

CSO/ADM CR 9/3221/01(03)

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14 November 2003

Mrs Percy Ma
Clerk to the Panel on Administration
of Justice and Legal Services
Legislative Council Building
8 Jackson Road
Hong Kong

Dear Mrs Ma,

Panel on Administration of Justice and Legal Services (“the AJLS Panel”)

Review on provision of legal aid services

Thank you for your letter of 29 October 2003, requesting the Administration to provide background information relating to the Court of Appeal case CACC 365 of 2000 (hereinafter referred to as “Mr Wu’s case”), and to advise whether we would review our legal aid policy in the light of the court judgment in the case.

As requested, I enclose, at Annex A and Annex B respectively, a background paper on the case prepared by the Legal Aid Department (“LAD”) and a copy of the Court of Appeal’s judgment dated 9 September 2003.

As to our legal aid policy, our objective is to ensure that no one with reasonable grounds for proceedings in a Hong Kong Court is prevented from doing so because of a lack of means. As legal aid is funded by the public coffer which is not unlimited, LAD has to conduct means tests on legal aid applicants to ensure that publicly-funded legal aid services are provided to those who are financially in need. It follows that an aided person is required to

make a contribution towards the cost of legal representation if, on a determination of his financial resources, he should be able to do so. It would not be a proper use of public money if relatively well-off persons are allowed to enjoy Government subsidized legal aid at no cost.

As mentioned in my letter of 20 October 2003, it has long been recognized by the Court that on full consideration of Article 11 of the Hong Kong Bill of Rights, there is no absolute right to free legal assistance in criminal proceedings (*R v Fu Yan* Criminal Appeal No. 490 of 1991). As stated in *R v Mirchandani* (Criminal Appeal No. 350 of 1990), two conditions must be satisfied – “the interests of justice” must require that legal aid be provided but only if the person concerned “does not have sufficient means to pay for it”. The Judge in that case further commented that since the cost of providing legal aid and assistance to those who cannot afford it is necessarily a charge on the public purse, there must be inbuilt mechanisms to regulate and limit the cost.

Hence, we require legal aid applicants to go through means-testing and to contribute towards the cost of legal representation under our existing legal aid regime. The Court of Appeal judgment did not challenge such requirements. Having affirmed the principle that there is no absolute right given to every person facing criminal proceedings to have legal representation at public expense, the Court of Appeal said in paragraph 38 of the judgment:

“Where a defendant desires to be represented at his trial, the decision as to whether or not legal aid will be granted is generally, aside from other considerations such as, for example, the minor nature of the offence to be tried, dependent on the defendant’s inability to afford the services, in whole or in part, of legal representatives.”

Having considered the financial situation of Mr Wu as disclosed in the transcript of the pre-trial reviews, the Court of Appeal seemed to have accepted that Mr Wu’s ample funds in his bank account justified LAD’s decision in attaching to its offer of grant of legal aid a condition to pay contribution. (paragraph 70). Although it was generally felt that Mr Wu had diverted his funds (paragraphs 73 and 79), the Court of Appeal considered that the discretionary power given to the judge to override LAD’s decision had to be looked at in a wholly different context (paragraph 70) since financial considerations aside, there were other cogent factors which the trial Judge should have taken into account in the exercise of his discretion under Rule 13(2) of the Legal Aid in Criminal Cases Rules (“LACCR”) (paragraph 74).

As the Court of Appeal was not satisfied that resort had been made by the Judge to consider whether to exercise his discretion to exempt Mr Wu from the requirement to pay a contribution, the Court of Appeal came to the conclusion that the Judge's approach to, and determination of, Mr Wu's application to him for legal aid did not represent a proper exercise of the discretion vested in him. Although the Court of Appeal allowed Mr Wu's appeal, it emphasized that the decision should not be seen as an open invitation to other applicants for legal aid to dissipate their assets (paragraph 78).

The judgment has no doubt provided useful guideline for the exercise of a judge's discretion under Rule 13(2) of LACCR. It is, however, not considered that this case provides justification for the Administration to depart from its current policy, to require an applicant for legal aid to be means-tested and to contribute towards the cost of legal representation where, on a determination of his financial resources, he should be able to do so.

Yours sincerely,

(Chan Yum-min, James)
for Director of Administration

cc Director of Legal Aid

Background Paper of the Court of Appeal Case CACC 365 of 2000

In the Court of Appeal case CACC 365, the Appellant (hereinafter referred to as “Mr Wu” in this paper) was charged in the Court of First Instance proceedings with the offence of murder and kidnapping. Mr Wu applied for legal aid on 30 August 1999. Legal aid was initially granted to Mr Wu for the committal proceedings.

Mr Wu was committed for trial in the Court of First Instance on 24 November 1999. After Legal Aid Department (LAD) had conducted fully the means investigation and obtained further information from Mr Wu, the financial resources of Mr Wu determined by LAD were found to exceed the financial eligibility limit. Having taken into account the factors known as the Widgery criteria, LAD considered it desirable to grant legal aid to Mr Wu under Rule 15(2) of the Legal Aid in Criminal Cases Rules (“LACCR”), notwithstanding that his financial resources exceeded the limit. Accordingly, on 21 January 2000, LAD offered to extend legal aid to him subject to payment of contribution of \$329,448.00.

