦予的任何權力。 (由1972年第18號第2條增補。由1972年第34號第16條修訂;由1998 年第25號第2條修訂)

- (d) in any case, any report concerning the respondent which was before the court which passed the sentence. (Added 20 of 1979 s. 4)
- (2B) The documents, or copies of the documents, specified in subsection (2A) shall be delivered to the Secretary for Justice within 7 days of a request therefor being made in writing to the magistrate or District Judge who passed the sentence or, if the sentence was passed by a judge of the High Court, to the Registrar. (Added 20 of 1979 s. 4. Amended L.N. 362 of 1997; 25 of 1998 s. 2)
- (3) The Court of Appeal may order a respondent to be detained in custody until an order has been made under section 81B(1).
- (4) The Court of Appeal may, if it seems fit, on the application of a respondent, admit the respondent to bail pending the hearing of the application.
- (5) The Court of Appeal may, if it refuses an application, award against the Secretary for Justice such amount of costs as it may determine, save that the amount shall not, if the respondent is legally aided, exceed the total of the contributions which he is liable to make. (Amended L.N. 362 of 1997)
- (6) In this section and sections 81B and 81C—
 "respondent" (答辯人) means a person on whom a sentence has been passed.

(Added 18 of 1972 s. 2. Amended 20 of 1979 s. 4) [cf. N.Z. Crimes Act 1961 s. 383]

81B. Review of sentence by Court of Appeal

- (1) Upon the hearing of the application the Court of Appeal may, by order—
 - (a) if it thinks that the sentence was not authorized by law, was wrong in principle or was manifestly excessive or manifestly inadequate, quash the sentence passed by the court and pass such other sentence (whether more or less severe) warranted in law in substitution therefor as it thinks ought to have been passed;
 - (b) in any other case, refuse to alter the sentence.
- (2) The Secretary for Justice and the respondent shall have the right to be heard on the hearing of the review of a sentence. (Amended L.N. 362 of 1997)
- (2A) The Court of Appeal may hear and determine an application for the review of a sentence notwithstanding that the respondent is not present, if the respondent has been served with an application or notice of it. (Added 20 of 1979 s. 5)
- (3) For the purposes of this section the Court of Appeal may exercise any of the powers conferred by section 83V.

(Added 18 of 1972 s. 2. Amended 34 of 1972 s. 16)

Criminal Procedure in Hong Kong by Gary N Heilbronn, 3rd edition

CRIMINAL APPEALS AND REVIEWS

Consequences of Review

Thus, if applied for first, review will be available in addition to other kinds of appeal and judicial review (giving the defendant an additional opportunity to challenge the decision). Making the relevant application for review postpones the commencement of the time limit for making other appeals but such postponement does not apply to applications for judicial review. Incidentally, there is no appeal from the magistrate's decision to refuse to grant a review.

The major advantages of self-review are the informality of the application procedure, its relative rapidity, and, notably, the fact that the procedure is considerably less expensive that an appeal or application for judicial review in the Court of First Instance.

12.1.2 Appeal to Court of First Instance 'by way of case stated'

The appeal 'by way of case stated' is an important but less common mode of appeal from the decisions of a magistrate.¹³ In practice, it is used more by the prosecution than the defence. Essentially, the magistrate is requested to 'state and sign a case setting forth the facts and the grounds' of the relevant determination for the opinion of a judge. It consists of a brief summary of the case in point form, which ends by posing one or more questions which are the issue(s) to be decided in the appeal. The magistrate may draft the case, or may invite either party (including the prosecution) to draft the case and present it to him for consideration.

Who May Appeal

Appeal 'by way of case stated' is in principle available to either party, the Secretary for Justice (even when he is not a party, but the determination is connected with an offence), or 'any person aggrieved' by the determination (in theory, it could arguably extend to a victim who is not a party). ^{13a}

The Secretary for Justice or prosecutor may appeal in this manner against an acquittal by a magistrate, which unlike acquittals in trials before judge and jury in the Court of First Instance, is not final, in the sense of being unappealable (see 12.4). Naturally, on appeal, the case may be remitted for retrial or conviction, or the magistrate's finding altered by the judge under s 119(1)(d) MO.

