LC Paper No. CB(2)1889/09-10(06)

For Information

LegCo Panel on Administration of Justice and Legal Services

Trial in the District Court

Purpose

This paper addresses three inter-related issues, namely (i) conviction rates, (ii) the prosecution's right to elect venue of trial and (iii) mode of trial. The first issue concerns conviction rates for all criminal trial courts in Hong Kong but because these statistics can be broken down into conviction rates for each of the three criminal trial courts, they provide a contrast between a defendant's likely chance of conviction in a trial by a jury as opposed to his or her chance of conviction before a professional judicial officer sitting alone. The other two issues exclusively concern the trial of criminal offences in the District Court.

(i) Conviction Rates

2. In the *Yearly Review of the Prosecutions Division* for 2008, the conviction rates at various levels of court were compared to those for 2007 and were as follows:

Level of Court	2007	2008
Magistrates Court	76.6%	73.2%
District Court	90.5%	92.6%
Court of First Instance	93.4%	94.8%

3. In respect of these statistics two matters should be noted. First, the statistics used to calculate the conviction rates were defendant based and in relation to any substantive or alternative offence on which the defendant was

convicted. The figures however did not take into account acquittals of other charges if any. Secondly, the above conviction rates included defendants who were convicted on their own plea.

4. These conviction rates were thus arrived at by first adding up the number of defendants convicted on their own plea and the number of defendants who pleaded not guilty but were convicted after trial. The total number of defendants brought before the different levels of court (who pleaded guilty and pleaded not guilty) was then used as the base for calculating the resultant percentage.

5. For the purposes of calculating the conviction rates after trial, the Prosecutions Division discounted the number of defendants convicted on their own plea and then adopted the number of defendants who pleaded not guilty as the base figure for arriving at a percentage figure.

6. In order to better understand the above two methods for calculating the conviction rates, Members are invited to refer to the table at Annex A. The said table also includes the statistics for the year 2009.

Annex A

7. An alternative method of calculating conviction rates is to use as the base figure the total number of persons charged. Using this figure as a base figure enables calculations to be made which show the proportions of guilty pleas, convictions after trials, and acquittals that make up the total number of persons charged. When this method is employed, the figures for Hong Kong would be as follows:

	District Court	**Court of First Instance**
2006		
Overall conviction rates	91.8%	92.3%
Guilty pleas	65.5%	68.3%

	District Court	**Court of First Instance**
Convictions after trial	26.3%	24.0%
2007		
Overall conviction rates	90.5%	93.4%
Guilty pleas	69.5%	76.2%
Convictions after trial	21.0%	17.2%
2008		
Overall conviction rates	92.6%	94.8%
Guilty pleas	72.4%	75.0%
Conviction after trial	20.2%	19.8%

It is more accurate to describe these figures as a breakdown of the outcomes of prosecutions as a proportion of the overall number of persons charged, rather than as conviction rates. Taking the 2008 figures for the District Court, the breakdown only shows that 92.6% of all persons charged were convicted: that 72.4% of all persons charged pleaded guilty and that 20.2% of all persons charged were convicted after trial. Importantly, what these figures do not show is the rate of conviction for persons tried after pleading not guilty. The conviction rates after trial, which in 2008 were 73.3% and 79.3% for the District Court and Court of First Instance respectively, are a much more accurate assessment of the performance of the criminal justice system and the ability of the Department of Justice to identify appropriate cases for prosecution and to bring those cases to a successful conclusion.

8. It is noted that by a letter dated 7 June 2010 the Research and Library Services Division of the Legislative Council Secretariat provided the Department of Justice ("DoJ") with a paper relating to conviction rates in other common law jurisdictions, namely England and Wales of the United Kingdom, Canada and Australia. A comparison was made between Hong Kong's overall conviction rates in the District Court and the Court of First

Instance and those for similar court levels in the three selected common law jurisdictions.

9. However, such a comparison would seem to be inappropriate for a number of reasons. Firstly, according to the calculation method published by the three overseas jurisdictions in question, it is clear that they adopted a different basis from that of the Prosecutions Division in arriving at the conviction rates[1]. It appears as though these other jurisdictions have not used conviction rates as Hong Kong has done but has rather employed calculations which merely show the outcomes of prosecutions as a proportion of the overall number of persons charged. As mentioned above, in Hong Kong, the calculation of the conviction rate has been defendant based and in respect of any substantive or alternative offence on which the defendant has been convicted. The fact that the defendant has been acquitted of other charges has been discounted.

10. Secondly, there could be a variety of reasons for the difference in terms of conviction rates between Hong Kong and the three selected common law jurisdictions. It would therefore be imprudent to reach to any conclusions based solely on conviction statistics without knowing their full details and the basis of their calculation.

11. The DoJ's concerns were conveyed to the Research and Library Services Division and are reflected in the latest version of the research paper.

---

[1] For England and Wales, the conviction rates were case based. The percentages for guilty pleas and convictions after trial were calculated using the total number of cases dealt with by way of (i) judge ordered acquittals (including bind overs), (ii) warrants etc.(iii) judge directed acquittals (iv) acquittals after trial (v) guilty pleas and (vi) convictions after trial as the base figure.
In the case of Canada, the conviction rates were file based. The percentage for guilty pleas included the number of files where there were guilty plea for other or lesser offence. Likewise, the percentage for convictions after trial included the number of files where there were convictions of other or lesser offence.
In relation to Australia, while the conviction rates were defendant based, the base figure used to calculate percentages for guilty pleas and convictions after trial included defendants whose charges had been withdrawn by prosecution, defendants who were deceased, unfit to plead, transferred to other courts and other non-adjudicated finalisations.

12. Although it would be imprudent to rush to any conclusion in respect of the DoJ's statistics, it can be said of them that in so far as they allow of any conclusion they suggest that the mode of trial has little impact on a defendant's chance of acquittal. The DoJ is of the view that there is nothing in its conviction statistics that should be a cause of any concern.

(ii) Venue of Trial

13. At the AJLS Panel Meeting held on 13 January 2009, Members noted the concerns raised by the Chairman of the Hong Kong Bar Association in his speech delivered at the Ceremonial Opening of the Legal Year 2009 that many commercial fraud cases, including the substantial and complex ones, were heard before the District Court rather than in the Court of First Instance before a jury. Members shared a concern that the current practice of allowing the choice of the venue of trial to rest solely with the prosecution may deny a defendant the right to jury trial.

14. The law in Hong Kong is that every indictable offence commences its progress through the magistrates' court as a committal proceeding until such time as the prosecutor brings that committal proceeding to an end, either by electing the offence to be tried summarily in the magistracy or before a judge alone in the District Court. If the prosecution wish the offence to be tried in the Court of First Instance, then it so informs the court and the defendant may then elect to have a preliminary enquiry in the magistrates' court or to be committed for trial in the Court of First Instance on the basis of the committal papers served on him. The effect of the prosecution electing District Court as the venue of trial is that the defendant will be tried by a District Court Judge and not by a jury.

15. The right of the prosecution to determine the venue of trial was considered in a judicial review of the prosecution's decision to elect District

Court, as opposed to the Court of First Instance, as the venue of trial in respect of two separate cases of conspiracy to defraud. This application for judicial review was heard before Wright J (*Chiang Lily v Secretary for Justice* HCAL 42/2008 and HCAL 107/2008 at Annex B). On 2 February 2009, in response to this Panel's request, the DoJ provided information on the factors to which the prosecution would have regard in selecting the venue for trial (LC Paper No. CB(2)756/08-09(01). In its response, DoJ also advised that although there were no plans to review the current practice, the question of whether any review was necessary or desirable would be examined in the light of the outcome of the judicial review proceedings.

Annex B

16. On 9 February 2009, Wright J delivered his judgment in the first of the two judicial reviews. He pointed out that there does not exist in Hong Kong any absolute right to a jury trial nor any mechanism by which a person to be tried for an indictable offence may elect to be so tried. The decision as to whether an indictable offence is tried in the Court of First Instance by a judge and jury or in the District Court by a judge alone is the prerogative of the Secretary for Justice ("SJ"). Wright J found that the reasons furnished by the SJ for his decision to transfer the proceedings to the District Court were sufficient on the factual situation of each case. In respect of the second judicial review, he ruled in June 2009 that the provision in the Magistrates Ordinance which allowed the prosecution to elect venue of trial (section 88) was not unconstitutional as a usurpation of judicial power.

17. In September 2009, the Court of Appeal upheld the decision of Wright J (see *Chiang Lily v Secretary for Justice* CACV 55 & 151/2009 at Annex C). The applicant then applied for leave to appeal to the Court of Final Appeal.

Annex C

18. The application for leave to appeal was heard by the Appeal Committee of the Court of Final Appeal in March 2010 (see *Chiang Lily v*

Annex D

Secretary for Justice FAMC 64 & 65/2009 at Annex D). In dismissing applications to certify various points of law and for leave to appeal, the Appeal Committee confirmed that there is no right to trial by jury in Hong Kong. The Appeal Committee determined that the contention that section 88 of the Magistrates Ordinance, Cap. 227 is unconstitutional on the basis that it allocates a judicial function to the SJ was not reasonably arguable. In giving the judgment of the Appeal Committee, Chief Justice Li stated that:

> 15. … Choice of the venue for a prosecution is clearly a matter covered by Article 63 of the Basic Law which gives control of prosecutions to the Secretary for Justice without any external interference. Wright J's conclusion was plainly correct.
>
> 16. This becomes obvious once one considers the context and basis of any decision regarding venue. As to context, if selection of venue were a judicial function, the magistrate would have to hear submissions and take evidence bearing on that choice, looking in some detail at the alleged offence and the circumstances of the accused, turning the mere decision as to venue into a mini-trial. That cannot be the proper function of the magistrate.
>
> 17. Moreover, the basis of making the selection shows that the function is not judicial. In the Statement of Prosecution Policy and Practice (2009), guidance as to choice of venue is given as follows:
>
> > "In the selection of venue, the sentence which is likely to be imposed upon an accused after trial is an important factor for the prosecutor to examine. The prosecutor will also wish to consider the general circumstances of the case, the gravity of what is alleged, the antecedents of the accused and any aggravating factors." (para. 14.1)
>
> 18. These are plainly matters that may properly guide the prosecutor but which it would be highly undesirable for a magistrate to explore before the trial. It would obviously be most inappropriate for there to be a debate as to likely sentence or antecedents or aggravating factors before the magistrate regarding a person fully entitled to the presumption of innocence. The present systems avoids this by properly treating the question of venue as a prosecutorial choice with the transfer following on a mandatory basis.

It is significant that by these comments Chief Justice Li is not just saying that the function of electing venue for trial is one that by operation of law belongs to the prosecution by virtue of Article 63. Importantly he is also saying that because of the factors involved in the decision-making process of electing venue, it is a function which properly should be vested in the prosecution. In view of the strength of these comments the DoJ is of the view that no change to the current process of determining venue of trial is warranted.

(iii) Mode of Trial

19. This issue concerns the question of whether criminal trials in the District Court should be before a professional judge sitting alone, the current position, or whether, like trials in the Court of First Instance, they should be before a jury. This issue of whether there should be jury trials in the District Court was last raised by this Panel in March 1997. An Information Paper on the issue was presented to Panel Members by the then Attorney General's Chambers on 16 June 1997 (Annex E). The 1997 Paper compared the jury system in Hong Kong with that in the United Kingdom, explained the reasons for not extending the jury system to the District Court and the Administration's opinion that such extension would require a lengthy, detailed and in-depth study, which would entail a consideration of the criminal justice system of other jurisdictions besides the United Kingdom.

Annex E

20. Article 81 of the Basic Law provides, inter alia, that the judicial system previously practised in Hong Kong shall be maintained. Article 86 also provides that the principle of trial by jury previously practised in Hong Kong shall be maintained. Neither the Basic Law nor the Hong Kong Bill of Rights Ordinance confers on a defendant the right to choose trial by jury.

21. In its judgment refusing Ms Chiang leave to appeal, the Appeal Committee of the Court of Final Appeal also rejected any suggestion that a

trial in the District Court was, by virtue of being a non-jury trial, in any way less fair than a trial in the Court of First Instance. At paragraph 9 of its judgment it said:

> As is rightly accepted by the applicant, it is clear that there is no right to trial by jury in Hong Kong. Although the applicant's strong preference is for a jury trial, she has not suggested that she cannot have a fair trial in the District Court before a judge sitting alone. Indeed, such a suggestion cannot be responsibly made by any person facing trial in the District Court.