As Mr Wu did not pay the required contribution, the legal aid offer lapsed. Accordingly, legal aid was not granted to Mr Wu in relation to his trial. Mr Wu subsequently wrote to LAD requesting a reconsideration of its decision and mentioned for the first time a loan which he had to repay. After conducting further investigation and interviewing Mr Wu, LAD was not satisfied that the moneys which he had dissipated were used to pay an allegedly outstanding debt. Based on the information obtained by LAD in the course of means investigation and interviews with Mr Wu during the relevant period, LAD maintained its decision to require Mr Wu to pay a contribution in respect of its offer to grant him legal aid.

Mr Wu’s financial situation was looked into fully during a series of three pre-trial reviews, all of which took place before the trial Judge (the “Judge”) when Mr Wu applied for legal aid to be granted to him. In the end, although the Judge granted Mr Wu a legal aid certificate, he did not exempt Mr Wu from the requirement to pay a contribution of \$329,448.

The trial was conducted from 15 June 2000 to 11 August 2000. Mr Wu was unrepresented at the trial. At the conclusion of the trial, he was convicted of the offences of kidnapping and murder as charged. He was sentenced to twenty-one years imprisonment on the first count and life imprisonment on the second count, both sentences to be served concurrently.

On 6 September 2000, Mr Wu applied for legal aid to appeal against conviction. Taking into account all the background information including the circumstances in which moneys were dissipated from his account, and having regard to the estimated cost of the appeal proceedings, LAD considered that Mr Wu should have sufficient means to pay for it and refused his application. Subsequent to the refusal by LAD, the Court of Appeal granted Mr Wu an appeal aid certificate on 13 July 2001.

The appeal was heard by the Court of Appeal on 9 September 2003. In essence, it was contended on Mr Wu's behalf that the Judge had either failed to appreciate he had a discretion to waive the requirement to pay a contribution or alternatively failed properly to exercise his discretion. Having considered the grounds of appeal and all the circumstances, the Court of Appeal took the view that the Judge's approach to, and determination of, Mr Wu's application to him for legal aid did not represent a proper exercise, if such it was, of the discretion vested in him under Rule 13(2) of LACCR and concluded that Mr Wu's trial was not a fair one. Accordingly, the Court of Appeal quashed Mr Wu's convictions and ordered a retrial on both counts.

Legal Aid Department
November 2003

CACC000365/2000

CACC 365/2000

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CRIMINAL APPEAL NO. 365 OF 2000
(ON APPEAL FROM HCCC 377 OF 1999)**

BETWEEN

HKSAR

Respondent

AND

WU WAI-FUNG (D1)

Applicants

CHEUNG CHI-KEUNG (D2)

Coram: Hon Ma, CJHC, Stuart-Moore VP & Stock JA

Date of Hearing: 9 September 2003

Date of Judgment: 9 September 2003

Date of Handing Down Reasons for Judgment: 11 September 2003

REASONS FOR JUDGMENT

Stuart-Moore, VP (giving the judgment of the Court):

Introduction

1. On 10 August 2000, following a 26-day trial (preceded by an additional 13-day *voir dire* which resulted in the evidence of confessions being ruled admissible) before Nguyen J, the Applicants (D1 and D2), aged 46 and 38 respectively, were convicted by the jury on the second count of an indictment which alleged the murder of a 13-year-old boy, named Wu Ho-him (the victim), on or about 21 April 1999. D1 was additionally convicted on count 1 of forcibly taking away the victim on 21 April 1999 with intent to procure a ransom for his liberation, contrary to section 42 of the Offences against the Person Ordinance, Cap. 212. D2 had pleaded guilty to the first count at the outset of the trial.

2. D1 was sentenced to twenty-one years' imprisonment on count 1 to be served concurrently with a life sentence on count 2. He sought leave to appeal against conviction on both counts. The grounds of his complaint mainly related to the unfairness which it was alleged resulted from the fact that he had no legal representative to act on his behalf throughout this most serious and lengthy trial.

3. D2 received concurrent sentences of fourteen years and life imprisonment on counts 1 and 2 respectively. No arguable grounds were found by counsel on his behalf but D2 nevertheless sought leave to appeal against his conviction on count 2. Mr Stirling was present on D2's behalf in the possible event that we might require his assistance.

4. On 9 September 2003, we gave leave to D1 and, treating the hearing as the appeal, we quashed his convictions and ordered that he should be retried on both counts on a fresh indictment. So far as D2 was concerned, his application was dismissed. We now give the reasons for our conclusions.

Prosecution's case

5. The case for the prosecution established that the victim was driven to school on 21 April 1999 by his father, Wu Ka-fai. In short, it was alleged that later in the day D1 and D2 drove the victim away from the school in a borrowed motor vehicle intending to procure a high ransom from his family for his liberation. However, in reality, as D1 was known to the victim, the release of the victim could only have led to the immediate identification of D1 as a culprit. Accordingly, the victim had to be killed to avoid detection.

6. D1 came from the same village on the Mainland as Wu Ka-fai. It was no coincidence that they shared the same surname. D1 was a distant relation of Wu Ka-fai and was known to the victim's family.