To institute these proceedings, the appellant must give security (enter into a recognizance to prosecute the appeal with diligence and to be liable for costs) as well as pay the nominal court fee (s 110 MO).

¹¹ See s 104(10) MO.

See the last sentence in s 104(10) MO.

¹³ See ss 105-112 MO.

This is held to include a police witness fined by a magistrate for failing to appear, and it was suggested that any person wrongfully affected by a decision or order could appeal. See *A-G r Davies* [1970] HKLR 203.

Care must be taken with the use of the word "final" as in most contexts, it will mean not open to appeal, though in others, slightly differing definitions may be given for it.

- (b) 在沒有任何該類協議的情況下,裁判官命令評定該等訟費。
- (3) 終審法院首席法官可在獲得立法會批准下,藉命令修訂第(2)款指明的款 額。(由1998年第25號第2條修訂;由1999年第39號第3條修訂)

可公訴罪行的控方訟費

凡被告人就某罪行而被區域法院或原訟法庭判有罪或在該等法院席前被判有 罪,則區域法院及原訟法庭除可作出在其他情況下按法律可予作出的判處外,另可命 令將訟費判給檢控人。

(由1998年第25號第2條修訂)

13. 在法官或上訴法庭駁回被告人沒有好的 成功機會的上訴案件中的控方訟費

凡被告人一

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- 不服裁判官所作的定罪、命令或裁定而向法官提出上訴;或 (a)
- 不服以下事項向上訴法庭上訴—
 - (i) 他的定罪或就他所作出的其他裁斷或裁決;或
 - (ii) 判處;或
- (c) 向上訴法庭申請不服(a)段所提述的任何事項而上訴的許可,

而該上訴或申請不成功,若法官或上訴法庭信納該上訴或申請(視屬何情況而定)是 沒有好的成功機會的,則法官或上訴法庭可命令將訟費判給檢控人。

(由1998年第25號第2條修訂)

14. 控方訟費可作爲民事債項予以追討

- (1) 任何憑藉根據本部所作出的命令而判給檢控人的訟費,是被告人欠檢控人 的債項,且可作爲民事債項予以追討。
- (2) 凡在法院根據本部作出命令前,如在被告人被拘捕、逮捕或拘押或自動接 受拘押時,自被告人取得任何款項或被告人向法院付給任何款項,則法院在作出任何 此項命令時,可命令判給檢控人的訟費或該等訟費的任何部分,從任何如此取得的或 如此付給的款項中支付。
- (3) 第(2)款並不適用作爲《法律援助條例》(第 91 章)第 18A(1)條所指的爲 使法律援助署署長受益的第一押記的款項。

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- the magistrate, in the absence of any such agreement, orders that those costs be taxed.
- The Chief Justice may, with the approval of the Legislative Council, by order, amend the sum specified in subsection (2).

12. Prosecution costs for indictable offences

Where a defendant is convicted of an offence by or before the District Court or the Court of First Instance, the District Court and the Court of First Instance may, in addition to such sentence as may otherwise be passed by law, order that costs be awarded to the prosecutor.

(Amended 25 of 1998 s. 2)

Prosecution costs where judge or Court of Appeal dismisses unmeritorious appeal by defendant

Where a defendant unsuccessfully—

- appeals to a judge from any conviction, order or determination of a magistrate: or
- appeals to the Court of Appeal against
 - his conviction of an offence or any other finding or verdict made in respect of him; or
 - sentence: or
- applies to the Court of Appeal for leave to appeal against any of the matters referred to in paragraph (a),

and the judge or the Court of Appeal is satisfied that the appeal or the application, as the case may be, is or was without merit, the judge or the Court of Appeal may order that costs be awarded to the prosecutor.