22. If there is no issue of fairness of trial involved then it is difficult to identify any benefit that jury trial would confer on a defendant that he would not obtain from a judge alone trial. The conviction statistics would suggest that the perception of a forensic tactical benefit that might increase the defendant's chance of an acquittal is illusory. Nor can any support be found in the statistics for the contention that jury trial would allow for more defendants to be tried in their native language. It is clear from the statistics that while the number of criminal cases tried in Chinese in the District Court has shown a steady increase in recent years, the number of those in the Court of First Instance has shown no comparable increase. Since 2007, while there has been an increased pool of Chinese-speaking jurors, this has not led to any significant increase in jury trials in Chinese in the Court of First Instance. This would suggest that the introduction of jury system in the District Court would not necessarily lead to an increased use of Chinese in that Court. The language of trial does not appear to be influenced by the mode of trial.

Level of Court	**Number of trials heard in Chinese**		
	2007	**2008**	**2009**
Court of First Instance	24.7%	23.8%	26.1%
District Court	31.9%	47.8%	55.5%

23. A significant benefit that a judge alone trial confers on a defendant is that he receives from the court reasons for why he is being convicted.

A jury trial only allows a defendant to know how the judge summed up to the jury and does not provide him with any insight into the reasoning behind the jury's verdict. The availability to a defendant of the District Judge's Reasons for Verdict is a considerable advantage to a convicted defendant in both understanding why he is convicted and formulating grounds of appeal against his conviction.

24. Considerations which militate against introducing the jury system to the District Court are the significant increase in demand for eligible jurors to service such trials and the resource implications involved in providing the required facilities.

Increased Demand for Jurors

25. The following are statistics obtained from the Judiciary regarding jury trials conducted in the Court of First Instance since 2007.

Year	**No. of cases tried by jury**	**No. of jurors empanelled**	**No. of summonses issued for potential jurors to attend for selection**
2007	77	541	18,172
2008	69	487	17,078
2009 (up to October)	73	515	14,260

26. On the other hand, the number of criminal trials conducted in the District Court for the same period are as follows:

Year	**No. of trials**
2007	647
2008	588
2009 (up to October)	612

27. From the above statistics and in particular the large number of criminal cases tried in the District Court, the introduction of the jury system in the District Court would mean that the number of members of the public required to serve as jurors would significantly increase.

Other Resource Implications

28. Although the Administration would never allow financial considerations to prejudice the fairness of a defendant's trial, it nevertheless cannot, where that fairness is not at risk, ignore the overall resource implications involved in introducing jury trials in the District Court. Introducing such trials in the District Court would have significant resource implications; for example it would be necessary to construct jury benches inside the courtrooms, a jury assembly room, separate access and facilities for jurors, jury deliberation rooms and overnight accommodation.

29. Other ongoing expenses, such as payment of allowances to those who serve as jurors and the costs of administrative staff to ensure effective running of the jury system in the District Court, have to be taken into account in assessing the viability for introducing the system. One should also bear in mind that there is an indirect cost to the community at large. Jurors, whether self-employed or not, are required to be absent from their normal work duties and may adversely affect their productivity and efficiency.

Conclusion

30. Having carefully reviewed the 1997 Paper and having taken into account all the circumstances, the Administration's position remains the same and it has no current plan to introduce the jury system to the District Court.

Prosecutions Division
Department of Justice
June 2010

Annex A

	Total No. of defendants (pleaded guilty and pleaded not guilty) (A) = (B)+(C)	No. of defendants convicted on own plea (B)	No. of defendants pleaded not guilty (C) = (D)+(E)	No. of defendants who pleaded not guilty but were convicted after trial (D)	No. of defendants who pleaded not guilty and were acquitted after trial (E)	Conviction rate after trial (F) = (D)÷(C)	Conviction rate including guilty plea (G) = [(B)+(D)]÷(A)
Magistrates Court							
2007	14,683	6,456	8,227	4,786	3,441	58.2%	76.6%
2008	14,125	5,931	8,194	4,415	3,779	53.9%	73.2%
2009	14,546	6,656	7,890	4,217	3,673	53.4%	74.7%
District Court							
2007	1,576	1,096	480	331	149	69.0%	90.5%
2008	1,277	925	352	258	94	73.3%	92.6%
2009	1,586	1,190	396	274	122	69.2%	92.3%
Court of First Instance							
2007	366	279	87	63	24	72.4%	93.4%
2008	368	276	92	73	19	79.3%	94.8%
2009	422	321	101	66	35	65.3%	91.7%

Annex B

HCAL 42/2008
HCAL 107/2008

HCAL 42/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 42 OF 2008

BETWEEN

CHIANG Lily — Applicant

and

Secretary for Justice — Respondent

HCAL 107/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CONSITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 107 OF 2008

BETWEEN

CHEE Hoi Suen Henry	1st Applicant
YU Man Chiu Raymond	2nd Applicant
and	
Secretary for Justice	Respondent

Before: Hon Wright J in Court

Date of Hearing: 2 February 2009

Date of Handing Down Judgment: 9 February 2009

J U D G M E N T

---

1. There does not exist, in Hong Kong, any absolute right to trial by jury nor any mechanism by which a person to be tried of an indictable offence may elect to be so tried. The decision as to whether an indictable offence be tried in the Court of First Instance by a judge and jury or in the District Court by a judge alone is the prerogative of the Secretary for Justice.

The background

2. The applicant in HCAL42/2008 was granted leave, by Hartmann J, on 16 May 2008 to judicially review a decision by the Secretary of Justice to transfer her trial on five charges, one of conspiracy to defraud contrary to Common Law, two of making a false statement as

a company director and one of fraud all contrary to the Theft Ordinance, Cap. 210, and one of authorizing the issue of a prospectus containing an untrue statement about shares contrary to the Companies Ordinance, Cap.32. The hearing was fixed for 2 February 2009.

3. The applicants in HCAL107/2008 were jointly charged with 13 counts of conspiracy to defraud contrary to Common Law. In addition the 1st applicant was charged with one count of offering an advantage to an agent contrary to the Prevention of Bribery Ordinance, Cap. 201. The Secretary for Justice made a similar decision to transfer their trials to the District Court. On 29 September 2008, given that the proceedings in HCAL42/2008 had already been fixed for hearing, I granted them leave to review that decision and directed that these two matters be heard together, the issues being the same in each.

4. The facts which gave rise to the charges are not germane to these proceedings. Suffice it to say, that amongst other arguments, each applicant unusually characterized the facts of the charges against her/him as bringing the offences into a serious category. Each suggests that this is a factor which should be taken into account by the respondent in determining venue. As will be seen, it has been. The course of the proceedings thus far against each applicant was broadly similar – nothing turns on such minor variations, or differences in dates of court appearances, as may exist.

5. Once a person has been charged with an offence he is brought before a magistrate whereupon proceedings for his committal for trial commence. That is in accordance with the procedure prescribed by Part III, s. 72(1) of the Magistrates Ordinance, Cap. 227 (the Ordinance).

Thereafter those committal proceedings continue until one of three things happens: first, with or without a preliminary enquiry which is at the option of the accused person, the accused person is either discharged or is committed to the Court of First Instance for trial before a judge and a jury or, if he has entered a plea of guilty to the charge, for sentence by a judge sitting alone; secondly, the respondent makes application to the magistrate under Part IV, s. 88 of the Ordinance, an application which the magistrate is obliged to grant, to transfer the trial for hearing in the District Court before a judge sitting alone; or, thirdly, the respondent decides that the offence should be tried summarily by a magistrate in accordance with the provisions of Part V of the Ordinance and gives his consent in terms of s. 94A. In the two latter events, the committal proceedings terminate.

6. In respect of these applicants, the respondent decided to follow the second course and applied to the magistrate to transfer the proceedings to the District Court. Each applicant took exception to that decision: each professed a desire to be tried in the Court of First Instance. The committal proceedings were adjourned to enable representations to be made to the respondent.

7. Those representations were made, and in very similar terms. Each set out her/their contentions in fine detail; the letters were expressed to have been written based on advice received from counsel; statistics were quoted; “principles” set out; references were made to decided cases in their plaint for the respondent to reconsider his decision. Particular emphasis was placed on two factors, first, the contention that Article 86 of the Basic Law had an effect beneficial to the applicants of which they would be deprived if they were to be tried in the District Court and,

secondly, that the pool of jurors now available in Hong Kong had increased substantially in recent times.

8. The respondent, in each instance, considered the representations that had been made to him but maintained his decision to have each applicant tried in the District Court.

9. He advised the applicant in HCAL42/2008 of that fact, by letter dated 20 March 2008, in these terms:

> "Having carefully considered your letter, I maintain my decision that the District Court would be a proper venue for the trial in this case and that the trial should be held in the District Court. Should your client be convicted it is unlikely that her conduct would attract a sentence of imprisonment greater than the jurisdiction of the District Court. I note that you have not referred to any matter peculiar to your client which would prevent her from receiving a fair trial in the District Court. I have no doubt that your client can and will receive a fair trial in the District Court and I see no good reason why her case should not be tried there. My decision was not affected in any way by resource constraints."

10. He advised the applicants in HCAL107/2008 of that fact, by letter dated 14 August 2008, in these terms:

> "You have not referred to any matter peculiar to your clients which would prevent them from receiving a fair trial in the District Court. We have no doubt that your clients can and will receive a fair trial in the District Court and we see no good reason to commit your clients to the Court of First Instance for a jury trial.
>
> In arriving at that conclusion, full weight has been given to the facts of the case, the alleged culpability of your clients, the prejudice and potential prejudice caused to the bank, the likely sentences in the event of conviction and all matters you have raised."

11. It is not contended by any of the applicants that they are unable to have a fair trial in the District Court. Mr Dykes SC, appearing

for the applicant in HCAL42/2008, indicated in his written skeleton submissions and reasserted in oral submissions:

> "2. In short, the issues are whether adequate reasons have been provided by [the respondent] to justify the decision and whether sufficient consideration has been given by [the respondent] in the choice of venue... having regard to the constitutional status of jury trial under the common law and, in the light of Article 86 of the Basic Law, which provides that the principle of trial by jury previously practised in Hong Kong shall be maintained.
> ...
> 9. It is not the applicant's case that she has an absolute right to jury trial. The "principle" referred to in Article 86 of the Basic Law is to be understood as referring to a system in which a person accused of an indictable offence would be tried on indictment before a jury, unless and until the Attorney General intervened and required summary trial before a magistrate or District Judge.
>
> 10. It is not the applicant's case that she cannot have a fair trial in the District Court...
>
> 11. It is not the applicant's case that there is necessarily something inherently and irredeemably unfair and wrong in giving the prosecution the right to decide where a case should be tried...."

12. Ms Lan who appeared for the applicants in HCAL107/2008 indicated in her submissions that she adopted all that had been said by Mr Dykes. It must be said, however, that during the course of her oral submissions she frequently made reference, variously, to a "*right*" and a "*qualified right* to a trial by jury" which, in the light of her acceptance of Mr Dykes's position and concessions, I took to be a phrase of convenience rather than a contention that such a right actually exists.

13. Although when commencing his oral submissions Mr Dykes indicated - I paraphrase - that the contentions were that the respondent had not attached sufficient weight to trial by jury under the Basic Law and Common Law and that the reasons furnished by the respondent were

not adequate in the public law sense, at the conclusion of submissions he, correctly in my view, identified the issue as being the adequacy of the furnished reasons.

14. Thus the true issue in these proceedings is the adequacy of the reasons for the respondent deciding to transfer the trials to the District Court and refusing to alter his decision and not the effect of the deprivation of some constitutional right - which the applicants accept does not exist. That affects the course which it is necessary to adopt in determining the issue – see *Dr Kwok-hay Kwong v The Medical Council of Hong Kong* CACV373/2006 §§18 -20: particularly, the numerous authorities to which I have been referred, in respect of the approaches adopted in this and other jurisdictions where there is a derogation from an existing constitutional right, are of little or no assistance.

