

**LETTERHEAD OF THE LAW SOCIETY OF HONG KONG**

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**BY HAND**

21 June 2001

The Hon. Margaret Ng  
10/F., New Henry House,  
10 Ice House Street,  
Central, Hong Kong.

Dear Ms. Ng, Margaret,

**Jurisdiction to Award Costs in Criminal Proceedings**

The Society's Criminal Law & Procedure Committee wishes to draw your attention to the practice by the prosecution in opposing a defendant's application for costs by relying on the judgement in Secretary of Justice v. Tang Bun [1999] 3 HKC 647. A copy of the case is enclosed for reference.

The Committee is of the view that it is a grossly unfair practice when a review is instituted by the prosecution and subsequently dismissed by the magistrate.

The Committee would like to have this issue placed on the next agenda of the LegCo Panel on Administration of Justice and Legal services.

Thank you for your attention and looking forward to receiving your reply.

Yours sincerely,

Margaret S.Y. Lau  
Assistant Director of Practitioners Affairs (Acting)

Encl.

P.1.36

[1999] 3 HKC 647

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**SECRETARY FOR JUSTICE V TANG BUN**

COURT OF FIRST INSTANCE - MAGISTRACY APPEAL NO 439 OF 1999  
WOO J  
16, 22 JUNE 1999

**Criminal Law and Procedure - Costs - Magistrates' jurisdiction to award costs - Review instituted by prosecution and dismissed by magistrate - Whether magistrate had jurisdiction to award costs of the review to the defence - Costs in Criminal Cases Ordinance (Cap 492) s 3(1)(c), (d)**

**Courts and Judicial System - Magistrates - Review of acquittal - Review dismissed - Whether the dismissal amounted to acquittal or a confirmation to acquit - Costs in Criminal Cases Ordinance (Cap 492) s 3(1)(c) - Magistrates Ordinance (Cap 227) s 104**

**Words and Phrases - 'Acquit' - Costs in Criminal Cases Ordinance (Cap 492) s 3(1)(c) Chinese characters omitted from electronic copy. Please consult paper publication.**

The respondent was charged with a number of offences and tried before the magistrate's court. At the end of the trial, the magistrate acquitted the respondent of all the charges. The respondent applied for costs but the magistrate refused that application. The prosecution, not being satisfied with the acquittal, applied under s 104 of the Magistrates Ordinance (Cap 227) to review the magistrate's decision to acquit. The magistrate dismissed the application for review and awarded costs of the review hearing to the respondent.

The appellant appealed by way of case stated under s 105 of the Magistrates Ordinance, and posed three questions for the court's determination, namely (1) whether the magistrate was correct in holding that he had the power under s 3(1)(d) of the Costs in Criminal Cases Ordinance (Cap 492) to award costs to the defence on dismissing an application for review instituted by the prosecution, where in that review, the magistrate neither reversed nor varied his decision; (2) whether the magistrate had power under s 3(1)(c) of the Costs in Criminal Cases Ordinance to award costs to the defence on dismissing an application for review instituted by the prosecution, where one of the grounds of the review was on the acquittal of the defendant; and (3) whether the magistrate was correct in awarding costs of the review proceedings to the respondent in this case. The

||**Page 648**>> appellant contended further that neither s 11 of the Costs in Criminal Cases Ordinance empowered the magistrate to award costs of the review to the prosecution where a review under s 104 of the Magistrates Ordinance was instituted by the prosecution.