7. In 1999, at Ching Ming, D1 returned to the village which had once been his home. As it happened, the Wu family, including the victim, were also there, visiting the graves of their ancestors.

8. The prosecution called evidence to show, amongst other things, that D1 harboured a dislike for the Wu family stemming from a trivial dispute over who was to blame for some damage which was done to the victim's father's car. This had been on an occasion about three years before the events in this case when D1 had been allowed to borrow it.

9. The manner in which the victim met his death was dreadful. At lunchtime, he went off with some of his classmates at school to play basketball. At the end of the game, he took the basketball back to the store where it was kept. He was then on his own.

10. Soon afterwards, D2 managed to lure the victim into a van which was driven away by D1. D2 punched the victim twice and then used a hammer on his head which had been put in the van by D1 for the purpose of hitting the victim. When D2 was asked by D1 to inflict more blows to the victim's head, he declined to do so saying that he would change places with D1. The victim at this stage was said by D2 to have "passed out" and had begun to bleed.

11. Thereafter, D2 took over the driving and D1 resumed the attack on the victim. While D1 was hitting the victim, the hammer broke. In this context, D1 had admitted to the police, when describing the manner of his attack on the victim, that: "It was like hammering a nail into a wall heavily." D1 then asked D2 to find another weapon. D2 immediately obliged by driving into the Choi Hung Estate where he found a stone and gave it to D1. D1 continued to attack the victim's head until he was dead.

12. It seems that this cold-blooded and merciless killing was committed within an hour of the kidnapping.

13. Later, the victim's body was put into a sack and thrown down a remote hillside at Fei Ngo Shan.

14. When the victim did not return to school after lunch, the school authorities notified his mother. She reported the matter to the police. It was while she was in the police station that she received the first in a series of ransom demands by telephone. The caller stated that her son was with him. He followed this with a demand for a ransom of \$8 million.

15. Thereafter, twenty-two ransom calls were made to the victim's family. The last call was on 28 June 1999.

16. The van in which the victim had been killed was eventually traced by the police. The victim's blood and hair were found in it. It had been rented to the Applicants, in D1's presence, by a friend of D2.

17. The victim's father sought assistance in tracing his son from a clansman named Chan Sau-nam (Chan). Chan then asked D1, as a fellow clansman, if he could help him to locate the victim. Later, D1 informed Chan that he had been able to track down the group responsible for the kidnapping and he volunteered to make a delivery of the ransom money. At that stage, D1 was allowed to believe that his assistance in this respect would be useful.

18. On 5 May 1999, D1 and D2, whilst under police surveillance, met a friend of their's (PW14) who worked as a street sweeper. They asked him about refuse collection procedures. They were particularly concerned to find out whether refuse collectors generally searched the bins. Their meeting was videotaped by the police.

19. Eventually, on 1 July 1999, by which time the ransom demand had been reduced to \$2.4 million, D1 and Chan went to the border gate in Macau which allows access to the Mainland for the purpose, as D1 was led to believe, of delivering the ransom. D1 went to the border gate first and he asked Chan to follow some minutes later after he (Chan) had dropped the ransom money into the bin he had been instructed to use. Again, a police surveillance exercise was in operation and, soon after the bag containing the money had been deposited in the bin, a female went to the same bin and took out the bag. She went through the border crossing with D1 who was holding a paper bag.

20. A little while later, the female returned to Macau. Meanwhile D1 took a taxi to a branch of the Bank of China. When he came out of the bank, he went home. Later, he left his home and boarded a public bus bound for Guangzhou. Officers of the Zhuhai Public Security Bureau ("PSB") boarded the bus and arrested him.

21. The paper bag D1 had been carrying earlier in the day was seized from his home. The \$2.4 million ransom money, made up of banknotes which had been previously dusted with an invisible powder for ease of identification, was recovered from D1's deposit box at the Bank of China.

22. On 3 July 1999, whilst in the custody of the Zhuhai PSB, D1 gave a statement under caution to Hong Kong police officers in which he admitted kidnapping and hitting the victim. If its contents were true, D1's answers were capable of amounting to a comprehensive confession to the charges he duly faced.

23. On 6 July 1999, D1 was returned to Hong Kong in the custody of Hong Kong police officers.

24. Thereafter, the police spoke to D1 on two particular occasions. He was told about the recovery of the \$2.4 million on the first and he was informed, secondly, of the reasons why he was being kept under arrest. On the first occasion, he asked the police to help return the money to the victim's father and, on the second, he stated that he did not want to kill the victim. According to him, it was "Ah Keung" (D2) who had hit the victim's head with a stone, while he (D1) held the victim tight until the victim did not move.

25. D2 was arrested on 3 July 1999. He also admitted participation in the offence and, on 4 July 1999, he showed the police where the victim's corpse was to be found. The skeletal remains were later examined by a pathologist who confirmed that the victim had suffered many severe blows to his skull.

26. Amongst the numerous admissions D2 made to the police following his arrest, he stated that he had hit the victim with the hammer which had made him bleed. The victim became "silent and motionless". He admitted, also, picking up a stone for D1. When asked at one stage where the victim was to be hidden, D2 replied: "He (D1) said he had to kill the kid". He went on to say that he told D1 that if this was what he wanted to do, he should do it himself. They then swapped positions in the van to let D1 do it.