The principle of jury trials before the Basic Law

15. Article 86 of the Basic Law reads:

> "The principle of trial by jury previously practised in Hong Kong shall be maintained."

16. The Article is clear and unambiguous. All that it is saying is that whatever principle applied in relation to jury trials prior to the Basic Law coming into effect would continue to apply thereafter. The applicants cannot be in any better position now than they would have been prior to the Basic Law coming into effect: they will be in the same position.

17. What was that principle which was previously practised? A challenge to the jurisdiction of the District Court based on the contention that the District Court Ordinance was *ultra vires* because its effect was to

extinguish a right to trial by jury was unsuccessful – see *R v WONG King Chau & Others* [1964] DCLR 94. Similarly, a review of an order to transfer a trial to the District Court based on the "essential question" identified by a Full Bench of the Court in *In an application by David Lam Shu-tsang & another for an Order of Certiorari* (1977) HKLR 393 as being "... is the trial of charges for indictable offences by a single judge sitting alone against the wishes of the person accused trial in accordance with law" failed, the court noting, at 399:

> "Neither Part V of the Magistrates Ordinance nor any section of the District Court Ordinance conferred any right to elect trial by jury. It is doubtful if there can be said to have been such a right to *elect* at Common Law. Indeed when considering the right to jury trial at Common Law it is well to remember that that right originated not as a privilege but as an obligation."

continuing, at 400:

> "Section 88 [of the Magistrates Ordinance] in itself does not take away the right to trial by jury although its operation has the effect of removing charges for indictable offences which an accused person faces to a court of a single judge as soon as the Attorney General applies for an order to that effect. This is in our view the clear unambiguous and intended effect of the section. It is capable of no other interpretation and we cannot interfere with its operation unless the decision of the Attorney General to apply for a transfer under it can be successfully attacked. Section 88 is primarily procedural although its direction to the magistrate to act "upon application made by or on behalf of the Attorney General" necessarily enables the Attorney General, in the exercise of his discretion to make application."

18. Three judgements, Pickering JA and Li and Cons JJ, were delivered in the Court of Appeal consequent upon an appeal against that decision: see *David Lam Shu-tsang & another v Attorney General* CACV42/1977. The appeal was dismissed. Pickering JA, having noted in the decision in *Wong King Chau and others* said, at 6:

> "... the section providing for mandatory transfer of indictable offences upon the application of the Attorney General contained no saving clause, nothing to the effect that the Attorney General must consult the wishes of the accused and nothing giving the accused any right of objection to the transfer. The discretion as to whether to apply for transfer was invested solely in the Attorney General and, upon his exercising that discretion by making a transfer, the obligation to transfer lying upon the magistrate was absolute. The scheme of the legislation is clear beyond a peradventure and it entails, with equal clarity, the deprivation of the former common law right to trial by jury.
>
> Mr Leggatt would have it that there is no necessity for his client to elect trial by jury since he enjoys the right to such trial and could only be put to election by statute. For the reasons I have given it appears to me that there is no right to election and no right to trial by jury and that the result has not been arrived at by what Mr Leggatt terms "a side wind" but by the unambiguous pattern of the legislation. It is not, with respect, correct to say that the right to trial by jury has not been taken away by either the District Court Ordinance or the Magistrates Ordinance. Certainly it has not been wholly taken away but it has so been taken by the former Ordinance in the case of any criminal charges which are bought in the District Court whilst the latter Ordinance provides the <u>mandatory machinery for transferring to that court such cases as the Attorney General in his unfettered discretion determines to prosecute there</u>." [emphasis supplied]

19. Consequently, the principle of trial by jury that applied prior to the Basic Law coming into effect was clear: an indictable offence was triable either by judge and jury, in the High Court, or by judge alone, in the District Court, at the discretion of the Attorney General. The order of the magistrate transferring the trial to the District Court is one which is not subject to appeal: s. 89(2) of the Ordinance. Article 86 preserved the *status quo ante*.

20. The Attorney General's discretion was, and hence the respondent's discretion is, unfettered, although not necessarily entirely free of judicial supervision:

> "20... the rule that ensures the Secretary's independence in his prosecutorial function necessarily extends to preclude judicial interference, subject only to issues of abuse of the court process and, possibly, judicial review of decisions taken in bad faith.
> ...

per Stock JA (Ma CJHC and Kwan J, concurring) in *Re: C (A Bankrupt)* [2006] HKC 582 in considering the implications of Article 63 of the Basic Law. See, further, the comments of the Full Bench in *In an application by David Lam Shu-tsang & another for an Order of Certiorari*, *supra*, at 401.

21. It was suggested that there existed a "legislative presumption" that a person would be tried by a judge and jury unless the Attorney General intervened. With respect, when the District Court was created it brought into effect a system, but neither that creation nor that system brought into existence any presumption, legislative or otherwise.

22. The respondent was entitled to arrive at his decision to transfer these two trials to the District Court. Representations were made to him to reconsider that decision. He considered those representations but declined to alter his decision. This was a course which he was entitled to follow in the exercise of his discretion.

Adequacy of the reasons

23. I was invited by Ms Lan to decide whether or not there is a duty on the respondent to provide reasons for a decision as to venue of a trial. That is a matter which I do not have to decide as the respondent has furnished reasons for his decision: where reasons are furnished, even absent a duty to do so, they are "... open to scrutiny and review upon ordinary public law principles, which may include the question of their

adequacy." (*R v Criminal Injuries Compensation Board, ex parte Moore* [1999] 2 All ER 90 at 95J)

24. It is obviously a matter of importance that any reasons furnished be scrutinized in the context in which they were supplied. There will be instances where comprehensive and detailed reasons may be required: there will be instances where the briefest of reasons will suffice. Whether reasons are to be regarded as adequate is a matter which will vary from instance to instance and which will depend upon, amongst other things, the factual circumstances which pertain, the nature of the decision made, the legislative framework within which it is made and the nature of the decision maker.

25. It is of importance in these applications to bear in mind that the respondent had made the decision, which was within his discretion, to transfer the trials to the District Court without reference to the applicants. It is self-evident that that is what occurs in the ordinary course. This was an unexceptional and unexceptionable event. Once the respondent's decision became known to the applicants, they sought a reconsideration of it emphasising in their representations specific aspects which they had been advised required particular consideration by the respondent.

26. In an appeal in which the issue was the choice of charges to be laid, but is of equal applicability in regard to the selection of venue, Beeson J said in *HKSAR v Pearce* [2006] 3 HKC 105 at §56:

> "The choice of charge and venue for trial is the responsibility of the Secretary for Justice... Charges are laid and venue chosen according to prosecution policy guidelines taking into account the gravity of the offence, the elements that can be proved and other factors such as prevalence, deterrence, community mores etc. The prosecutorial burden is a heavy

> one and it is for the Secretary for Justice to decide in what manner it is borne...."

27. The considerations to which the judge referred are, as commonsense dictates, matters which will be considered in every instance. Prosecution policy guidelines are well known and publicly available. As such, it seems to me that it would be unrealistic to expect the respondent, as part of his reasons for arriving at a given decision, to say that he had acted in terms of the guidelines.

28. The reply to each of the letters of representation made by the applicants, the relevant paragraphs being set out in full at §§9 and 10, *supra*, specifically indicated that, in respect of the applicant in HCAL42/2008, the respondent had "... carefully considered your letter..." and, in respect of the applicants in HCAL107/2008, that "... full weight has been given to... all the matters you raise.". Bearing in mind that those representations sought a reconsideration of a pre-existing decision and were detailed, I am satisfied that the response by the respondent indicating, in effect, that the arguments, contentions and submissions of the applicants, had been considered but did not alter the original decision was all that was necessary in the circumstances. To have expected the respondent to have dealt with each contention and each point put forward is simply unrealistic in the context of this matter.

29. The respondent's response in each instance went further. The respondent was at pains to point out that, in each instance, nothing had been put before him "peculiar" to each of the applicants that would prevent her/him from receiving a fair trial the District Court. It has been suggested that this is an irrelevant consideration because a fair trial in every venue is a fundamental right. I do not think that suggestion to be

correct. The response demonstrates that if anything specific to any particular applicant had been invited to his attention the respondent would have factored that into account. The point about this part of the respondent's response is not that it is stating the obvious, as is suggested, but that it illustrates that he has given full consideration not only to the specific representations that have been made to him, but to additional matters which he perceived also potentially of relevance.

30. Much has been made of the references in each of the respondent's responses to the fact that it seemed to the respondent that, in the event of conviction, any sentence would fall within the jurisdiction of the District Court. It has been submitted that that should not be the sole determining factor in respect of venue. As a basic, single proposition, that is obviously correct. But that does not mean that it is not an important factor to be taken into account and perhaps, in a given situation, the determinative factor. The Court of Appeal has frequently emphasized the necessity to bring trials in the appropriate venue taking into account the likely sentence to be imposed in the event of conviction: see, e.g., *KWOK Chi-wai & Anor. v HKSAR* CACC12/2005; *TAI Chi-wai & Anor v HKSAR* CACC497/2006. This is acknowledged in the current Code for Prosecutors (2009) published by the Department of Justice. It would be naive to suggest, and the respondent has not sought to do so, that it did not play an important role in these decisions.

31. Which leads to the contention that by certain accused having been tried in the Court of First Instance and others in the District Court there has been an inequality of treatment. That argument, it seems to me, may avail the applicants in the event that these proceedings related to the deprivation of a constitutional right, which they do not. In any event, the

contention ignores the reality of the situation which, as the applicants contentions demonstrate in HCAL107/2008, is that even where similar matters have been tried in the Court of First Instance the resulting sentences frequently fall within the jurisdiction of the District Court. However, as the respondent is required to consider venue in respect of each matter on its own merits and as each matter will have factors peculiar to it, comparison with other decisions without being aware, at least, of the facts of them is of no practical value.

32. The respondent has also been criticised for saying that he sees "no good reason" for the applicant in HCAL42/2008 not to be tried in the District Court and for the applicants in HCAL107/2008 to be committed for trial in the Court of First Instance. The respondent's assertion simply demonstrates that he had fully considered the consequences of the decision to transfer the trials to the District Court.

Conclusion

33. I am satisfied that the reasons which were furnished by the respondent for his decision to transfer the proceedings to the District Court were sufficient on the factual situation in each instance.

34. Consequently, each application is dismissed.

35. Costs are to follow the event: the applicants are to pay the respondent's costs, to be taxed if not agreed, in respect of their respective applications including the application for leave.

(A R WRIGHT)

Judge of the Court of
First Instance

Mr Kevin Zervos, SC, DDPP, and Mr. Alex Lee, SADPP, of the Department of Justice, for the Respondent.

Mr Philip Dykes, SC, Mr Hectar Pun, and Ms Jocelyn Leung, instructed by Messrs Fairbairn Catley Low & Kong for the Applicant (HCAL 42/2008).

Ms Gekko Lan, instructed by Messrs Joseph SC Chan & Co. for 1st and 2nd Applicant (HCAL 107/2008).

Annex C

CACV 55 & 151/2009

CACV 55/2009

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 55 OF 2009

(ON APPEAL FROM HCAL NO. 42 OF 2008)

BETWEEN

CHIANG LILY	Applicant
and	
SECRETARY FOR JUSTICE	Respondent

CACV 151/2009

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 151 OF 2009

(ON APPEAL FROM HCAL NO. 53 OF 2009)

BETWEEN

CHIANG LILY	Applicant
and	
SECRETARY FOR JUSTICE	Respondent

Before : Hon Ma CJHC, Stock VP & McMahon J in Court

Dates of Hearing : 15 & 16 July 2009

Date of Handing Down Judgment : 21 September 2009

JUDGMENT

Hon Ma CJHC :

1. The two appeals (both arising in judicial review proceedings) have their origins in a decision of the Respondent (the Secretary for Justice) made in March 2008, in which it was indicated to the Applicant, an accused charged with several indictable offences, that the venue for her trial would be the District Court. In the first appeal, the issue is whether the Respondent's decision could be challenged on the basis that it was unreasonable. Wright J held it could not and dismissed the application for judicial review. In the second, where leave to institute judicial review proceedings was refused by the court below, the main issue is whether leave should have been refused on the basis that the application for judicial review constituted an abuse. Wright J did not decide this issue; instead refusing leave on the basis that no arguable ground existed. The abuse issue arose before us by way of a Respondent's Notice. Underlying both sets of proceedings for judicial review is the wish of the Applicant to be tried in front of a jury. However, I ought to make clear at the outset that these appeals are not about whether a right to a jury trial exists in Hong Kong; it is accepted there is no right or entitlement as such. It also ought to be made clear that while the Applicant wishes to have a trial by

jury, it is accepted that there is no question of any unfairness were a trial to take place in the District Court.

