立法會
Legislative Council

LC Paper No. LS13/08-09

Paper for the Panel on Security

HKSAR v Chuen Lai-see and 3 others (HCMA 470 of 1998)

In the letter to the Panel dated 24 June 2008 (LC Paper No. CB(2)2429/07-08(01)), the Secretary for Security provided supplementary information concerning the *Fourth and Fifth Reports of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Part Two: Hong Kong Special Administrative Region*. On page 3 of the letter, the Secretary provided a response to the question of whether the police officers charged in HKSAR v Chuen Lai-see and three others should have been charged under the Crimes (Torture) Ordinance (Cap. 427). To recap, the Secretary's response was:-

> *"In regard to the case of HKSAR v Chuen Lai-see and others, four police officers were tried in 1998 for assaulting a suspect to force a confession. The decision to charge them with offences under the Offences Against the Person Ordinance was made after a careful review of the evidence available at the time. The evidence revealed that there was no reasonable prospect of securing a conviction for an offence under the Crimes (Torture) Ordinance. They were subsequently convicted of assaulting occasioning actual bodily harm and sentenced to imprisonment."*

This paper provides further information and the views of the Legal Service Division for members' reference.

2. Members may note that the Secretary's response was essentially similar to the Administration's reply made to the Panel on Home Affairs on the same issue at its meeting on 13 March 2000. At that meeting, representative of the Department of Justice provided the following as the reasons why the officers concerned were not charged under the Crimes (Torture) Ordinance:-

(a) the prosecution at that time concluded that there was no reasonable prospect of securing a conviction for an offence under section 3 of that Ordinance; and

(b) in order to lay a charge under section 3 the prosecution had to prove beyond reasonable doubt that an official had intentionally inflicted severe pain or suffering in the performance or purported performance of his official duties.

Background of the case

3. In HKSAR v Chuen Lai-see and three others, the four defendants were police officers at the material time. They were each charged with and convicted of assault occasioning actual bodily harm, contrary to common law and section 39 of the Offences Against the Person Ordinance (Cap. 212), in the magistrates' court. The first and second appellants were sentenced to six months' imprisonment, the third and fourth appellants to four months' imprisonment. The defendants appealed against conviction. Their appeal

was dismissed by the High Court (HCMA 470 of 1998). The first appellant alone applied for leave of the Court of Final Appeal to appeal out of time but her application was dismissed.

4. The acts of the police officers concerned, as revealed in evidence during trial at the magistrate's court, were summarized by the High Court in paragraphs 4 to 7 of its judgment. The said paragraphs are reproduced below:-

> *"4. All four appellants are police officers from the Special Duty Squad at Kwai Chung Police Station. In the early evening of 3 March 1997, YIU So-man, the first prosecution witness, was intercepted by the 3rd and 4th appellants at the Ground Floor of Wing Lok House on the Fuk Loi Estate, Tsuen Wan, close to where he lived. He was handcuffed and taken to the refuse room on the 16th Floor. Having been asked what he thought he had done wrong and having refused to answer, he was ordered to lie on the floor on his back. The 3rd appellant sat on his pelvis and punched him in the chest. The 4th appellant removed his spectacles and sat on his shins. The 2nd appellant entered the room and, after discussion with her colleagues, told him that his methadone card had been found, together with a quantity of heroin. When YIU denied that the heroin was his, he was punched in the chest by the 3rd appellant.*
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> *5. The 1st appellant, the inspector in charge of the team, then joined the officers and a further discussion took place which YIU was unable to hear. The second appellant stuffed a shoe in his mouth. Then the 1st appellant, followed by the 2nd appellant, poured water from metal drinks cans into his ears, nose and mouth until he found it difficult to breathe, whilst the 3rd and 4th appellant sat on his body. He said that a Coca-Cola can and a San Miguel beer can were used to do this. Some sheets of cardboard were placed under him.*
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> *6. He was told that he would be released if he was able to borrow money to buy drugs. When he expressed doubt at being able to do this, all four officers carried him to the railings in the refuse room and the 1st appellant threatened to have him thrown to the ground. He agreed to co-operate. He was returned to his position on the floor, where the 3rd appellant pressed his thumbs onto his neck, whilst the 2nd appellant poured more water into his nose and mouth, which caused him to lose consciousness.*
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> *7. When he came around, the 4th appellant handed him a mobile phone. He made a call to his mother and asked her for $7,000. Other police officers then arrived. He was given a change of clothing, as his own were wet, and released on the basis that they would be in touch with him again shortly. He managed to receive his spectacles, which were broken, and his wallet from which he said $200 was missing."*

Elements of "assault occasioning actual bodily harm" and "torture"

5. In its previous submission made to the Panel, the Human Rights Monitor was apparently of the view that the defendants in this case should have been charged with torture instead of assault occasioning actual bodily harm. Members may note that under the

common law, the offence of assault occasioning actual bodily harm is committed if:-

(a) the defendant did an act by which he intentionally or recklessly caused the victim to apprehend immediate and unlawful personal violence; and

(b) the act caused bodily harm or that the harm was a direct result of the act.