Defence case

27. D1 did not give evidence in the trial although he testified during the *voir dire*. The prosecution was effectively put to strict proof on every issue. The principal issue went to intent bearing in mind that D1 had told police, at the time of his formal arrest in Hong Kong, that he had not wanted "to kill the boy". As to his admissions in general, it was suggested that he had been forced to cooperate on the Mainland by the conduct of police.

28. D2 gave evidence in his own defence to the effect that he had agreed to the plan to kidnap the victim but not to any further plan to cause the victim harm. He blamed D1 for carrying out the killing. According to him, the idea had been to kidnap the victim and to keep him in a bag for two or three days. The victim would then be released whether or not the ransom had been paid. He said that he had never intended to cause serious bodily harm to the victim when punching him and using the hammer to strike him on the head. He said there had been one blow with the hammer which had been struck with no great force. This was to stop the victim from struggling and shouting. When D2 changed positions with D1, the victim was resting with his eyes closed. He was not moving. According to him, he thought the changeover was to enable D1 to "control" the victim.

29. D2 went on to say that while he was driving he heard banging in the back of the van. At one point, he could hear the victim saying he was feeling very bad and that he could recognise his uncle. D1 told D2 that the hammer was broken and that he wanted an iron rod or a wooden pole or "something". D2 found a stone which he gave to D1 but he had no idea for what purpose D1 needed it. Later, in the course of the journey, D1 announced: "The boy is dead".

30. D2 touched on a number of important peripheral matters in his evidence. He said that D1 had spoken to him about the victim's family being rich but he had never said he was actually related to the family. D1 allegedly told D2 that he had spoken to the intended victim and said that if the boy recognised him when they carried out the plan, he would kill the victim. When he heard this, it was D2's testimony that he told D1 he could not do it, but D1 put pressure on him to continue with the plan. D2 then told D1 that he wanted "money not life" whereupon D1 assured him that it would not be necessary to kill the victim. D2 understood that all he would have to do would be to drive and to make telephone calls for which he would receive 20 per cent of the ransom as a reward. D2 said that he was told by D1 that the victim could be kept in a rental vehicle for up to three days before being released. According to D2, the van was obtained by D1 as well as some gloves and a hammer. The last item was, he said, for the purpose of scaring the boy.

31. D2 explained in evidence how his statements to police came to be at considerable variance with his testimony in court. This was, he said, because he had been a heroin addict for many years and he found himself in a confused state, when withdrawal symptoms began to set in, at the time of his interviews.

Conduct of the trial

32. The trial itself involved the prosecution calling a total of 43 witnesses and reading approximately 25 statements relating to evidence of a relatively formal nature.

33. It is apparent that the judge gave as much assistance to D1 throughout the trial as he felt he was able to do by seeking to find out, after each of the prosecution witnesses had been called, whether they had said anything with which D1 disagreed. On almost every occasion D1 said words to the effect that without a lawyer he did not know how to put questions. On some occasions, frequently against objection by prosecuting counsel that D1 was giving evidence from the dock, D1 provided his version which the judge then used as the basis for asking the witness questions. A similar procedure was adopted after D2 had himself given evidence.

34. D1 attempted to make a final speech but, after uttering a few sentences which effectively amounted to an attempt to give evidence from the dock, D2's counsel rightly objected. D1, having been reminded of what he was permitted to do, apologised and said that he had nothing more to say.

35. For the purposes of D1's present application, no criticism was made of the legal or factual directions given to the jury in the summing up. Again, it is apparent that the judge attempted to do all in his power to give a fair and balanced picture of the evidence against D1.

Grounds of appeal (D1)

36. Against this background, it was submitted, on the basis of four substantive grounds of appeal, that the convictions of D1 were unsafe or unsatisfactory. We only needed to concern ourselves in any detail with the first three, all of which related to the fact that, at his trial, D1 was unrepresented. In essence, it was contended in these written grounds that by not permitting D1 to be legally aided "without a requirement that he should pay a contribution towards his legal aid", the judge had, despite his other efforts to assist him, denied D1 a fair trial. It was also submitted in the grounds of appeal that the judge had either failed to appreciate that he had a discretionary power to grant legal aid in the event that the contribution which had been ordered remained unpaid or, alternatively, had failed properly to exercise his discretion when refusing to grant D1 legal aid without the precondition that he should first pay a financial contribution.

37. The resolution of the matters raised by Mr Martin Lee, SC, on D1's behalf, was so overwhelmingly clear that we did not need to call on him.

38. There is no absolute right given to every person facing criminal proceedings to have legal representation at public expense (see: *McInnis v R* [1979] 143 CLR 575 at 579). Where a defendant desires to be represented at his trial, the decision as to whether or not legal aid will be granted is generally, aside from other considerations such as, for example, the minor nature of the offence to be tried, dependent on the defendant's inability to afford the services, in whole or in part, of legal representatives.

39. In this case, D1 had stated that he wished to be legally represented but that, without sufficient funds of his own to brief lawyers privately, he would require legal aid.