2. Before dealing with the issues that arise in these appeals in greater detail, I ought first set out the factual context and the relevant statutory scheme.

3. On 23 October 2007, the Applicant was arrested by the ICAC. In January 2008, the Applicant, together with another person, was charged with one charge of conspiracy to defraud and two charges of making a false statement as a director (contrary to section 21 of the Theft Ordinance Cap. 210) : -

(1) The conspiracy charge related to a company called Pacific Challenge Holdings Limited ("PCHL"), a company that had been founded by the Applicant in 1999. It is alleged that the Applicant conspired with others to defraud investors of that company, as well as the Securities and Futures Commission and the Stock Exchange of Hong Kong ("the SEHK"), by concealing the fact that under a share option scheme of PCHL involving some 23,880,000 shares, some of the company's employees who were to subscribe to the shares were merely nominees for the Applicant herself. The relevant date of this conspiracy was sometime between 1 February 2002 and 31 August 2002.

(2) The 2nd charge alleged that on 22 April 2002, the Applicant and other officers of PCHL agreed to publish an Announcement which was misleading or false in that the

company's employees who were given share options under the scheme referred to above, might not themselves be the beneficial owners of the shares.

(3) The 3rd charge related to the publication of an alleged false statement contained in a letter dated 6 June 2002 in which it was stated that 21,492,000 shares options would be granted to certain employees of PCHL. The allegation was that these employees were not be the beneficial owner of the shares under the option.

4. By a letter dated 29 February 2008, the Respondent informed the Applicant's solicitors, Fairbairn Catley Low & Kong ("FCLK") that at the next court appearance (scheduled for 3 March 2008), two additional charges would be laid against her. The two additional charges were : -

(1) A 4th charge alleging that between 16 January 2001 and 5 December 2001, the Applicant together with others made a false representation with intent to deceive the SEHK in relation to another company, Eco-Tek Holdings Limited ("Eco-Tek"), a company also founded by the Applicant in 1999. The false statement was it was represented that after a placing and capitalization issue, 8,844,800 shares of that company was held by one Yip Yuk-chun, when in truth the Applicant had an interest in some or all of these shares. The charge was made under section 16A of the Theft Ordinance.

(2) A 5th charge under section 351 of and Schedule 12 to the Companies Ordinance Cap. 32, in which it was alleged that on 21 December 2001, the Applicant and another person authorized the issue of a prospectus for Eco-Tek that contained a false statement to the same effect as in charge 4.

5. The letter of 29 February 2008 also stated that at the court hearing scheduled for 4 March 2008, the prosecution would seek to transfer all five charges to be tried in the District Court. This was an obvious reference to section 88 of the Magistrates Ordinance, Cap. 227 (to which I shall return when I deal with the relevant statutory scheme), whereby upon the application of the Respondent, a committing magistrate would have to make an order transferring all relevant charges for trial in the District Court.

6. On 3 March 2008, FCLK responded in a letter indicating that the Applicant wished to have a trial by jury on the charges. The Respondent was accordingly requested to reconsider his position to take into account this wish. The hearing originally scheduled in the Magistrates Court on 4 March 2008 was adjourned to 25 March 2008.

7. By a letter dated 20 March 2008, it was indicated to FCLK that the original decision to apply to have the five charges tried in the District Court, would be maintained and that, accordingly, the prosecution would ask that there be a transfer to the District Court. At the hearing on 25 March 2008, the Respondent did apply for the transfer of the criminal proceedings to the District Court, but no order was made and the matter was again adjourned (presumably it had been indicated that judicial review proceedings were being contemplated by the Applicant).

A B C D E F G H I J K L M N O P Q R S T U V

8. It was this letter of 20 March 2008 that led to the application by the Applicant for leave to institute judicial review proceedings. The Form 86A application was issued on 5 May 2008 this was the 1st judicial review proceedings with which we are concerned (HCAL 42/2008) ("the 1st Judicial Review"). Hartmann J granted leave on 16 May 2008 and also ordered that there be a stay of the criminal proceedings pending the outcome of the judicial review proceedings.

9. The substantive hearing of the 1st Judicial Review took place on 2 February 2009. Wright J also heard at the same time another judicial review that had been brought by two other applicants who were charged with thirteen charges of conspiracy to defraud and a charge of offering an advantage to an agent. These other judicial review proceedings (HCAL 107/2008) involved a separate decision to that in the 1st Judicial Review, but as common issues arose in both, Wright J directed that they be heard at the same time. We are now no longer concerned with HCAL 107/2008: following the judge's dismissal of that application for judicial review, the Applicants in those proceedings did not appeal.

10. At the hearing on 2 February 2009, the Applicant was represented by FCLK as her solicitors, and, as counsel, Mr Philip Dykes SC, Mr Hectar Pun and Miss Joycelyn Leung. Following the hearing, on 9 February 2009, Wright J handed down his judgment in which both applications for judicial review were dismissed. I shall be dealing in greater detail with the issues arising in this judicial review later in this judgment; for the time being, it suffices to say that the judge was of the view that adequate reasons had been given by the Respondent for the decision to have the charges tried in the District Court. The Applicant appealed by a Notice of Appeal dated 13 March 2009 (CACV 55/2009).

A B C D E F G H I J K L M N O P Q R S T U V

A B C D E F G H I J K L M N O P Q R S T U V

11. With the 1st Judicial Review dismissed, the criminal proceedings against the Applicant were able to resume. On 16 March 2009, the committing magistrate (Ms Bina Chainrai) made an order under section 88 of the Magistrates Ordinance transferring the criminal proceedings against the Applicant to the District Court for trial. It will be recalled that at the hearing on 25 March 2008, the prosecution had already applied for a transfer (see paragraph 7 above).

12. The Applicant and her co-accused appeared in the District Court on 3 April 2009 but the matter was adjourned to 8 May 2009. On 7 May 2009, the Applicant and the Respondent consented to an adjournment to 18 August 2009 pending the outcome of the appeal from the 1st Judicial Review.

13. On 14 May 2009, the Applicant instituted another application for judicial review, this time against the decision of the magistrate made on 16 March 2009 transferring the criminal proceedings against her to the District Court ("the 2nd Judicial Review"). Wright J heard the application for leave on 1 June 2009. This was an inter partes hearing; the Respondent (as the putative Respondent in these new proceedings) made submissions.

14. The same day, Wright J dismissed the application for leave on the basis that it was not arguable, applying the test laid down by the Court of Final Appeal in *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676.

15. The Applicant has appealed the decision refusing leave by a Notice of Appeal dated 29 June 2009 (CACV 151/2009). Before dealing with the issues in both this appeal and CACV 55/2009, I ought to set out the relevant statutory context.

A B C D E F G H I J K L M N O P Q R S T U V

A. ***The statutory scheme***

16. Criminal offences in Hong Kong are divided into summary offences and indictable offences : -

(1) Summary offences are criminal offences other than treason, or where the words "upon indictment" or "an indictment" appear in a relevant statute, or where an offence has been transferred to the District Court for trial under Part IV of the Magistrates Ordinance (see section 14A(1) of the Criminal Procedures Ordinance, Cap. 221).

(2) An indictable offence is an offence other than a summary one. It means a crime or offence for which a magistrate is authorized or empowered or required to commit an accused for trial before the District Court or the Court of First Instance (see section 2 of the Magistrates Ordinance).

17. Summary offences may subject to limited circumstances only be tried in the Magistrates Court. Many indictable offences, on the other hand, may be tried either summarily, or in the District Court or the Court of First Instance. Where an offence is stated in an Ordinance to be triable either summarily or on indictment (or punishable on summary conviction or on indictment), then it can be tried either summarily (in the Magistrates Court) or on indictment (in the District Court or the Court of First Instance): section 14A(4) of the Criminal Procedure Ordinance. Where the offence is treason, or where the words "upon indictment" or "on indictment" appear and it is not further stated that the offence can be tried or is punishable either

summarily or on indictment, then the offence can *only* be tried on indictment: section 14A(2) of the Criminal Procedure Ordinance.

18. The Magistrates Ordinance contains detailed provisions regarding the trial of summary offences, the trial by Magistrates of indictable offences and the transfer or committal by the Magistrates Court of indictable offences to the District Court or the Court of First Instance. The sentencing jurisdiction of each of these levels of court are well-known. Only the Court of First Instance has unlimited jurisdiction in this respect (subject of course to the limits imposed by statute).

19. The offences with which the Applicant were charged, are all indictable offences. Accordingly, as Wright J pointed out in his judgment, they were first dealt with in the Magistrates Court in committal proceedings in accordance with the procedures laid down in Part III of the Magistrates Ordinance.

20. In terms of a transfer for trial (that is, ignoring the possibility of a guilty plea, a finding by the Magistrates Court that there is insufficient evidence to commit for trial or a summary trial), there are two possible venues: the District Court and the Court of First Instance.

21. We are concerned in the present case with a transfer for trial to the District Court. The relevant provisions are contained in Part IV of the Magistrates Ordinance, in particular section 88 : -

> "**88. Transfer of certain indictable offences**
>
> (1) Notwithstanding anything contained in any other provision of this Ordinance but subject to subsection (3), whenever any person is accused before a magistrate of any indictable offence not included in any of the categories specified in Part III of the

A B C D E F G H I J K L M N O P Q R S T U V

> Second Schedule, the magistrate, upon application made by or on behalf of the Secretary for Justice -
>
> (a) shall make an order transferring the charge or complaint in respect of the indictable offence to the District Court; and
>
> (b) may, if the person is also accused of any offence triable summarily only, make an order transferring the charge or complaint in respect of the summary offence to the District Court.
>
> (2) An application under subsection (1) may be made either orally in open court or in writing.
>
> (3) Subsection (1) shall not apply in relation to any proceedings transferred to be dealt with summarily by a magistrate pursuant to section 65F of the Criminal Procedure Ordinance (Cap. 221) or section 77A of the District Court Ordinance (Cap. 336) or transferred for a preliminary inquiry pursuant to section 77A of the District Court Ordinance (Cap. 336)."

22. The effect of section 88, which was at the centre of the Applicant's submissions, is this: where the Secretary for Justice applies to a magistrate for the transfer of a charge or complaint made against an accused person to be dealt with in the District Court, the magistrate *must* make an order to this effect; in other words, there is no discretion to refuse an order for transfer.

23. The decision of the Court of Appeal in *David Lam Shu-Tsang v Attorney General*, unreported, CACV 42 and 43 of 1977, 7 November 1977 confirms that the machinery under section 88 is a mandatory one. As Pickering JA said at page 6 (when addressing the background and effect of that provision) : -

> " When a community, through its Legislature, radically alters the structure of its Courts and, as a corollary to so doing, provides by a new section of an established enactment, the exclusive machinery whereby criminal cases shall reach a newly constituted Court itself obviously the subject of a wholly new contemporaneous enactment,

A B C D E F G H I J K L M N O P Q R S T U V

> it is idle to attempt to construe that transferal section of the existing enactment without reference to the all-pervading shift in juridical competence enshrined in the new legislation. The scheme of the legislation was clear and fragmentation of interpretation has no part in that scheme. That, I believe, must be the principle and applying it to the facts of the present case, whereas in 1953 the former Magistrate's Courts, the Supreme Court and the Full Court remained in existence there came into being, at a level between the Magistrate's Courts and the Supreme Court, a completely new jurisdictional tier in the form of the District Court in which, by the very constitution of the Court, there was no room for a jury. It was to this Court that transfer of cases from the Magistrate's Courts was contemplated and the section providing for mandatory transfer of indictable offences upon the application of the Attorney General contained no saving clause, nothing to the effect that the Attorney General must consult the wishes of the accused and nothing giving the accused any right of objection to the transfer. The discretion as to whether to apply for transfer was invested solely in the Attorney General and, upon his exercising that discretion by electing for transfer, the obligation to transfer lying upon the Magistrate was absolute. The scheme of the legislation was clear beyond a peradventure and it entailed, with equal clarity, the deprivation of the former common law right to trial by jury."