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**Held, allowing the appeal:**

- (1) Courts had no inherent jurisdiction to award costs in criminal proceedings. The power to award costs was derived from legislation. *A-G v Ip Wai Kwong* [1982] HKLR 93, *R v Mak Yuet Hang* [1990] 1 HKLR 121, *A-G v A Deputy District Court Judge* [1991] 2 HKLR 507, *A-G v Lam Sau Ki* [1993] 2 HKC 330, *S-J v Chan Cheung Chor* (HCAL 102/98, unreported) considered (at 650H).
- (2) There was simply no provision in either s 3 or s 11 of the Costs in Criminal Cases Ordinance or in the entirety of the Magistrates Ordinance to cater for the situation where an application for review was made by the prosecution. It followed that s 3(1)(d) did not confer power or jurisdiction on the magistrate to award costs of the review proceedings to the respondent upon dismissing the application for review instituted by the prosecution. The answer to question 1 was 'No' (at 653 F-H/I).
- (3) The dismissal of the prosecution's application for review, properly speaking, only confirmed the magistrate's decision of acquittal. It could not amount to an acquittal because an acquittal had taken place earlier. The word 'acquit' in s 3(1)(c) could not cover a confirmation of the decision to acquit (at 654D-E).
- (4) The provisions in ss 11(1)(b) and 3(1)(d) were so specifically designed to cover reviews such that they overrode any other provisions in the Costs in Criminal Cases Ordinance in all situations in respect of reviews. Sections 11(1)(a) and 3(1)(c) could not be prayed in aid to deal with costs in respect of any matter in or in consequence of review proceedings (at 657I-659B).
- (5) Section 3(1)(c) only covered the situation where the defendant was acquitted after trial. Its meaning could not be fairly extended to cover a situation where the acquittal was confirmed on rejecting a review brought by the prosecution. The answer to question 2 was 'No' (at 659B-C).
- (6) The magistrate had no power or jurisdiction under the Costs in Criminal Cases Ordinance or in any other enactment to award costs of the review wherever the application for review was instituted by the prosecution, regardless of whether it succeeded or not, and he had no power to award costs in favour of one party or another. The answer to question 3 was 'No' (at 655C, 659D-E).

**Per curiam**

A judge of the Court of First Instance had power to award costs under s 120 of the Magistrates Ordinance, which was specifically referred to in s 8(a) of the Costs in Criminal Cases Ordinance, in an appeal by way of case stated by the prosecution (at 659E-F).

**Cases referred to**

*Attorney General v A Deputy District Court Judge* [1991] 2 HKLR 507

*Attorney General v Ip Wai Kwong* [1982] HKLR 93

*Attorney General v Lam Sau Ki* [1993] 2 HKC 330

*R v Mak Yuet Hang* [1990] 1 HKLR 121

*Secretary for Justice v Chan Cheung Chor* (HCAL 102/98, unreported)

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### Legislation referred to

Costs in Criminal Cases Ordinance (Cap 492) ss 3, (1)(a), (b), (c), (d), 8, (a), (b), 9, 11, (1)(a), (b), 13

Criminal Procedure Ordinance (Cap 221) ss 81A, 81D, 81F

Dangerous Drugs Ordinance (Cap 134) s 56

Magistrates Ordinance (Cap 227) ss 51, 53, 54, 55, 56, 104(6), 105, 120

### Other legislation referred to

Bennion Statutory Interpretation (3rd Ed) p 903

[*Editorial note:* (i) See further *Halsbury's Laws of Hong Kong* Vol 9, Criminal Law and Procedure [130.172] as to awards of costs in favour of the offender by a magistrate; see also Vol 8, Courts and Judicial System [125.270] as to magistrates jurisdiction to award costs. (ii) Section 120 of the Magistrates Ordinance (Cap 227) and s 8(a) of the Costs in Criminal Cases Ordinance (Cap 492), so far as material, provide:

*120. Provision as to costs*

(1) On any appeal to which section 105 or 113 applies, the judge may make such orders as to costs, as he may think fit ...

*8. Defence costs on appeal from magistrate*

Where a judge -

(a) allows an appeal to which section 105 or 113 of the Magistrates Ordinance (Cap 227) applies, in the exercise of his powers under section 120 of that Ordinance; or ...

the judge may order that costs be awarded to the defendant.]

### Appeal

This was an appeal by way of case stated by the Secretary for Justice against a magistrate's decision to award costs to the defendant on a review application instituted by the prosecution. The facts appear sufficiently in the following judgment.