40. Rule 15 of the Legal Aid in Criminal Cases Rules, Cap. 221D, provides for the assessment of financial resources of applicants for legal aid and gives the Director of Legal Aid a discretion to grant a certificate even in cases where the applicant's financial resources are in excess of the specified figure set out in the legislation. Rule 15(2) states:

"(2) The Director may, if he is satisfied that it is desirable in the interests of justice, grant a legal aid certificate or an appeal aid certificate to an applicant notwithstanding that on an assessment under paragraph (1) he determines that the applicant's financial resources, in the case of legal aid to which section 5 of the Legal Aid Ordinance (Cap 91) applies, exceed the amount specified in that section."

41. If the Director of Legal Aid has decided that the applicant has sufficient financial resources to contribute to his legal aid then, by virtue of Rule 16:

"(1) Subject to rule 13, the Director may require an aided person to pay to him a contribution towards the sums payable on his account by the Director.

(2) The amount of any contribution required to be paid under paragraph (1) shall-

(a) be calculated in accordance with Part I of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap 91 sub. leg.) as if the aided person required to pay the contribution had been granted legal aid under the Legal Aid Ordinance (Cap 91);

(b) be a debt due to the Director payable in a lump sum or by instalments on such day or within such periods as the Director may determine."

42. The qualification to the application of Rule 16, to be found in the reference to Rule 13, has considerable significance in these proceedings. Rule 13, still apparently unamended in its outdated reference to 'capital' cases, provides, so far as it is relevant, that:

"(1) Notwithstanding anything contained in this Part, where a person-

(a) is committed for trial upon a charge of murder,

(b)

(c)

the Director may, having considered the financial resources of the accused person, grant him a legal aid certificate and shall do so if his financial resources do not exceed the relevant amounts specified in rule 4.

(2) The powers of the Director under sub-paragraphs (a) and (b) of paragraph (1) may be exercised by a judge and the judge, if he thinks fit, may by order exempt the accused person or appellant from the requirements of Part III.

(3) Upon granting a legal aid certificate under this rule, the judge or the Director shall assign a solicitor and 1 or 2 counsel, one of whom may be

leading counsel, as he may think fit, to represent the accused person"
(Emphasis added)

43. The factual position relating to D1's finances was relatively straightforward and we are grateful to Mr Blanchflower, SC, on the Respondent's behalf, for clearly setting this out. It appears that D1 was represented by counsel on legal aid when he made his earliest appearances at Eastern Magistrates' Court.

44. After that time, following his committal for trial, it seems that D1 applied once more for legal aid. At that stage, the Director determined that, as D1 had a credit balance of about \$480,000 in his bank account, he would grant legal aid provided D1 contributed \$329,000 odd towards the cost of his representation. D1 was told of this decision and, *after* hearing it, according to him, he wrote a cheque in a sum which was more or less the same as his credit balance in repayment of an outstanding debt. He was, as a result of this action, left with insufficient funds to make the contribution the Director had required of him.

45. D1's financial situation was looked into fully during a series of three pre-trial reviews all of which took place in front of the trial judge between 11 April and 26 May 2000.

46. At the first of the pre-trial reviews, D1 explained that he wanted to have a lawyer to represent him. However, he said that he had had to repay a creditor all the money in his account. This, he told the judge, represented part of a \$700,000 loan which he had received in August 1997 and he stated that he had been pressed hard for its repayment.

47. Junior counsel for the Respondent in these proceedings, Ms Vinci Lam, who also represented the prosecution at that pre-trial review, very sensibly added, for the judge's consideration, that having regard to the gravity of the charges D1 was facing, the prosecution had taken the view that it was desirable for D1 to be legally represented.

48. In conclusion, the judge ruled as follows:

"You apply to me for legal aid, I reject it. If you really want to have legal representation and you cannot raise the money, you should contact the Legal Aid Department, to see whether they can have means to allow you to pay less contribution or waive it in order to assign you a lawyer." (Appeal bundle 'A' p. 18(K))

49. On 16 May 2000, at the second pre-trial review, D1 informed the judge that the Director of Legal Aid was still insisting that he should make a financial contribution to his legal aid. When asked by the judge if he was proposing to instruct lawyers privately, D1 replied that he had no money to do so.

50. Again, prosecuting counsel at those proceedings expressed her anxiety that, in a matter as serious as this, D1 should find himself without legal representation. Neither she nor counsel for D2, both of whom can be said to have had long experience in criminal practice, had any personal knowledge of a High Court case proceeding to trial, leaving a defendant who wanted to be represented in the position of having to represent himself.

51. The judge then stated that there had been money available to meet the Director's requirement of a financial contribution but that it had been paid to an "alleged creditor" and had now "gone". The judge then discussed with counsel a number of further difficulties with regard to the presentation of the case. These topics included the availability of witnesses and the impossibility, with an unrepresented defendant in a case involving over 70 potential prosecution witnesses, of reaching any formal agreement as to any of the facts.

52. On this aspect of the matter, we feel we should say that to have allowed D1 to go to trial without representation was a false economy. What the public purse may have saved, on the one hand, by the judge's refusal to let D1 off the payment of his assessed contribution would,

on the other hand, have been lost by the substantial lengthening of the proceedings by reason of the prosecution being put to strict proof on every issue in the trial.