24. The final part of the quoted passage makes a reference to the right to trial by jury. There is no such right in Hong Kong and it was not contended on behalf of the Applicant that there was any right to a trial by jury that belonged to an accused.

25. The only reference to trial by jury in the Basic Law is Article 86 : -

> "**Article 86**
>
> The principle of trial by jury previously practised in Hong Kong shall be maintained."

In the court below, much time was devoted to the question of what was the "principle of trial by jury previously practised in Hong Kong". In view of the concession that there was no right to a jury trial in Hong Kong as such, it is unnecessary in the present appeals to go into this question.

A B C D E F G H I J K L M N O P Q R S T U V

26. I now deal with the two appeals.

B. *CACV 55 of 2009*

B1. *The challenge*

27. The relevant decision that was challenged in these judicial review proceedings was that contained in the letter dated 20 March 2008, namely the decision by the Respondent to have the criminal charges against the Applicant transferred to the District Court under section 88 of the Magistrates Ordinance.

28. In the Form 86A application in HCAL 42/2008, concessions were made narrowing the ambit of the judicial review challenge in the following way : -

> "**V GROUNDS OF REVIEW**
>
> 57. It is not the Applicant's case that she has an absolute right to jury trial. The "principle" referred to in Article 86 of Basic Law is to be understood as referring to a system in which a person accused of an indictable offence was liable to be tried on indictment, unless the Secretary for Justice intervened and required summary trial before a magistrate or District Judge.
>
> 58. It is not the Applicant's case that she cannot have a fair trial in the District Court. The right to a fair trial "by the judicial organs" of the HKSAR is expressly guaranteed by Article 87 of Basic Law. That means a fair trial before a magistrate, a District Judge or a judge of the Court of First Instance when sitting with a jury.
>
> 59. It is not the Applicant's case that there is necessarily something inherently and irredeemably unfair in giving the prosecution the right to decide where a case should be tried. In at least one jurisdiction, Scotland, the procurator fiscal, as "master of the instance", decides upon the venue of trial in a criminal justice system which allows for summary trial before a District Court (60 days imprisonment maximum) or

A B C D E F G H I J K L M N O P Q R S T U V

> before a sheriff (12 months' imprisonment maximum) or trial by "solemn procedure", i.e. with a jury, before a sheriff (5 years' imprisonment maximum) or before a judge of the High Court of Justiciary (jurisdiction limited only by offence).
>
> 60. It is the Applicant's case however that, unlike Scotland, or England & Wales for that matter, trial by jury has an entrenched constitutional value. There is, in addition, a legislative presumption that a person accused of an indictable offence is entitled, unless there is intervention by the prosecutor on behalf of the SJ, to go through committal proceedings and, if those proceedings succeed, will be entitled to be tried on indictment."

29. Given the concessions made by the Applicant in the Grounds of Review in the Form 86A as set out in the previous paragraph, it is clear that no constitutional challenge was made by the Applicant as to the legislative scheme under Part IV of the Magistrates Ordinance, and, in particular within that part, section 88. This is a point that assumes considerable importance when I come to deal with CACV 151/2009 and the question of abuse that arises in it.

30. Instead, the challenge was directed only at the decision by the Respondent. As Mr Johnny Mok, SC (who represented the Applicant in both appeals with Mr Hectar Pun) ultimately made clear, it was said that the decision was unreasonable in the Wednesbury sense; in other words, it was an irrational decision. Where a challenge is made on this basis (finding its origins in the case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1KB 223), broadly speaking, it is necessary for an applicant to demonstrate, for example, that in arriving at the relevant decision, a decision-maker displayed bad faith, or took into account extraneous factors, or failed to take into account relevant ones or disregarded public policy. In the context of a prosecutor's decision-making powers, see also *David Lam* (in particular the decision of the Full Bench reported in

A B C D E F G H I J K L M N O P Q R S T U V

[1977] HKLR 393, at 402-3) and the decision of this court in *Re C (A Bankrupt)* [2006] 4 HKC 582, at 591 H-J (paragraph 20). Traditionally, a challenge on this basis has in practice involved a high hurdle to overcome.

B2. *The decision contained in the letter dated 20 March 2008*

31. It is accordingly in this context that I must now examine the letters dated 3 March 2008 (from FCLK to the Respondent) and dated 20 March 2008 (from the Respondent in reply) in greater detail.

32. It will be recalled that by the letter dated 29 February 2008 (see paragraphs 4 and 5 above), the prosecution informed the Applicant of two additional charges being laid and, more important for present purposes, that the Respondent would seek to have all five charges transferred so as to be dealt with in the District Court. It was in response to this letter that FCLK wrote to the Respondent on 3 March 2008.

33. In that letter, the following points were made on behalf of the Applicant to the Respondent to contend that she should be tried in front of a jury : -

(1) A historical background was provided which included references to Article 86 of the Basic Law and the case of *David Lam* (see paragraphs 23 and 25 above).

(2) The crimes with which the Applicant were charged were said to be serious ones, attracting a possible sentence of up to 51 years. The letter continued in this respect : -

> "Obviously, such a sentence will not be passed, but it is worth making the point that the offences are serious and that

> prosecutorial discretion about choice of venue should not be a vehicle for unwarranted and avoidable clemency at the hands of a judge who might, if sitting in another court, pass a different sentence."

(3) Trial by jury was referred to as a "Common Law right" and the "right to a jury trial" being a "fundamental right of a British subject in colonial days".

(4) It was said that the "right" to a jury trial had been taken away by the amendments introduced in 1953 which established the District Court as a venue for criminal cases and which also introduced the present section 88 of the Magistrates Ordinance (see the reference to this in the passage from *David Lam* as set out in paragraph 23 above). Even though it appears to have been accepted that the prosecution had the discretion to decide on the venue for trial (Article 63 of the Basic Law stating that the Department of Justice "shall control criminal prosecutions free from any interference" was also referred to), the Respondent was urged to take into account the fact that there were considerably more persons qualified to be jurors in Hong Kong now than in 1953. The Respondent was reminded that the prosecution policy regarding venue for trial had consequently to be continually kept under review.

(5) It was also said that insofar as any decision not to proceed by way of trial by jury might be dictated by resource constraints or implications imposed by other branches of Government, such a decision would have been tainted by some form of interference.

A B C D E F G H I J K L M N O P Q R S T U V

34. Before dealing with the reply of 20 March 2008, I ought just to make the following observations in respect of this letter from FCLK, for this will be of some relevance when I come to deal with the question of abuse arising in CACV 151/2009 : -

(1) It is clear from all the reference to the Basic Law that the Applicant could be taken to be fully aware of the constitutional considerations that arose in the context of a decision to have criminal proceedings transferred to be dealt with by the District Court (under section 88 of the Magistrates Ordinance).

(2) Although it seems to have been asserted that there was some form of Common Law right to a jury trial, on analysis, it was accepted by the Application that she had no such right once account was taken of the discretion belonging to the Respondent to decide the venue for trial under section 88 of the Magistrates Ordinance

35. The relevant part of the letter of 20 March 2008 from the Respondent to the FCLK stated as follows : -

> "Having carefully considered your letter, I maintain my decision that the District Court would be a proper venue for the trial in this case and that the trial should be held in the District Court. Should your client be convicted it is unlikely that her conduct would attract a sentence of imprisonment greater than the jurisdiction of the District Court. I note you have not referred to any matter peculiar to your client which would prevent her from receiving a fair trial in the District Court. I have no doubt that your client can and will receive a fair trial in the District Court and I see no good reason why her case should not be tried there. My decision was not affected in any way by resource constraints."

A B C D E F G H I J K L M N O P Q R S T U V

36. Four points made in this passage ought to be emphasized : -

(1) That the points made in the letter dated 3 March 2008 from FCLK had been "carefully considered".

(2) Emphasis was laid on the fact that the likely sentence that the Applicant would receive if found guilty would not exceed the jurisdiction of the District Court (namely 7 years imprisonment).

(3) Nothing had been referred to in the 3 March 2008 letter "peculiar to [the Applicant]" that would prevent a fair trial from taking place in the District Court.

(4) Resource constraints did not affect the decision to have the charges dealt with in the District Court.

37. Before us, Mr Mok emphasized time and again the importance of a trial by jury to an accused. Ultimately, although he had to shy away from any suggestion that there was any such right, it was nevertheless submitted that this was such an important factor that due, if not weighty, consideration had to be given to it by the Respondent in arriving at a decision whether or not to apply under section 88 of the Magistrates Ordinance for the transfer of criminal proceedings to the District Court. It was contended that the Respondent had not given any due (or even any) consideration to this aspect in arriving at the decision to apply for a transfer. Mr Mok pointed to the absence of any detailed reasons contained in the 20 March 2008 letter going to this aspect or even reasons dealing with those factors identified in the Statement of Prosecution Policy and Practice published by the Department of Justice. Criticism was made of the failure to weigh and evaluate the various

A B C D E F G H I J K L M N O P Q R S T U V

factors that had to be considered, and of the undue emphasis on the likely sentence that the Applicant would receive if she were convicted.

B3. *Analysis*

38. In my judgment, none of the criticisms made by the Applicant is enough, individually or cumulatively, to impugn the decision to apply to have the proceedings transferred to the District Court : -

(1) Insofar as the challenge was based on the decision being unreasonable in the Wednesbury sense, the Applicant has not gone anywhere far enough to succeed along this lines. There is nothing inherently unreasonable in a decision to apply for a transfer when the main reason is the likely sentence that might be imposed if a conviction were to materialize. As Wright J pointed out in his judgment, the Court of Appeal has in a number of cases emphasized the importance of taking into account the possible sentence when determining the venue for trial.

(2) Insofar as the challenge is based on a suggested failure to take into account relevant factors, the points made by the Applicant in the letter dated 3 March 2008 letter from FCLK (see paragraph 33 above) were stated in the 20 March 2008 letter (see paragraph 35 above) to have been "carefully considered". There was a faint suggestion made by Mr Mok that perhaps the points made by the Applicant should have been dealt with individually and in greater detail by the Respondent but, with respect, even

A B C D E F G H I J K L M N O P Q R S T U V

assuming there to be such a general obligation (which I doubt) the fact that they were not so dealt with does not equate to the decision being unreasonable, whether in the Wednesbury sense or otherwise. Furthermore, the fact that the Respondent might have addressed the points individually does not mean he did not address them.

(3) It is also important to highlight the point made in the 20 March 2008 letter that the Applicant had not referred to any aspect “peculiar” to her that would prevent a fair trial from taking place in the District Court. This was effectively emphasizing the fact that no factor had been identified by the Applicant to suggest that a jury trial would be, in her case, any fairer than a trial in the District Court. The only matters that perhaps could be said to be peculiar to the Applicant was her subjective desire to have a trial by jury and the fact that she was charged with serious offences that might attract long sentences were she to be convicted.

(4) Yet, the sentence aspect was already considered by the Respondent so there can really be no valid complaint here.

(5) As to the Applicant’s subjective desire to have a trial by jury, while I acknowledge the importance of this as far as an accused is concerned, where, however, there is no constitutional right to a trial by jury and in the absence of any objective, peculiar and powerful features pointing to the desirability of a trial by jury rather than before a single

A B C D E F G H I J K L M N O P Q R S T U V

A B C D E F G H I J K L M N O P Q R S T U V

judge, it is difficult to see why this factor should be elevated into almost a paramount one, as the Applicant's submissions impliedly suggest. In any event, as shown above (see sub-paragraph (2)), it was duly considered by the Respondent. Mr Mok criticized the Statement of Prosecution Policy and Practice for omitting even to identify this desire as a factor to be taken into account, but this cannot mean that this factor was not in fact taken into account in the present case; it clearly was, since all the points made by the Applicant had been "carefully considered." I would also observe here that insofar as the Statement of Prosecution Policy and Practice is concerned, there is no challenge made to it in the present judicial review proceedings.