*David Leung (Director of Public Prosecutions) for the appellant.*

*Peter Duncan (Augustine CY Tong & Co) for the respondent.*

### Woo J

*The facts*

This is an appeal by way of case stated pursuant to s 105 of the Magistrates Ordinance (Cap 227) brought by the Secretary for Justice (the appellant) against an order for costs made by a

magistrate on 28 January 1999. The order was for the costs of the review to be paid by the prosecution to the defendant. The review was instituted by the prosecution and the order for costs was made by the magistrate upon his dismissing the application.

The respondent was the defendant facing four criminal charges before the magistrate, namely, soliciting an advantage as an agent, accepting an advantage as an agent, false accounting, and doing an act tending and

||Page 650>> intended to pervert the course of justice.

The respondent pleaded not guilty to all of the four charges. At the close of the prosecution case, the magistrate ruled a case to answer on all charges. The respondent elected not to give evidence or call any witness. The magistrate acquitted the respondent of all of the four charges, but refused his application for costs of the trial. That took place on 28 December 1998.

On 6 January, 1999, the prosecution, pursuant to s 104 of the Magistrates Ordinance, applied for a review of the magistrate's decision to acquit the respondent.

After the hearing of the application for review on 28 January 1999, the magistrate dismissed the application for review and awarded costs of the review proceedings to the respondent, to be taxed if not agreed within 14 days.

### ***The case stated***

The appeal by way of case stated is in relation to that single order for costs. In the case stated, the magistrate posed three questions for this court to answer:

- (1) Whether I (the magistrate) was correct in holding that I have power under s 3(1)(d) of the Costs in Criminal Cases Ordinance (Cap 492) to award costs to the defence on dismissing an application for review instituted by the prosecution;
- (2) Whether I was correct in holding that I have the power under s 3(1)(c) of the Costs in Criminal Cases Ordinance (Cap 492) to award costs to the defence on dismissing an application for review by the prosecution where one of the grounds of the review was on the acquittal of the defendant;
- (3) Whether I was correct in awarding costs of the review proceedings to the respondent in this case.

### ***The main arguments***

It is well established law, and both parties before me accept, that a court has no inherent jurisdiction to award costs in criminal proceedings, and the power to award costs is derived from legislation: see *A-G v Ip Wai Kwong* [1982] HKLR 93, *R v Mak Yuet Hang* [1990] 1 HKLR 121, *A-G v A Deputy District Court Judge* [1991] 2 HKLR 507, *A-G v Lam Sau Ki* [1993] 2 HKC 330 and *S-J v Chan Cheung Chor* (HCAL 102/98, unreported).

A magistrate's power to award costs to the defence is based on the Costs in Criminal Cases Ordinance (Cap 492) (the Ordinance).

Part II of the Ordinance deals with defence costs while Pt III deals with prosecution costs. In the main, there are two most relevant sections for

||Page 651>> consideration: s 3 under Pt II and s 11 under Pt III. Section 3 provides as follows:

3. *Defence costs in summary proceedings*
- (1) Where -
    - (a) an information or complaint laid before a magistrate is not proceeded with;
    - (b) a magistrate inquiring into an indictable offence determines not to commit the defendant for trial;
    - (c) a magistrate dealing with a summary offence or any offence summarily dismisses the information or complaint or acquit the defendant; or
    - (d) a magistrate, under section 104 of the Magistrates Ordinance (Cap. 227), on the application of the defendant or on his own initiative reviews his decision, and on that review, reverses or varies his decision, the magistrate may order that costs be awarded to the defendant.
  - (2) ...
  - (3) ...

Section 11 provides as follows:

11. *Prosecution costs in summary proceedings*
- (1) Where -
    - (a) a defendant is convicted by a magistrate or a magistrate makes an order on complaint in respect of a defendant under the Magistrates Ordinance (Cap. 227); or
    - (b) a magistrate, under section 104 of that Ordinance, on the application of the defendant reviews and subsequently confirms his decision to convict a defendant or to make an order on complaint in respect of a defendant, the magistrate may order that costs be awarded to the prosecutor.
  - (2) ...
  - (3) ...