53. It was also decided in the second pre-trial review that a *voir dire* would be necessary, before a jury could be sworn, as D1 had made plain his objection to the admissibility of the confession statement which he had signed whilst in custody on the Mainland.

54. When the judge returned to the question of legal aid, he remarked, in relation to D1's use of his available funds to pay a private debt, that:

"... I don't want him to think that he can do that without having to suffer the consequences but, on the other hand, if it's going to cause insuperable difficulties with the progress of the trial, I suppose one has to give some consideration to whether at the end of the day he ought to have representation." (Appeal bundle 'A' p. 30)

55. The judge concluded by telling D1 to make "best endeavours to try and obtain representation" in view of the seriousness of the charges he faced. Unfortunately, it seems from the transcript that at no stage did the judge or counsel have resort to the Legal Aid in Criminal Cases Rules to consider whether there was a discretion which the judge himself could exercise by exempting D1 from the requirement that there should be a contribution.

56. The last pre-trial review, on 26 May 2000, produced nothing which advanced D1's situation. He merely repeated that, as he had no money, he had not tried to instruct lawyers privately. Counsel made reference to a decision in a case at first instance which was said to turn on a "defendant's inability to find sufficient funds". Once again, it does not appear to have occurred to anyone to see what the Rules relating to the granting of legal aid actually said. Had resort been made to them, the judge's power to make a discretionary award of legal aid to D1 without payment of a contribution would have become plain. Insofar as the judge expressed an opinion, he stated that:

"As I said on the previous occasion, I'd loathe to interfere with the Director of Legal Aid's obviously very carefully considered decision." (Appeal bundle 'A' p. 34)

57. After the judge had checked all the facts he had been given previously, he ruled:

"Court: 1st Accused, I am granting you a legal aid certificate, but the requirement of a contribution of \$329,448 imposed by the Director of Legal Aid is not exempted. Yes, \$329,448. So that is the position. Unless you pay that amount to the Legal Aid Department, you will not be assigned counsel or solicitors." (Appeal bundle 'A' p. 36)

58. In the event, when the date for the start of the *voir dire* had been fixed for 15 June 2000, D1 enquired how he could go to trial without a lawyer. The judge's response was that he "should have thought about that" before writing a cheque to his creditor.

59. Mr Blanchflower did not seek to support the judge's ruling. His standpoint was the same as that which the prosecution had throughout most responsibly adopted, namely, that the interests of justice demanded that D1 should be legally represented.

60. Regarding the exercise of the discretion given to the judge in his determination of this question, Mr Blanchflower was able to point out that the judge had given the appearance of a general awareness of the effect of Rule 13 of the Legal Aid in Criminal Cases Rules, because of the references by him to his power to "grant legal aid" or to "exempt" D1 from making a financial contribution. However, there was, so far as we were able to discern, no attempt on

the part of the judge to direct any enquiries towards matters which would have borne upon his discretionary power to override the contribution order, made as a prerequisite to the award to D1 of legal representation, by the Director of the Legal Aid.

61. Enquiries for the purpose of gauging whether this was an appropriate case in which to exercise a discretion in favour of D1 by exempting him from the requirement to pay a contribution towards his legal aid, might well have started with a consideration of the overall complexity of the case. Mr Blanchflower's description of the case as one which was "not complex" was appropriate when viewed through the eyes of an experienced advocate such as himself. However, the judge would have had to examine this question from an entirely different standpoint, considering it from the perspective of a layman, with no adversarial experience whatever, who was, in the circumstances we have recounted, about to embark on his own defence.

62. It was known that the trial would fall into two important parts, firstly the *voir dire* to decide the admissibility of the 'confession' evidence and, secondly, the trial before the jury following the judge's rulings on admissibility. It was also known that a lengthy timescale had been forecast to allow for the numerous witnesses to be called. The witnesses covered a wide variety of topics including surveillance, scientific analysis, medical opinion, the recording of confessions allegedly made in interview and more generalised facts where credibility was likely to be a factor.

63. In the category of evidence where credibility could be expected to be an issue, the judge would have been aware, from the alleged confessions made by D1 and D2 to the police, that it was highly likely that their respective cases at trial would involve putting forward a 'cut-throat' defence, each blaming, in effect, the other for carrying out the physical act of killing the victim. In the event, as we have said already, D2 gave evidence along precisely these lines. In advancing this line of defence, it goes without saying that D2 had experienced counsel to act on his behalf, leaving D1 not merely to fend for himself against the prosecution's allegations but against D2's as well.

64. The killing itself was one which not only involved a child victim but was also, from its manner of implementation, nothing short of barbaric. As such, it was a trial which was likely to arouse strong feelings of emotion. The stabilising influence of retaining counsel to appear on D1's behalf should have been kept in mind as an important factor towards the maintenance of a fair and balanced trial. As an example of the practical application of this, the victim's mother was amongst the witnesses the prosecution was confidently expected to call. This was because no admitted facts covering the ransom telephone calls she had received could be formulated with an unrepresented defendant involved in the trial. The judge had made it clear to prosecuting counsel on a number of occasions during the pre-trial reviews that all facts would have to be strictly proved. This left the ghastly prospect, in the circumstances of this case, of the victim's mother being subjected to cross-examination by D1, face to face across the courtroom.