(6) As to the argument that the Respondent did not deal with each of the factors contained in the Statement of Prosecution Policy and Practice, I cannot agree with it. It is not for the Respondent to demonstrate that each factor has been considered in his decision; the burden is on the Applicant (as indeed it is incumbent on any applicant in judicial review proceedings) to demonstrate that the decision is flawed and provide details of this before a Respondent is required to answer them.

(7) Lastly, it is difficult to see how the Respondent could have dealt with the Applicant's letter dated 3 March 2008 in any greater detail or provide reasons in addition to those

A B C D E F G H I J K L M N O P Q R S T U V

provided, when the Applicant had provided no reason of her own as to why she preferred or desired a trial by jury.

B4. *Conclusion on CACV 55/2009*

39. For these reasons, the appeal in CACV 55/2009 is dismissed.

C. *CACV 151 of 2009*

C1. *The challenge*

40. It will be recalled in the above chronology of events that following the dismissal by Wright J of the 1st Judicial Review on 9 February 2009, the criminal proceedings against the Applicant were able to resume. On 16 March 2009, Ms Bina Chainrai made an order under section 88 of the Magistrates Ordinance transferring the five charges laid against the Applicant to be dealt with in the District Court. On 14 May 2009, two months later, the Applicant instituted the 2nd Judicial Review, this time challenging the decision of the 16 March 2009.

41. The application for leave to institute judicial review proceedings against this decision sought a declaration that "section 88 of the Magistrates Ordinance, Cap. 2 to 7 is inconsistent with Articles 2, 19(1), 80, 85 & 86 of the Basic Law …. and is unconstitutional". The argument was essentially this : -

(1) The effect of section 88 conferred on the Respondent a power to determine the venue for criminal cases and this was a power that was entirely within his discretion.

(2) The power to decide the proper venue for a criminal trial should, however, vest in the court. It is a judicial power and not an administrative one, and the exercise of judicial power belongs to the court. This, it is said, was the effect of the concept of the separation of powers contained in the Basic Law.

(3) Accordingly, the effect of section 88 being to take away the exercise of this judicial power from the court and instead vesting it in the Secretary for Justice, this provision thereby contravened the Basic Law, was unconstitutional and therefore had to be struck down.

42. In support of this position, reference was made by the Applicant to the position in various jurisdictions such as Canada, the United Kingdom and the United States. Two observations can be made in this context : -

(1) In these jurisdictions, there may indeed be entrenched rights to a jury trial given to an accused. By contrast, as mentioned above, there is no such absolute right in Hong Kong (although it should be pointed out that where the venue chosen is the Court of First Instance, there is in that instance a requirement for jury trial). This will not be too dissimilar to the position in some jurisdictions where certain offences (usually relatively minor offences) can be dealt with summarily without there being a right to a jury trial.

A B C D E F G H I J K L M N O P Q R S T U V

(2) In those jurisdictions where there is a right to trial by jury, the choice belongs to an accused. There is generally no question of a court being asked to exercise a judicial power to determine whether a trial by jury should take place. In other words, in such jurisdictions, the choice of venue is then left to an accused rather than (as in Hong Kong) the prosecution. The court is simply not engaged in the question of deciding the venue for trial.

43. The focus then of the 2nd Judicial Review being a challenge on the power vested in the Respondent to determine the venue for trial in criminal proceedings, the inevitable question arises as to why this challenge was not made in the 1st Judicial Review. After all, the very legal basis for the challenge against the decision contained in the 20 March 2008 letter was that once the Respondent decided to apply under section 88 for a transfer of the proceedings to the District Court, this was inevitable and an order would have to be made by the committing magistrate. The Form 86A in HCAL 42/2008 made this abundantly clear when identifying the decision challenged in those proceedings: -

> "**Judgment, Order, Decision or other Proceeding in respect of which relief is sought**
>
> The decision of the Secretary for Justice contained in a letter dated 20 March 2008 refusing to continue the committal proceedings in ESCC 105/2008 against the Applicant under Part III of the Magistrates Ordinance ("the MO") but, instead, requiring the said proceedings to terminate with the transfer of the case to the District Court under section 88 of the MO."

44. By the time the 1st Judicial Review was launched on 5 May 2008, the Respondent had already (on 25 March 2008) applied to the court for a transfer under section 88 (see paragraph 7 above).

A B C D E F G H I J K L M N O P Q R S T U V

45. At the hearing of the application for leave before Wright J on 1 June 2009, it was contended by the Respondent that the application for judicial review constituted an abuse and leave therefore should be refused on this basis. The abuse alleged was that it had been entirely open to the Applicant to argue the same point in the 1st Judicial Review as was attempted to be pursued in the 2nd Judicial Review. Yet it was not; worse still, this was a point that had expressly been conceded in the earlier judicial review.

46. In his judgment of 1 June 2009 dismissing the application for leave, Wright J did not reach any conclusion on the abuse issue, although he did remark that no acceptable reason had been given as to why a declaration of unconstitutionality was not sought in the 1st Judicial Review. The Judge also found the submissions on abuse (from the Respondent) “attractive”. Instead, the learned judge determined the constitutional issue and concluded it was not reasonably arguable.

47. For my part, it is first necessary to determine the abuse issue. If leave ought to have been refused on account of the proceedings constituting an abuse, then the court should not, as a matter of principle, deal with any other issue, even accepting (for present purposes) that the relevant issue may be one of importance. It would be wrong for a court to deal with other issues if it came to the conclusion that the proceedings were an abuse. To do so would largely play into the hands of the party in default and provide an unfortunate precedent whereby despite the existence of abuse, the court nevertheless continued with the proceedings as if the abuse never occurred. Such an approach would mean that the court might also be asked to adjudicate on the merits of a case in the hope, if not expectation, that if they were good, the abuse might somehow be overlooked when, as a matter of

A B C D E F G H I J K L M N O P Q R S T U V

principle, abuses ought not be. Obviously, circumstances may dictate a different approach but in the present case, it would have been more appropriate to have dealt with the abuse issue first.

48. In the appeal before us, both sides at first addressed only the merits of the application for leave to institute judicial proceedings (that is, the constitutional issue). It was only when the court raised with Mr Kevin Zervos, SC (for the Respondent) the issue of abuse that it came to be dealt with. For this purpose, leave had to be obtained to serve a Respondent's Notice raising the above issue. Leave was not resisted. The Applicant was, however, given leave to serve an affidavit from the solicitors seeking to explain why the constitutional argument was not raised in the previous judicial review proceedings. I shall in due course deal with this affidavit.

<u>C2. The legal approach</u>

49. Section 21K(3) of the High Court Ordinance, Cap. 4 states that no application for judicial review can be made unless leave has been obtained. This requirement is repeated in RHC Order 53 rule 3(1). For example, where a potential applicant has insufficient standing (see section 21K(3) and RHC Order 53 rule 3(7)) or has delayed his application for judicial review (see section 21K(6) and RHC Order 53 rule 4), leave may be refused.

50. The leave requirement is an important feature of judicial review. Given the impact that many decisions of a public nature have and therefore the need for certainty in decisions that can affect many people, the need to filter out unmeritorious applications assumes considerable importance. Even

A B C D E F G H I J K L M N O P Q R S T U V

where decisions may affect only a limited number of people, sometimes just one person, the public interest demands that decisions should be challenged in a timely manner and on proper basis. In *Po Fun Chan v Winnie Cheung* (a case involving a challenge to a decision of the governing body for accountants rejecting the applicant's application for reinstatement), the Court of Final Appeal emphasized the importance of expedition: Bokhary PJ said at 686G-H (paragraph 9) "the filtering out of unarguable judicial review cases is naturally conducive to according expedition to those arguable judicial review cases in particular need of being dealt with expeditiously"; Litton NPJ at 687E-F (paragraph 23) referred to the "just, expeditious and economical" disposal of grievances.

51. In the context of criminal charges and criminal trials, much has been said in recent times by the courts deprecating the trend of what are known as collateral challenges which delay or fragment the progress and timely disposal of criminal proceedings: see the comments of Sir Anthony Mason NPJ in *Yeung Chun Pong v Secretary for Justice* (2006) 9 HKCFAR 836, at 849C-D (paragraph 44). It goes without saying that the public interest is clearly in the efficient and expeditious disposal of criminal charges, and that unnecessary delays ought not to be permitted.

52. In this context, undue delay in instituting judicial review proceedings may be a reason to refuse leave. This is an aspect I shall elaborate on later in this judgment. So would an application which does not pass the arguability test (meaning reasonable arguability: a case than on the merits enjoys a realistic prospect of success) laid down in *Po Fun Chun v Winnie Cheung*.

A B C D E F G H I J K L M N O P Q R S T U V

A B C D E F G H I J K L M N O P Q R S T U V

53. In my judgment, it is clear that proceedings which constitute an abuse or are vexatious should be filtered out at the leave stage. The commentary at paragraph 53/14/15 of *Hong Kong Civil Procedure 2009* Volume 1 states as one of the purposes of the leave requirement "to eliminate frivolous, vexatious or hopeless applications for judicial review without the need for a later substantive hearing".

54. The abuse with which we are concerned is the bringing of judicial review proceedings on a basis that *could and should* have been brought in earlier judicial review proceedings. The additional feature in the present case is that the very point that was sought to be raised in the 2nd Judicial Review was one that was expressly conceded in the first.

55. In the submissions before us, there was some discussion as to whether the abuse that was alleged was some form of *res judicata* in the wider sense. In order just to identify this principle, I need only refer to two short passages contained in the judgment of Cheung JA in *Ngai Few Fung v Cheung Kwai Heung* [2008] 2 HKC 111 where at 115B-G (paragraphs 11-12), he said : -

> "***Henderson v Henderson***
>
> 11. This principle of estoppel can be found in the well-known case of Henderson v Henderson (1843) 3 Hare 100, where Wigram VC at 115 held that:
>
>> '… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in

A B C D E F G H I J K L M N O P Q R S T U V

A B C D E F G H I J K L M N O P Q R S T U V

> special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

Yat Tung Investment Co Ltd

12. This principle was approved by the Privy Council in an appeal from Hong Kong in the case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581. Lord Kilbrandon at p 590 held that:

> 'But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.'"

56. It is unnecessary for the purposes of the present appeal to go into the question whether *res judicata* in the *Henderson v Henderson* sense (that is, *res judicata* in the wider sense), strictly speaking, applies. I can envisage complex questions arising as to whether as a matter of law, the 1st and 2nd Judicial Reviews in the present case did actually involve the same parties. While in a sense the parties are indeed the same, yet the decision challenged in the 1st Judicial Review (that of the Respondent) is to be contrasted with the order challenged in the 2nd Judicial Review (that of the committing magistrate). The complexities increase when one enters into an examination of the extent to which *res judicata* applies in public law litigation in the first place.

57. It is unnecessary to dwell on these issues that arise on a consideration of the various facets of the doctrine of *res judicata* if one keeps firmly in mind the real issue that, in my view, has to be addressed, namely, the question of abuse arising from matters that ought properly have been litigated in previous proceedings. I emphasize here the existence of two

A B C D E F G H I J K L M N O P Q R S T U V

A B C D E F G H I J K L M N O P Q R S T U V

elements that have to be demonstrated by the part alleging abuse: that there exist matters that could *and* should have been litigated in earlier proceedings. I am aware that in *Yat Tung* (in the passage quoted in paragraph 55 above), Lord Kilbrandon did refer to "matters which could and *therefore* should have been litigated in earlier proceedings" (my emphasis). However, despite the reservations expressed by the court in *Chen Roy v Wan Ching Lam Anita* [2006] 1 HKC 454 on whether this represents the law on this topic in Hong Kong (see in particular 463F 464E (paragraphs 26 and 27)), I think it is now clear that just because a point *could* have been raised in earlier proceedings did not of itself mean that it *should* have been. This is consistent with the approach of this court in *Tsang Yu v Tai Sang Container Cold Storage and Wharf Limited* [2000] 1 HKLRD 780, at 784A-I and *Ngai Few Fong v Cheung Kwai Heung*. In *Johnson v Gore Wood & Co (a firm)* [2002] 2AC 1, Lord Bingham of Cornhill said at 31A-E : -

> " But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and

A B C D E F G H I J K L M N O P Q R S T U V

> private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

58. The starting point is a statement of general principle that the court must possess an inherent power to prevent abuse in situations that would be manifestly unfair or unjust to a party before it or would otherwise bring the administration of justice into disrepute. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, Lord Diplock said in a well-known passage at 536B-D : -

> " My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied."