Mr Leung, on behalf of the prosecution, submits that in making the order for costs, the magistrate was not exercising any of the powers provided for in s 3 of the Ordinance, wherefore he had no jurisdiction to do so.

It is common ground that neither s 3(1)(a) nor s 3(1)(b) of the Ordinance is applicable to the present case. Mr Leung argues that in order to exercise the power under s 3(1)(d) of the Ordinance to award costs to the defendant in review proceedings, two conditions must be satisfied:

- (a) the review is made either on application of the defendant or on the initiative of the magistrate; and  
||Page 652>>
- (b) in that review, the magistrate reverses or varies his decision.

In the present case, as the application for review heard on 28 January 1999 was made by the prosecution, the first condition in s 3(1)(d) was not met on the facts. The second condition in s 3(1)(d) was also not fulfilled because the magistrate dismissed the prosecution's application for review, not reversing or varying his decision. Thus, the facts of the present case do not come within the ambit of s 3(1)(d) and the magistrate has no jurisdiction under that provision

to award costs to the respondent.

Mr Leung further relies on the wording of s 11(1)(b) of the Ordinance in support of his argument, because even under that paragraph, a magistrate cannot award costs of the review to the prosecution where a review under s 104 of the Magistrate Ordinance is instituted by the prosecution. Similarly, as there is no express provision in s 11(1)(b) to cater for the scenario, a magistrate has no power to award costs of the review to the prosecution where the review is instigated by the magistrate himself.

Mr Leung argues that s 3(1)(c) has no application to the present case because it only deals with the situation where a magistrate 'dismisses the information or complaint or acquit the defendant'. Upon the conclusion of the trial on 28 December 1998, the magistrate acquitted the respondent. Section 3(1)(c) confers power on the magistrate to award costs when he acquitted the respondent, but it has no application to the review proceedings that took place on 28 January 1999.

Apart from the wording of the provision, Mr Leung also relies on the doctrine of *generalibus specialia derogant* (special provisions override general ones) as applicable to the interpretation of s 3(1)(c) and s 3(1)(d). In *Bennion on Statutory Interpretation* (3rd Ed) p 903, it is stated as follows:

Where a literal meaning of a general enactment covers a situation for which specific provisions is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision. ... Acts very often contain general provisions which, when read literally, cover a situation for which specific provision is made elsewhere in the Act. This maxim gives a rule of thumb for dealing with such a situation: it is presumed that the general words are intended to give way to the particular. This is because the more detailed a provision is, the more likely it is to have been tailored to fit the precise circumstances of a case falling within it. Professor Pearce says -

It is common sense that the draftsman would have intended the general provision to give way should they be applicable to the same subject matter as it is dealt with specifically ... The draftsman often indicates his intention that this should be so by the inclusion of such words as 'subject to this Act' in a general provision. But these words are included more by way of abundant caution as the overriding idea that an Act should be read as a whole has the effect of making all provisions subject to one another.

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On the other hand, Mr Duncan, counsel for the respondent, argues that although he accepts that the application for review before the magistrate was not a situation specifically covered by the express wording of s 3(1)(d) of the Ordinance, the dismissal of the application was in effect an acquittal of the respondent. The power to award costs upon the magistrate's refusal of the application for review that amounted to an acquittal is covered by s 3(1)(c) of the Ordinance. However, Mr Leung argues that the respondent was acquitted on 28 December 1998 and therefore the dismissal of the application for review brought by the prosecution merely confirmed the acquittal order and did not amount to a further acquittal of the respondent. In the circumstances, Mr Leung argues that s 3(1)(c) of the Ordinance has no application.