65. As it transpired, D1 proved to be wholly incompetent in defending himself, so that the victim's mother was spared a close and open confrontation with her child's alleged killer, but the opportunity for such an unseemly spectacle should never, in our opinion, have arisen.

66. There are other factors, not least perhaps the public perception of the unfairness likely to result from a denial to D1 of unqualified legal aid in a case of this magnitude, which might be added to the list of considerations for the purposes of deciding whether a discretion should have been exercised in favour of D1. It will suffice to repeat, as an illustration of the unprecedented situation which had arisen, that neither of the counsel appearing in the court below had previously experienced a High Court trial where a defendant, who wished to be represented, had been put in the position of having to conduct his defence without the benefit of legal representation.

67. This court, two of whom have particularly extensive experience of High Court criminal cases in this jurisdiction, has also never before encountered a situation of this kind. Mr Blanchflower, too, knew of no such precedent in this jurisdiction. This was, on any view, a case of the utmost gravity in which a highly unusual situation had developed. For legal representation to be denied, truly compelling circumstances were required as a justification for taking this course (see, for example, *Robinson v R* [1985] 1 AC 956).

68. Mr Blanchflower drew to our attention, as a possible justification in the mind of the judge when he decided to allow the trial to proceed without D1 being given legal representation, to Regulation 9 of the Legal Aid (Assessment of Resources and Contributions) Regulations which provides as follows:

"9. Deprivation or conversion of resources

If it appears to the Director that the person concerned has with intent to reduce the amount of his financial resources, income, disposable income or disposable capital-

(a) directly or indirectly deprived himself of any resources; or

(b) converted any part of his resources into resources which under these regulations are to be wholly or partly disregarded (including the repayment of money borrowed on the security of a dwelling), or in respect of which nothing is to be included in determining the resources of that person.

the resources of which he has so deprived himself or which he has so converted shall be treated as part of his resources or as not so converted as the case may be."

69. The judge had expressed his unwillingness to interfere with the "very carefully considered decision" of the Director of Legal Aid. No doubt the judge had taken the view that a seemingly rational conclusion had been reached by the department responsible for deciding whether and, if so, on what conditions, legal aid should be given, and it seems that he was not prepared to contemplate changing the order which had been made.

70. Amongst the factors which no doubt influenced the Director of Legal Aid was the thought that to award legal aid to D1, without attaching a condition that he should contribute towards the cost of legal representation, was contrary to the spirit of the legislation. Plainly, D1's ample funds in his bank account justified that decision. Once these funds were removed by him from his account, and D1 was effectively left with no funds at all, the Director of Legal Aid would, in all probability, have considered that to remove the contribution order might be seen by others in similar circumstances as an encouragement to do the same. However, the discretionary power given to the judge to override that decision had to be looked at in a wholly different context. Leaving aside financial considerations, a trial of this kind, with an unrepresented defendant, would inevitably give rise to many procedural difficulties affecting the fairness of the proceedings which would outweigh the factors to which the Director of Legal Aid seems to have given sole consideration.

71. In this regard, whilst the decision in *R v Marr* [1990] 90 Cr App R 154 was concerned with a scenario which bore no resemblance to the present case, because it was, unlike this case, the conduct of the judge in the course of the trial which had given rise to criticism,

nevertheless the judgment of the English Court of Appeal contains advice which is pertinent to the present application. The Lord Chief Justice (at p. 156) said:

"No one could doubt that if the allegations made by the prosecution were true, this was a singularly unattractive crime, earning the offender no sort of sympathy. Likewise the nature of the defence was, to say the very least, most unimpressive. It is however an inherent principle of our system of trial that however distasteful the offence, however repulsive the defendant, however laughable his defence, he is nevertheless entitled to have his case fairly presented to the jury both by counsel and by the judge. Indeed it is probably true to say that it is just in those cases where the cards seem to be stacked most heavily against the defendant that the judge should be most scrupulous to ensure that nothing untoward takes place which might exacerbate the defendant's difficulties."

72. The judge in the present case was aware that the award to D1 of legal aid was correct in principle. All that was stopping D1 receiving representation at his trial was a sum of money over which it was accepted he no longer had control. In this regard, there has been no suggestion that the debt which D1 paid with the funds in his bank account was anything other than a genuine one.

73. We could not avoid the conclusion, on a thorough consideration of all the matters to which we have referred, that D1 was being made to suffer a fundamental disadvantage at his trial having deliberately chosen to divert his financial resources in a way which prevented them from being utilised towards his legal aid.

74. Whether or not the Director of Legal Aid was justified, bearing in mind the interests of justice, in deciding as he did on this basis is beside the point. The judge was not sitting on an appeal from the Director's decision (cf. section 26 of the Legal Aid Ordinance, Cap. 91). He had to exercise a quite separate jurisdiction as required under Rule 13(2) of the Legal Aid in Criminal Cases Rules. While, no doubt, the decision of the Director of Legal Aid was a factor to be considered, there were other cogent factors that the judge had to take into account in the exercise of his discretion under Rule 13(2), not least a critical assessment of the accused's right to a fair trial, particularly given the seriousness of the crime, the penalty for it and, from the layman's perspective, the procedural complexities of the case. The importance of persons accused of serious crimes having the advantage of counsel to assist them cannot be doubted (see: the judgment of Viscount Maugham in *Galos Hired v The King* [1944] AC 149, at 155).