14. Prosecution costs to be recoverable as a civil debt

- (1) Any costs awarded to a prosecutor by virtue of an order made under this Part shall be a debt due to the prosecutor from the defendant and be recoverable as a civil debt.
- (2) Where prior to an order being made under this Part any moneys were taken from a defendant on his apprehension, arrest, being taken into custody or his surrender to custody or were paid into court by a defendant, the court may, on the making of any such order, order that the payment of any costs awarded to the prosecutor or any part thereof be made out of any moneys so taken or paid.
- (3) Subsection (2) shall not apply to moneys that are a first charge for the benefit of the Director of Legal Aid within the meaning of section 18A(1) of the Legal Aid Ordinance (Cap. 91).

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對裁判法院判案以案件呈述方式提出上訴的訟費

	由檢控人提出	由被告人提出
以案件呈 述方式上 訴	在裁判官聆訊及裁定任何的 他有權循簡易程序裁他 中訴、告發、控罪或其律 中訴、告發,控可以法律 事有錯誤或超越可法 對有錯誤或 就任何定罪、 法 管 、裁定或此 之 。 数定或 是 。 之 。 之 。 之 。 之 。 之 。 之 。 之 。 之 。 。 之 。 。 之 。	在裁判官聆訊及裁定任何 他有權循簡易程序裁定任的 申訴、告發、控罪或其他法 律程序後,被告人或司司 以法律 觀點有錯誤或超何定 時一令、裁定或上述的其他 令、裁定或上述的其代的 持官上訴:《裁判官條例》 第105條。
訟費	以案件呈述方式上訴,無論 成功與否,法官均無權作出 命令將訟費判給任何一 方。	若以案件呈述方式上訴成功,法官可命令將訟費判給被告人:《刑事案件訟費條例》第8條。 若以案件呈述方式上訴失敗,似乎除非該上訴沒有權的成功機會,否則法官無權將上訴的訟費判給控方等人刑事案件訟費條例》第13(a)條。

就裁判官的決定提出上訴及 就裁判官所判刑罰申請覆核的訟費

	由控方提出	由被告人提出
上訴	裁判官在聆訊及裁定他有權循簡易程序裁定的任何申訴或其他法律程序後(與罪行有關的裁決或法律程序則除外),任何一方均裁判官作出的命令或裁定官提出上訴:《裁判官條例》第113(3)條。	任何人如因裁判官就任何 罪行作出的定罪、命令或裁 定而感到受屈,而且並無認 罪或承認有關告發或申下 的內容為真實,即可按下 規定方式,就該項定罪、命 令或裁定向法官提出 等 等 。 。 。 。 。 。 。 。 。 。 。 。 。 。 。 。 。
		任何人在認罪後或在承認 有關告發或申訴的內容為 真實後,如被裁判官裁定犯 任何罪行,該人即可就其判 處的刑罰向法官提出上 訴,但如該項判處是由法律 所固定的,則屬例外:《 判官條例》第113(2)條。
		裁判官在聆訊及裁定他有權循簡易程序裁定的任何申訴或其他法律程序後(與罪行有關的裁決或法律程序則除外),任何一方均裁別官作出的命令或裁官提出上訴:《裁判官條例》第113(3)條。

	由控方提出	由被告人提出
訟費	無論上訴成功與否,法官均 無權命令將訟費判給任何 一方。	若上訴成功,法庭可命令將 訟費判給被告人:《刑事案 件訟費條例》第8條。 若上訴失敗,除非該上訴沒 有好的成功機會,否則法庭 無權命令將訟費判給控 方:《刑事案件訟費條例》 第13(a)條。
申請覆核刑罰	律政司司長經上訴法庭許可就上訴法庭以外任何 可就上訴法庭以外任何 法庭所判處的刑罰(法律所 固定的刑罰除外),基於則 罰並非經法律認可、原則 上錯誤、或明顯過重或明顯 上錯誤、或明顯過重或時期 不足的理由,向上訴法程序條 例》第81A(1)條。	不適用。
訟費	若申請覆核成功,法庭並無權力命令將訟費判給控方。若申請失敗,法庭可作出命令,將訟費判給被告人:《刑事訴訟程序條例》第81A(5)條。	不適用。