### **Question (1)**

It is noteworthy that in both s 3(1) and s 11(1) of the Ordinance there is no mention of any situation where an application for review under s 104 of the Magistrates Ordinance is made

by the prosecution. In s 3(1)(d), provisions are made in respect of a review on application of the defendant or a review on the magistrate's own initiative, whereas in s 11(1)(b), only the application of the defendant for review is mentioned. This difference demonstrates that if a magistrate upon his own initiative reviews his decision of acquittal, reverses such a decision and convicts the defendant, he may not award costs of the review to the prosecution by virtue of s 11(1)(b), for such a method of instituting the review is not within the ambit of that paragraph, nor can the situation satisfy the wording of 'subsequently confirms his decision to convict a defendant' in the paragraph.

Similarly, there is simply no provision in either s 3 or s 11 or in the entirety of the Ordinance to cater for the situation where an application for review is made by the prosecution. Neither of the two specific sections is ambiguous. Clear language is used in each of these provisions to encompass particular methods of instituting review under s 104 of the Magistrates Ordinance, and only in a review instituted by the defendant (both in ss 3(1)(d) and 11(1)(b)) and one made on the magistrate's own initiative (s 3(1)(d) but not s 11(1)(b)) that power is given to the magistrate to make an award of costs. In the premises, I am of the view that s 3(1)(d) does not confer power or jurisdiction on the magistrate to award costs of the review proceedings to the respondent upon dismissing the application for review instituted by the prosecution. The answer to question (1) in the case stated is therefore 'No'.

### **Question (2)**

Regarding question (2), from the way the question was posed, it seems that the magistrate was of the view that he had power to award costs to the

||**Page 654**>> defence on dismissing the application for review made by the prosecution where one of the grounds of the review was on acquittal of the defendant. Mr Duncan supports this view. He further argues that when the application for review instituted by the prosecution was made, the respondent was facing the risk of the acquittal being reversed, or in other words, open to the jeopardy of being convicted. It follows therefore that the respondent was compelled to incur legal expenses to oppose the application and it is just that upon the dismissal of the application for review when the acquittal was maintained, the magistrate should have power under s 3(1)(c) of the Ordinance to award costs to compensate the respondent.

On the face of it, the wording of s 3(1)(c) does not seem to cover the situation. Factually speaking, the magistrate acquitted the respondent on 28 December 1998, and he dismissed the application for review on 28 January 1999, exactly one month afterwards. The dismissal of the prosecution's application for review, properly speaking, only confirmed the magistrate's decision of acquittal. It cannot amount to an acquittal because an acquittal had taken place a month earlier. This, I am of the opinion, is the true interpretation of the word 'acquit' in s 3(1)(c) of the Ordinance. Support can also be found in s 11(1)(b) of the Ordinance in that it provides for the situation of the defendant applying for reviewing a decision of a magistrate, eg, of a conviction, by using the words that the magistrate 'confirms his decision to convict a defendant'. The word 'acquit' in s 3(1)(c) therefore should not cover a confirmation of the decision to acquit. If the interpretation of s 3(1)(c) were otherwise to cover the situation of the dismissal of the application by the prosecution to review a decision of acquittal, then by the same token, s 11(1)(a) would cover a situation of an application for review by the prosecution of an acquittal decision which is granted resulting in a conviction and therefore giving power

to the magistrate to award costs of the review proceedings to the prosecution. Such interpretations, I am of the view, are overstretching the language of both ss 3(1)(c) and 11(1)(a) of the Ordinance.

It is, nevertheless, open to argument that in the event of a magistrate on his own initiative reviewing his decision of a conviction and subsequently confirming the conviction, while the situation is not covered by s 11(1)(b), s 11(1)(a) gives him power to award costs to the prosecution because the provision in that paragraph that the 'defendant is convicted' is wide enough to cover the situation. The same argument also applies to a prosecution's application to review a decision of acquittal resulting in a conviction of the defendant. Even if that argument is correct, a question to which I will return later, no power is given to the magistrate by s 11(1)(a) to make any award of the costs of the review, as opposed to the costs of the proceedings leading to the conviction.