75. As we have already noted, during the trial the judge gave as much assistance to D1 as he could. Nevertheless, in our view, however much assistance is rendered by a judge to an unrepresented defendant, this cannot really compare to the advantages of representation by counsel. This was a matter to which Mason CJ and McHugh J referred in a joint judgment given in *Dietrich v R* (1992) 177 CLR 292, where at 301-2, they said:

"The advantages of representation by counsel are even more clear today than they were in the nineteenth century. It is in the best interests not only of the accused but also of the administration of justice that an accused be so represented, particularly when the offence charged is serious. Lord Devlin stressed the importance of representation by counsel when he wrote: 'Indeed, where there is no legal representation, and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down.' An unrepresented accused is disadvantaged, not merely

because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as counsel for the Crown. The hallowed response that, in cases where the accused is unrepresented, the judge becomes counsel for him or her, extending a 'helping hand' to guide the accused throughout the trial so as to ensure that any defence is effectively presented to the jury, is inadequate for the same reason that self-representation is generally inadequate: a trial judge and a defence counsel have such different functions that any attempt by the judge to fulfil the role of the latter is bound to cause problems. As Sutherland J stated in *Powell v Alabama*, when delivering the judgment of the United States Supreme Court:

'But how can a judge, whose functions are pure judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.'

76. Furthermore, where, as in the present case, *voir dire* proceedings were involved, the problem becomes exacerbated by the different tasks a judge may have to perform. Lord Slynn of Hadley touched upon this aspect in *John Mitchell v R* [1999] 1 WLR 1679, at 1687E when saying:

"As the judge himself stressed, however, there are limits to what the judge can do by way of cross-examination and on the *voire dire* the task of the judge both in cross-examining, and giving a ruling is a particularly difficult and sensitive one."

77. The extent to which D1 was, in the event, disadvantaged is starkly evident from the judge's own comments at an early stage of the summing up where he said:

"Because he has not got a lawyer with a lot of the prosecution witnesses he in fact did not cross-examine and because he has not got a lawyer and he has not been putting his case like Mr Loughran has, on behalf of the 2nd accused, and because the 1st accused did not give evidence, as he is entitled to do, we do not really know what he accepts or what he does not accept.

So in so far as the case against him is concerned, the issues have not been crystallised and have not been formulated In so far as the 2nd accused is concerned, the issues are more straightforward."

78. In all the circumstances, we were satisfied that the judge's approach to, and determination of, D1's application to him for legal aid did not represent a proper exercise, if such it was, of the discretion vested in him. However, we emphasise that this decision should not be seen as an open invitation to other applicants for legal aid to dissipate their assets. D1's trial was lengthy and unusually serious, and the financial considerations which prevented him from

receiving the legal representation he should have had were, with respect, given undue weight in the present case.

79. Mr Blanchflower rightly conceded that although D1 had plainly diverted the funds in his bank account after learning about the legal aid contribution he would have to make, this court's determination as to whether D1 had received a fair trial could only properly be made after an examination of the entire proceedings. This we have done and we have no hesitation in saying that, in the light of those circumstances, D1's trial was not a fair one. Consequently, we did not need to consider a further ground of appeal in D1's case which did not carry his application further forward.

D2's application

80. Two homemade grounds of appeal were put before us by D2.

81. Firstly, he contended that as the result of D1 not giving evidence, the testimony he (D2) gave lacked the corroboration it required from D1.

82. This ground was devoid of merit. The evidence given by D2 did not need to be corroborated. In any event, the implication that D2 expected support for his account from D1, when D2's account was that D1 alone was responsible for the murder, stretches credulity beyond any sensible limit.

83. In his second ground, D2 complained that great injustice was done to him as the result of D1 having no legal representation. He suggested that the Hong Kong courts had never previously encountered such a situation in a murder trial and that the particular unfairness to him stemmed from D1 being convicted of "joint liability" in the murder as the result of which he (D2) was "tied down and convicted".

84. There was, again, no merit in this ground. The lack of legal representation for D1 had no bearing whatever on the fairness of D2's trial. There was no suggestion by D2 that his defence was not properly conducted by counsel and it was clearly in the interests of justice that D1 and D2 should be jointly charged and tried together.

85. This ground also fails.

Result

86. Accordingly, for these reasons, D1's appeal was allowed and his convictions were quashed. We ordered a retrial on both counts and directed that he should remain in custody pending that trial.

87. D2's application was dismissed.

(Geoffrey Ma)
Chief Judge
High Court

(M. Stuart-Moore)
Vice-President,

(Frank Stock)
Justice of Appeal

Representation:

Mr M.C. Blanchflower, SC, and Ms Vinci Lam, GC of the Department of Justice, for the Respondent.

Mr Martin Lee, SC, leading Ms Margaret Ng & Mr Jeremy S.K. Chan, instructed by Messrs Ho, Tse, Wai & Partners (assigned by Director of Legal Aid) for D1/Applicant.

Mr William N.C. Stirling, instructed by Director of Legal Aid, for D2/Applicant.