In decided cases, “bodily harm” has its natural meaning, and includes any hurt or injury calculated to interfere with the health or comfort of the victim. The hurt or injury need not be permanent but must be more than transient or trifling. Penalty of the offence is prescribed in section 39 of the Offences Against the Person Ordinance (Cap. 212). A person found guilty of assault occasioning actual bodily harm is liable to imprisonment for 3 years.

6. The offence of torture is provided under section 3 of the Crimes (Torture) Ordinance. Section 3(1) of the Ordinance provides that a public official or person acting in an official capacity, whatever his nationality or citizenship, commits the offence of torture if in Hong Kong or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties. A person holding in Hong Kong an office in the Hong Kong Police Force is within the definition of a "public official" under section 2 of the Ordinance. Section 3(6) of the Ordinance provides that a person who commits the offence of torture is liable on conviction on indictment to imprisonment for life. In a charge of torture, the prosecution is required to establish that:–

(a) the defendant is a public official or person acting in an official capacity;

(b) the defendant intentionally inflicts severe pain or suffering on the victim; and

(c) the pain or suffering is inflicted in the performance or purported performance of official duties.

7. Applying the elements of the offence of torture to the evidence revealed at trial, it would seem possible to argue that there was a prima facie case of torture. The analysis would be, in relation to element (a) above, the defendants were members of the Hong Kong Police Force and were thus within the meaning of "public official" under section 2 of the Ordinance. In relation to element (b), it could reasonably be argued that the acts of the police officers concerned would amount to intentional infliction of severe pain and suffering on the victim. There was also medical evidence that the victim had been subjected to a brutal and extensive assault. As to element (c), there was evidence that at the material time the Special Duty Squad team was on an anti-dangerous drugs operation and was looking for a particular suspect so that it could be said that the police officers concerned were in the performance or purported performance of their official duties. However, it should be noted that this analysis is only based on evidence revealed during trial, but not on what was before the prosecutor at the time of deciding the charge. Without full knowledge of what was before the prosecutor at that time, it would be difficult to make a well founded comment on a judgment of the prosecution authorities.

The power to decide the charge

8. In commenting on a prosecution decision, it may be relevant to bear in mind the provisions of Article 63 of the Basic Law that "the Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference". This independent power in making prosecution decisions has been recently considered by the High Court in RV v Director of Immigration (HCAL 2/2008). In that case, the High Court pointed out that Article 63 enshrined the independence of the Secretary for Justice to control criminal proceedings as he thought best and in the exercise of that power he was free of both political interference and judicial encroachment. The High Court held that on a true construction of the Basic Law the High Court has jurisdiction to judicially review the Secretary's power and to determine whether he had acted within limits of his constitutional power, but judicial review would only be granted in truly exceptional cases, such as the Secretary decided to prosecute not on an independent assessment of the merits but in obedience to a political instruction, if he acted in bad faith, or had a rigid fettering of his discretion.

9. It would also be relevant to note the prosecution policy and practice of the Department of Justice. In relation to whether to proceed on a prima facie case, paragraph 8.1 of it's *Statement of Prosecution Policy and Practice* states that:-

> *"….. The Secretary for Justice does not support the proposition that a bare prima facie case is enough to justify a decision to prosecute. The proper test is whether there is a reasonable prospect of a conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. When reaching this decision, the prosecutor will wish as a first step to be satisfied that there is no reasonable expectation of an ordered acquittal or a successful submission of no case to answer.".*

10. It would also be relevant to note that in certain circumstances the Department of Justice may decide not to charge the most serious offence revealed by the evidence. Paragraph 11.1(d) of the Department's Statement of Prosecution Policy and Practice states that:-

> *"In the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence. Nevertheless, when account is taken of such matters as the strength of the available evidence, and the probable lines of defence to a particular charge, it may be appropriate to lay or proceed with a charge which is not the most serious revealed by the evidence."*

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18 November 2008