Mr Duncan lays great stress on the inequality of treatment or lack of reciprocity of treatment of the prosecution and the defendant. He contends that if 'acquit' in s 3(1)(c) does not entitle a magistrate to award costs of

**||Page 655>>** a review instituted by the prosecution and dismissed by the magistrate, that would create inequality of treatment, favouring the prosecution and disadvantaging the defendant. He submits that there should be consistency in the interpretation of the relevant sections: if the prosecution is able to obtain costs following an unsuccessful review application by the defence (the situation covered by s 11(1)(b) of the Ordinance), so also should the defence be able to obtain costs following an unsuccessful review application by the prosecution. The argument appears logical. But it should be noted that wherever an application for review is instituted by the prosecution, regardless of whether it succeeds or not, no power is given to the magistrate to award costs in favour of one party or another. This must provide an answer, albeit partially, to Mr Duncan's claim of unequal treatment.

Mr Duncan further submits that the purpose of the Ordinance was to introduce or reinforce a scheme for giving power to the courts to award costs in criminal cases, with the intent to compensate and not to punish with orders for costs, displacing fully the former principles of costs based on fault. The new regime of costs under the Ordinance is designed for trials, reviews and appeals. Part II deals with costs to the defence while Pt III deals with costs to the prosecution. Under Pt II, s 3 deals with trials and reviews, s 8 deals with appeals from magistrates and s 9 deals with appeals from the District Court and the Court of First Instance. Under Pt III, s 11 deals with trials and reviews whereas s 13 deals with appeals from various courts. He submits that in each stage of the normal criminal procedure, namely, trials, reviews and appeals, the provisions of the Ordinance demonstrate an attempt to aim at equality of treatment of the prosecution and the defence or reciprocity of treatment between the two adversaries. Regarding trials, there is power given to the magistrate to award costs to the defendant by virtue of s 3(1)(a), (b) and (c), corresponding to such power given him to award costs to the prosecution by virtue of s 11(1)(a). Regarding appeals from the magistrate to the judge of the Court of First Instance, equal treatment regarding costs is provided by s 8 in favour of the defendant coupled with s 13 in favour of the prosecution. He therefore argues that the intent of the Ordinance is to provide equal treatment to the defence and the prosecution and the intent is so clear that it must similarly apply to review proceedings. It follows that s 3(1)(c) should be construed in a wide and liberal way enabling it to cover the

situation of a review, especially in view of the contended interpretation of s 11(1)(a) that encompasses the situation of a conviction secured by the prosecution upon its successful application to review a magistrate's decision to acquit.

Mr Duncan further argues that since s 3(1) is supposed to cover costs relating to trials and the reviews under s 104 of the Magistrates Ordinance, it is important to bear in mind that a magistrate can 'reserve, vary or confirm' his previous decision upon a review pursuant to s 104(6) of that Ordinance. Since s 3(1)(d) only deals with reversal and variation of a

||Page 656>> magistrate's decision upon review, there is an obvious lacuna regarding confirmation of a decision. For this reason, s 3(1)(c) should be viewed and interpreted as covering a confirmation of decision upon a review.

There is little disagreement that s 3(1)(a), (b) and (c) and s 11(1)(a) have the general effect that costs follow the event regarding trials in criminal proceedings, achieving the equality of treatment described by Mr Duncan.

It is now necessary to set out ss 8 and 13 for closer examination, regarding the situation in respect of appeals from the magistrate to the judge of the Court of the First Instance. The relevant parts of ss 8 and 13 respectively provide as follows:

8. *Defence costs on appeal from magistrate*  
Where a judge -
  - (a) allows an appeal to which section 105 or 113 of the Magistrates Ordinance (Cap. 227) applies, in the exercise of his powers under section 120 of that Ordinance; or
  - (b) in any appeal against sentence imposed by a magistrate, quashes the sentence and in place of it imposes a less severe punishment than that so imposed, the judge may order that costs be awarded to the defendant.
  