This inherent power existed in Hong Kong well before the innovations brought about by the Civil Justice Reform but it is all the more underlined by that Reform. The Underlying Objectives stated in RHC Order 1A rule 1(b) and (d) refer to the desirability of expedition and the necessity of ensuring fairness.

A B C D E F G H I J K L M N O P Q R S T U V

59. Apart from any question of *res judicata* (whether in the narrow or wider sense), abuse can arise in attempting to relitigate matters decided in previous rulings that were not strictly speaking binding on the party seeking to raise them in later proceedings: see, for example, *Ashmore v British Coal Corporation* [1990] 2 QB 338.

60. It is important to bear in mind that the roots of the doctrine of *res judicata* lie in the more general principle that the court's process must not be abused: see the decision of the Judicial Committee of the Privy Council in *Brisbane City Counsel v Attorney General* [1979] AC 411, at 425G-H per Lord Wilberforce. In *Johnson v Gore Wood*, Lord Millett said this at 59D-E : -

> " It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression."

See also the judgment of Lord Bingham of Cornhill in the same case at 31A-E (set out in paragraph 57 above).

61. These passages emphasizing again the public interest were expressly approved by this court in *Ngai Few Fung v Cheung Kwai Heung*.

62. Much therefore depends in any given case on the precise circumstances as to whether or not the attempt to raise an issue for

A B C D E F G H I J K L M N O P Q R S T U V

determination in proceedings will constitute an abuse where such an issue could have been raised in previous proceedings. Where an issue *should* have been raised, it is likely that an abuse has occurred.

63. I am fully cognisant of the point made by Lord Millet in the passage quoted from *Johnson v Gore Wood* (see paragraph 60 above) that the denial of a person's right to litigate for the first time a matter not previously decided may constitute a denial of access to the court (see here Article 35 of the Basic Law). However, I would observe here that a number of seemingly contradictory principles or concepts can be involved when one is considering whether a party should be shut out from litigating an issue which could have been previously litigated, but has not. The key lies in determining whether an abuse has truly taken place and an examination of the public interest that is involved.

64. Before dealing with the facts of the present case, I ought to deal with an argument advanced by Mr Mok to the effect that the 2nd Judicial Review was different in nature to the 1st Judicial Review in that it involved a decision of the committing magistrate on 16 March 2009, a different decision to the one challenged in the 1st Judicial Review. Not only that, it was said this decision could not have been challenged in the 1st Judicial Review : it will be recalled that the hearing before Wright J in the 1st Judicial Review took place on 2 February 2009, with judgment handed down on 9 February 2009.

65. I have already mentioned RHC Order 53 rule 4 dealing with delay in judicial review proceedings. That Rule states : -

A B C D E F G H I J K L M N O P Q R S T U V

A B C D E F G H I J K L M N O P Q R S T U V

> "**Delay in applying for relief**
>
> 4.—(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.
>
> (3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

66. Accordingly, it could be argued that as the application for leave in the 2nd Judicial Review was made on 14 May 2009, this was well within the 3 month period mentioned in Order 53 rule 4(1). And, as Order 53 rule 4(2) makes clear, the time when "grounds for the application first arose" would be the date of the Order of the 16 March 2009 (an order for certiorari was sought in the Form 86A against this Order).

67. I accept that superficially, these arguments carry some weight and in certain situations, will provide a complete answer enabling a second set of proceedings to continue. However, much again depends on the precise circumstances.

68. The critical issue with which we are concerned is still whether there existed an abuse in the institution of a later set of proceedings on a basis that could and should have been litigated in an earlier set of proceedings. The fact that the later set of proceedings involved a different decision or order is no doubt an important factor to be taken into account, but one must always look at the substance of the matter and not merely the form. In other words, as Lord Diplock implicitly recognized in the passage extracted from

A B C D E F G H I J K L M N O P Q R S T U V

A B C D E F G H I J K L M N O P Q R S T U V

Hunter v Chief Constable of the West Midlands Police (see paragraph 58 above), one must look at questions of abuse ("misuse" is the term he uses) even though what has been done may be consistent with the literal application of procedural rules.

69. Lastly, it was also submitted by Mr Mok that insofar as any abuse may be found to exist consequent upon a point not having been taken by a party in earlier proceedings, it would be a factor for the court's discretion to consider whether the failure was attributable to the legal advisers of that party. The argument was really that any default on the part of the legal advisers ought not be visited on the client. I am aware that in certain circumstances, this may be a factor to excuse a failure to comply with court orders (see for example RHC Order 2 rule 5(1)(f)), but where an abuse is found to exist, I find it difficult to conceive that the failure of a legal adviser can somehow excuse that abuse. The failure of one's legal adviser should hardly affect the question of whether there has been an abuse. The remedies of a party in such a situation lie elsewhere than in being permitted to proceed with a set of proceedings which constitute an abuse of the court's process.

70. With these principles in mind, I now analyse the facts in this appeal.

C3. Was there an abuse in instituting the 2nd Judicial Review?

71. In my judgment, it was clearly an abuse to seek to institute the 2nd Judicial Review, and Wright J was correct to refuse leave (albeit he did not do so on this basis).

72. It is first important to note that underlying the 1st Judicial Review was the assumption that under section 88 of the Magistrates

A B C D E F G H I J K L M N O P Q R S T U V

Ordinance, the decision as to the venue of trial in the District Court was left entirely to the discretion of the Respondent and that once a decision was made to seek a transfer, an order to this effect would be inevitable (see paragraph 43 above). Paragraphs 27 and 32 of the Form 86A in HCAL 42/2008 also made this clear : -

> "27. The effect of the enactment of the DCO in 1953 was to take away the benefit of trial by jury at the discretion of a magistrate by placing the decision regarding venue in the hands of the prosecutor. See *In an application by David Lam Shu-tsang & another for an Order of Certiorari* [1977] HKLR 393 and, on appeal, CACV's 42 and 43/1977, unreported, 7 November 1977."

> "32. Neither the magistrate nor the defendant can object to the request for a transfer by the prosecutor. Once the order for transfer is made, proceedings before the magistrate are stayed pursuant to section 89(1) of the MO and the magistrate's jurisdiction over the case ends for all practical purposes."

The reference to the enactment of the District Court Ordinance in 1953 is a reference to the legislative changes that year which is established the District Court (see in this context the passage from *David Lam* set out in paragraph 23 above).

73. I have already set out in paragraph 28 above paragraph 59 of the Form 86A in those proceedings, referring to the prosecutions "right to decide where a case should be tried".

74. It was on this underlying basis that the Applicant mounted her challenge in the 1st Judicial Review against the reasoning in the Respondent's decision contained in 20 March 2008 letter.

75. There can be no doubt in these circumstances that a constitutional challenge against section 88 of the Magistrates Ordinance on the basis that the power to determine the venue of trial is a judicial one and should therefore vest in the court rather than the Secretary for Justice, was a challenge that was clearly open to the Applicant to make in the 1st Judicial Review. Accordingly, this was a basis of challenge to the decision contained in the 20 March 2008 letter that *could* have been made in the 1st Judicial Review. The argument that could be mounted would have run something along the following lines: the decision could be impugned on the basis that the statutory vehicle by which an application for transfer could be made (section 88 of the Magistrates Ordinance) was not one that was permissible in law since that provision was unconstitutional in allowing the power to decide venue to be exercised by the prosecution instead of by the court.

76. The Applicant was clearly aware of the possibility of this argument. The concession made in paragraph 59 of the Form 86A (paragraph 28 above), which was repeated in the written submissions placed before Wright J as well as in oral submissions (see paragraph 11 of the judgment handed down on 9 February 2009), demonstrates this. The letter of 3 March 2008 from FCLK to the Respondent also indicated that the Applicant was aware of possible constitutional arguments (see paragraphs 33 and 34 above).

77. The remaining question then is whether this constitutional challenge was one that *should* have been made in the 1st Judicial Review. In my view, it ought to have been : -

(1) The event that triggers an order for the transfer of criminal proceedings to the District Court under section 88 of the

Magistrates Ordinance is an application by the Secretary for Justice for a transfer. Once an application is made, the process is an automatic one as we have seen : in other words, upon an application, the transfer order becomes an inevitability.

(2) Accordingly, in the present case, once the prosecution had stated (or rather, restated), its intention in the 20 March 2008 letter to apply for a transfer, an order under section 88 was bound to be made. In these circumstances, the principle decision as far as a transfer was concerned, must in reality have been the Respondent's decision to apply for a transfer, for this was the triggering event that would inevitably lead to a transfer. Clearly, the Applicant recognized this: hence the 1st Judicial Review being launched.

(3) If, as shown above, the underlying assumption of the 1st Judicial Review was the power given to the Respondent to determine venue, those proceedings were clearly the most appropriate proceedings to mount a constitutional challenge to that underlying assumption. It should be noted that by the time the 1st Judicial Review was heard by Wright J on 2 February 2009, the Respondent had by then (on 25 March 2008) already applied for a transfer under section 88, so that if the matter had come before a magistrate, it was even more inevitable that a transfer order would be made.

A B C D E F G H I J K L M N O P Q R S T U V

A B C D E F G H I J K L M N O P Q R S T U V

(4) Challenging the order made by the committing magistrate on 16 March 2009 in the 2nd Judicial Review amounted, in these circumstances, effectively to a collateral challenge on the original, and principal, decision, which was the very subject matter of the 1st Judicial Review. A collateral challenge can constitute an abuse and ought not be permitted (see the passage from the judgment of Lord Bingham of Cornhill in *Johnson v Gore Wood* set out in paragraph 57 above).

(5) Mounting a constitutional challenge in the 1st Judicial Review was not only open to the Applicant (and those proceedings were clearly the appropriate proceedings in which to do so), it would also have resulted in the least disruption and delay to the criminal proceedings against her. All issues which could have been dealt with, would then have been determined by the court at the same time instead of piecemeal in two sets of proceedings. The delay to and fragmentation of the criminal proceedings cannot be underestimated. The chronology of the present criminal proceedings against the Applicant outlined above demonstrates this. Basically, these proceedings have stopped since the two judicial reviews have been launched, and all this in relation to criminal charges that related to events dating back as far as 2001; the type of history with which the courts are all too familiar, especially in commercial crime cases. Were the 2nd Judicial Review permitted to continue, the proceedings would then revert to the Court of First Instance for the substantive hearing (it

A B C D E F G H I J K L M N O P Q R S T U V

A B C D E F G H I J K L M N O P Q R S T U V

will be remembered that the present appeal only concerns the question of whether leave should have been granted by the court below), and there may be possible consequent appeals as well.

(6) It is a point of some significance that the constitutional challenge sought to be raised in the 2nd Judicial Review was one that was expressly conceded by the Applicant in the 1st Judicial Review. I have already referred to paragraph 59 of the Form 86A in those proceedings.

78. On the point just made in paragraph 77(6) above, I would observe that there is something inherently unattractive in a party resiling from a position taken in earlier proceedings and then seeking to resurrect it in later proceedings. When one adds to this the delay and disruption that is caused where there are, as in the present case, underlying criminal proceedings, the position is very much aggravated. It would, in my view, be an affront to the administration of justice were this permitted to happen unless exceptional circumstances exist to justify such a situation. None, in my view, exists in the present case.

79. As to the relevant circumstances, Mr Mok's submissions here focused on the position of the legal advisers. The following matters are relevant in this context : -

(1) The Applicant engaged the same solicitors for both the 1st and 2nd Judicial Review, namely FCLK.

A B C D E F G H I J K L M N O P Q R S T U V

(2) In the 1st judicial review, three counsel were instructed; in the 2nd Judicial Review, three counsel were also instructed. One counsel was common to both proceedings.