13. *Prosecution costs where judge or Court of Appeal dismisses unmeritorious appeal by defendant*  
Where a defendant unsuccessfully -
  - (a) appeals to a judge from any conviction, order or determination of a magistrate; or
  - (b) ...
  - (c) ..., and the judge ... is satisfied that the appeal ..., is or was without merit, the judge ... may order that costs be awarded to the prosecutor.

It can be noted that there are differences in the two sections in the treatment of the defendant and the prosecution though both deal with appeals. Section 8 empowers the judge to order costs be awarded to the defendant when the judge allows an appeal, be it against conviction or sentence. Although it is not provided expressly, the appeal mentioned in s 8(b) must relate to an appeal against sentence instituted by the defendant and not the prosecution, because the prosecution has no power to appeal against sentence. Again, although not expressly stated, the appeal referred to in s 8(a) must also relate to an appeal instituted by the defendant, for otherwise if the prosecution appeals by way of case stated under s 105 of the Magistrates Ordinance, as in the present case, the judge might order costs be awarded to the defendant even when he allows the prosecution's appeal. Further, the prosecution has no power to appeal against an acquittal.

||Page 657>> It is therefore clear that s 8 does not cater for a situation where the prosecution appeals; and insofar as the appeal is launched by the prosecution, the judge has no power to

award costs under s 8.

Similarly, the clear language of s 13 does not cater for the situation where the appeal to the judge is made by the prosecution. On the prosecution's appeal, such as an appeal against a magistrate's decision refusing to issue a warrant of distress or to commit a defendant for failure to pay a fine or costs under ss 51, 53, 54 and 55 of the Magistrates Ordinance, or a decision refusing to commit a person for failing to performing acts ordered by a magistrate under s 56 of that Ordinance, or a decision refusing to make a forfeiture order under s 56 of the Dangerous Drugs Ordinance (Cap 134), there is no power given by s 13 to the judge to award costs to the successful prosecutor. The same observations apply to the situation of a review, in the sense that if the review is instituted by the prosecution which succeeds, the magistrate has no power under s 11 to award costs in its favour. If the review or appeal instituted by the prosecution is opposed by the defendant, and the magistrate or the judge rejects the review or appeal, neither is given any power to award costs in favour of the defendant. There is not necessarily unequal treatment: it is simply that the Ordinance, for one reason or another, does not provide power to the magistrate to award costs in case the prosecution applies for review of his previous decision or appeals against it. All reviews instituted by the prosecution are treated equally by the Ordinance, in that no power to award costs, to one party or another, is given to the magistrate.

In this connection, it is instructive to note that upon the Secretary for Justice applying to the Court of Appeal to review sentence pursuant to s 81A of the Criminal Procedure Ordinance (Cap 221), the Court of Appeal is not given any power to award costs to the applicant even if the application is successful while it has the power to award costs to the defendant. The same rule applies regarding an appeal by the Secretary for Justice against an order quashing the indictment involving a question of law under s 81F of the same Ordinance. Where the Secretary for Justice refers a point of law for the opinion of the Court of Appeal after the acquittal of a defendant, the court is bound by s 81D of the same Ordinance to award costs to the defendant who appears by counsel at the hearing, but the court is given no power to award costs in favour of the Secretary, whatever the outcome. These provisions in the Criminal Procedure Ordinance clearly distinguishes the situation of the prosecution from that of the defence. They tend to support my view that Mr Duncan's suggested intent of the legislature to provide equal treatment to both the prosecution and defence on all matters of costs is incorrect.

Moreover, I think the intention of the Ordinance is clear from the arrangement of the sections. As Mr Duncan submits, and I accept, ss 3 and 11 are to provide for trials and reviews whilst ss 8, 9 and 13 are to cover appeals. The sections are specific provisions each dealing with a specific

||**Page 658**>> procedural stage of criminal proceedings. It appears to me that paras (a), (b) and (c) of s 3(1) deal with trials, as compared with s 11(1)(a) that covers the same stage of proceedings. Section 3(1)(d), correspondingly with s 11(1)(b), deals with review proceedings. Each set of provisions deals with a particular stage of criminal proceedings and I am not persuaded that there is any justifiable reason to extend the application of the provisions designed for trials to cover the review scenario. The doctrine of *generalibus specialia derogant* relied upon by Mr Leung applies.

In addition, s 3(1)(c) is not a general provision empowering the magistrate to award costs to

the defendant insofar as the defendant succeeds in any matter heard before him. The provisions of s 3(1)(d) and, for that matter s 11(1)(b), to cater for the situation of reviews are specific, so are the provisions of s 3(1)(a), (b) and (c) and s 11(1)(a) to cover the situation of trials. There is no general provision in the Ordinance that can be utilised to override the application of these specific provisions. There is no general provision that costs should follow the event, nor is there any general provision to say that upon an acquittal, at whatever stage of the proceedings before a magistrate, the magistrate may award costs to the defendant. As adumbrated above, however, there is arguably a general provision that the magistrate may order costs in favour of the prosecution where 'the defendant is convicted' under s 11(1)(a) of the Ordinance. There is no wording in that paragraph to indicate that its application is restricted to a situation of a conviction upon the conclusion of a trial but not of a review.

A review of a decision of acquittal on the application of the prosecution or on the own initiative of the magistrate resulting in a conviction is unequivocally not covered by s 11(1)(b), and therefore the magistrate has no power to award costs pursuant to that paragraph. The question is whether he has such power under s 11(1)(a) because 'the defendant is convicted'. A restrictive interpretation of s 11(1)(a) will result in the magistrate not having such power, for apparently the situation of review is designed by the Ordinance to be covered by s 11(1)(b) and no other provision. I think this is a better view; otherwise the provisions of s 11(1)(b) would overlap those in s 11(1)(a) in this situation. If the word 'convicted' in s 11(1)(a) were to be given an extended meaning to include 'conviction confirmed' upon review, then the provisions of s 11(1)(b) would be totally redundant. A fortiori, if the word, 'acquitted' in s 3(1)(c) were to include 'acquittal confirmed' upon review, s 3(1)(d) would be rendered utterly unnecessary. I find these wide interpretations most unattractive.

Moreover, the restrictive interpretation of s 11(1)(a) will result in less unfairness towards the defendant, because if he is able to oppose the review successfully, the magistrate is given no power to award costs to him, which corresponds fairly with the lack of power to award costs to the prosecution where the prosecution succeeds in securing a conviction upon review.

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I therefore consider that as the provisions in s 11(1)(b) and similarly s 3(1)(d) are so specifically designed to cover reviews, they override any other provisions in the Ordinance in all situations in respect of reviews. It follows that s 11(1)(a) and s 3(1)(c) cannot be prayed in aid to deal with costs in respect of any matter in or consequence of review proceedings.

I am of the opinion that the wording of s 3(1)(c) is clear, only to cover the situation where the defendant is acquitted upon trial, and its meaning cannot fairly be extended to cover a situation where the acquittal is confirmed on rejecting a review brought by the prosecution; it does not confer any power on the magistrate in such an event to award costs of the review proceedings to the respondent.

In the circumstances, my answer to question (2) in the case stated is 'No'.

### **Question (3)**

In my view, the magistrate had no power or jurisdiction under the Ordinance or in any other enactment to award costs of the review when he dismissed the application for review instituted by the prosecution on 28 January 1999. The answer to question (3) is also 'No'.

I would, therefore, allow the appeal. Both parties before me have agreed that there should be

no order for costs regardless of how I answer the questions. Thus, I allow the appeal without making any order as to costs, though I have power to do so under s 120 of the Magistrates Ordinance specifically referred to in s 8(a) of the Costs in Criminal Cases Ordinance.

Reported by David Leung