(3) Before us, Mr Mok submitted that the former legal team for the Applicant (those engaged in the 1st Judicial Review) was not aware that a point could be taken that section 88 of the Magistrates Ordinance was unconstitutional and this was only "flagged" when Leading Counsel in London gave an advice subsequent to the judgment in the 1st Judicial Review. This statement of fact from the Bar table, which we wanted verified on oath, led to an affidavit from the partner of FCLK in charge of the case (Ms Barbara Chiu) being served. In it, she clarified what we were told by leading counsel : -

> "4. The former legal team who acted for the Applicant in the 1st JR was not aware that a *viable* point could be taken that s.88 of the Magistrates Ordinance, Cap. 227, is unconstitutional for being in breach of the principle of separation of powers enshrined in the Basic Law. This point was first flagged up when advice was given by Leading Counsel in London on the merits and grounds of appeal against the Judgment of the Honourable Mr. Justice Wright handed down on 9 February 2009 in the 1st JR.
>
> 5. In view of the above, it is not the case that the Applicant or the said legal team had withheld the said constitutional point during the course of the 1st JR and reserved it for argument in a subsequent judicial review application." (emphasis added)

80. From this affidavit, it can, on one view, be inferred that the Applicant's legal advisers must be taken to have been fully aware of the possibility of a constitutional challenge, only that it had not been regarded as

A B C D E F G H I J K L M N O P Q R S T U V

A B C D E F G H I J K L M N O P Q R S T U V

"viable". This view is reinforced by the express concession made in paragraph 59 of the Form 86A in the 1st judicial review (see paragraph 28 above). The change of position (as to whether this point was a viable one) came about, it would appear, when Leading Counsel in London took a different view of the merits.

81. These facts provide no basis whatsoever for justifying what appears *prima facie* to be an abuse of the court's process. Were every change of opinion on the legal merits by a party's legal advisers (or even the unawareness of a possible legal argument) to justify the proliferation of proceedings leading to delay and disruption, this would constitute an unmanageable, not to mention unjust, state of affairs in the administration of justice. The courts have to bear in mind the position of the parties, the public interest and its own resources having to be shared among all litigants who come before them.

82. In the end, Mr Mok submitted that any mistakes on the part of the Applicant's previous legal advisers ought not prejudice the Applicant. I repeat here the point (made in paragraph 69 above) that where there is found to be an abuse of the court's process, it is difficult to see how the failure of a party's legal advisers can provide an excuse. After all, it surely must go without saying that responsibility for the actions (or inaction) of a party's legal advisers must ultimately attach to that party; legal advisers do not enjoy an independent status. This is quite apart from the lack of any evidence to point to this conclusion in the present case: for example, the Applicant has not herself suggested this in any affidavit.

83. For the above reasons, I am of the view it was clearly an abuse bringing the 2nd Judicial Review and, in these circumstances, leave to

A B C D E F G H I J K L M N O P Q R S T U V

institute those proceedings ought not to be given. This is enough to dispose of the present appeal.

84. It is accordingly unnecessary to go into the substantive merits of the leave application. I realize that both parties have dealt with the constitutional challenge at length but, for the reasons stated in paragraph 47 above, it is inappropriate and undesirable to resolve this issue once a finding of abuse has been established. I have assumed for present purposes that the point sought to be raised by the Applicant is an arguable one. No doubt it is an interesting point, although it has to be put in proper context (see paragraph 42 above).

85. Underlying the Applicant's submissions to this court was a plea that somehow it would be unfair if she were deprived of the opportunity to make a constitutional challenge in the 2nd Judicial Review, particularly when under discussion was her desire to be tried by a jury. There are two answers to this : -

(1) First, there can be no unfairness when the 2nd Judicial Review constitutes, as I have found, an abuse of process on her part.

(2) Secondly, the assertion of unfairness must be put in context. The practical effect of the Applicant not succeeding in either of the present judicial reviews is that she will have to face trial in the District Court, a venue she has at no stage alleged to be incapable of providing her with a fair trial (see here the concession made in paragraph 58 of the Form 86A in the 1st judicial review (paragraph 28 above)).

A B C D E F G H I J K L M N O P Q R S T U V

A B C D E F G H I J K L M N O P Q R S T U V

D. *Conclusion*

86. For these reasons, both appeals are dismissed. I would also make a costs order *nisi* that the Respondent should have his costs in these appeals, such costs to be taxed if not agreed.

Hon Stock VP :

87. I agree.

Hon McMahon J :

88. I agree.

(Geoffrey Ma) Chief Judge, High Court	(Frank Stock) Vice President	(M.A. McMahon) Judge of the Court of First Instance

Mr Johnny Mok, SC & Mr Hectar Pun, instructed by Messrs Fairbairn Catley Low & Kong for the Applicant

Mr Kevin P Zervos, SC & Mr Alex Lee of Department of Justice for the Respondent

A B C D E F G H I J K L M N O P Q R S T U V

FAMC Nos 64 & 65 of 2009

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FAMC No. 64 of 2009

MISCELLANEOUS PROCEEDINGS NO. 64 OF 2009 (CRIMINAL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM CACV NO. 55 OF 2009)

Between:

CHIANG LILY	**Applicant**
- and -	
SECRETARY FOR JUSTICE	**Respondent**

FAMC No. 65 of 2009

MISCELLANEOUS PROCEEDINGS NO. 65 OF 2009 (CRIMINAL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM CACV NO. 151 OF 2009)

Between:

CHIANG LILY	**Applicant**
- and -	
SECRETARY FOR JUSTICE	**Respondent**

Appeal Committee: Chief Justice Li, Mr Justice Chan PJ and Mr Justice Ribeiro PJ

Date of Hearing: 26 March 2010

Date of Determination: 26 March 2010

D E T E R M I N A T I O N

Chief Justice Li:

1. The background to this matter is fully set out in the judgment of the Court of Appeal, [2009] 6 HKC 234 and it is unnecessary to set out the details here.

2. On 23 October 2007, the applicant was arrested by the ICAC. In January 2008, she was charged with two offences. Later, three further charges were added. All five charges relate to commercial crimes including conspiracy to defraud and offences under the Theft Ordinance and the Companies Ordinance.

3. In February 2008, the prosecution notified the applicant that it intended to seek an order for the trial to be transferred to the District Court under section 88 of the Magistrates Ordinance ("section 88"). The applicant objected and in a letter dated 3 March 2008, made representations for her case to be tried before a judge and jury in the Court of First Instance. The Secretary for Justice replied by letter dated 20 March 2008, maintaining his decision to apply for trial in the District Court and, in May 2008, the applicant obtained leave to apply for judicial review to challenge that decision ("the first application").

4. On 9 February 2009, Wright J dismissed the first application and on 16 March 2009, the Magistrate made an order for transfer under section 88. On 14 May 2009, the applicant sought leave to apply for judicial review of the Magistrate's decision of 16 March 2009 ("the second application").

5. On the second application, the applicant contends that section 88 is unconstitutional on the ground that the power to select the venue for a criminal trial is a judicial power, but that the effect of section 88 is to confer that power exclusively on the executive.

6. On 1 June 2009, after hearing the parties, Wright J dismissed the second application, holding that the reasonably arguable case threshold was not met. Consequently, he found it unnecessary to deal with the prosecution's contention that the second application was an abuse of process.

7. On 21 September 2009, the Court of Appeal dismissed the applicant's appeals against Wright J's decisions on both the first and second applications and, on 5 January 2010, it refused to certify various points of law. The applicant now seeks leave to appeal from the Court of Appeal's decision.

8. In the first application, the argument before Wright J focused on whether the reasons given by the prosecution in its letter dated 20 March 2008 for maintaining its decision to apply for transfer to the District Court were adequate. The Court of Appeal agreed with Wright J that the reasons given were adequate. Before it, the argument centred on whether the prosecution's decision was irrational.

9. As is rightly accepted by the applicant, it is clear that there is no right to trial by jury in Hong Kong. Although the applicant's strong preference is for a jury trial, she has not suggested that she cannot have a fair trial in the District Court before a judge sitting alone. Indeed, such a suggestion cannot be responsibly made by any person facing trial in the District Court. There are plainly no grounds for holding the Secretary for Justice's decision to seek trial in that court to be irrational. In the circumstances, the Court of Appeal was plainly right to dismiss her appeal regarding the first application, and there are no reasonable grounds for the grant of leave to appeal from such dismissal.

10. As to the second application, the Court of Appeal held that it was clearly an abuse of the process since it considered that any challenge to the constitutionality of section 88 could and should have been made in the first application. It therefore did not proceed to deal with the merits of the section 88 argument.

11. There can be no doubt that the question of constitutionality could have been raised in the first judicial review application. It is also clear that, as the Court of Appeal pointed out, it should have been raised to avoid highly undesirable delays and disruption to the pending criminal proceedings.

12. The central argument upon which leave to appeal against the Court of Appeal's conclusion of abuse is sought involves the contention that the applicant should not be shut out from arguing a point of which she was herself previously unaware and which her then legal advisers either did not know about or did not consider to be viable, given that her present legal advisers now take a different view and consider it a worthwhile line to pursue. As was put by Mr Johnny Mok SC, who has said all that could be said on behalf of the applicant:

> "If (the original legal advisers) failed to appreciate a difficult or novel line of argument or that such argument is viable, the consequence of that failure should not be visited upon their lay client ..."

13. We do not accept that argument. The fact that a second or subsequent set of lawyers thinks of a new point which the earlier advisers did not consider or might have thought was unmeritorious cannot be a basis for effectively re-opening a matter where arguments then considered proper had been deployed and duly considered. If that were the applicable standard, there would never be finality in any court proceedings. As the Court stated in *Chong Ching Yuen v HKSAR* (2004) 7 HKCFAR 126, a person is generally bound by the way a matter is conducted by his or her counsel. The exception

is where the person in question can show that he or she was deprived of a fair trial because of the "flagrant incompetence" of counsel.

14. In considering whether there has been an abuse of process, all the relevant circumstances have to be considered. But on a leave application like the present, the applicant must show that it is at least reasonably arguable that a charge of flagrant incompetence can properly be made against the earlier advisers. No such allegation is or could possibly be made in the present case. A difference of view taken by counsel now instructed – on a point described as "novel" or "difficult" – falls far short of the applicable standard.

15. While the Court of Appeal declined to deal with the merits, it is in our view clear that the contention that section 88 is unconstitutional because it allocates a judicial function to the Secretary for Justice is not reasonably arguable. Choice of the venue for a prosecution is clearly a matter covered by Article 63 of the Basic Law which gives control of prosecutions to the Secretary for Justice without any external interference. Wright J's conclusion was plainly correct.

16. This becomes obvious once one considers the context and basis of any decision regarding venue. As to context, if selection of venue were a judicial function, the magistrate would have to hear submissions and take evidence bearing on that choice, looking in some detail at the alleged offence and the circumstances of the accused, turning the mere decision as to venue into a mini-trial. That cannot be the proper function of the magistrate.

17. Moreover, the basis of making the selection shows that the function is not judicial. In the Statement of Prosecution Policy and Practice (2009), guidance as to choice of venue is given as follows:

> "In the selection of venue, the sentence which is likely to be imposed upon an accused after trial is an important factor for the prosecutor to examine. The

> prosecutor will also wish to consider the general circumstances of the case, the gravity of what is alleged, the antecedents of the accused and any aggravating factors." (para 14.1)

18. These are plainly matters that may properly guide the prosecutor but which it would be highly undesirable for a magistrate to explore before the trial. It would obviously be most inappropriate for there to be a debate as to likely sentence or antecedents or aggravating factors before the magistrate regarding a person fully entitled to the presumption of innocence. The present system avoids this by properly treating the question of venue as a prosecutorial choice with the transfer following on a mandatory basis.

19. We therefore consider both the complaint against the abuse of process conclusion and the arguments on the merits of the application to be without substance. Accordingly, the applications to certify various points of law and for leave are dismissed with costs.

(Andrew Li) Chief Justice	(Patrick Chan) Permanent Judge	(R A V Ribeiro) Permanent Judge

Mr Johnny Mok SC and Mr Jeffrey Tam (instructed by Messrs Fairbairn Catley Low & Kong) for the applicant

Mr Kevin Zervos SC and Mr Alex Lee (of the Department of Justice) for the respondent

Information Paper for LegCo Panel on Administration of Justice and Legal Services

Jury System in Hong Kong

Introduction

1. At a meeting on 10 March 1997, the LegCo Panel on the Administration of Justice and Legal Services asked for an information paper on the jury system in Hong Kong setting out the following:

   a) a comparison of the jury system in Hong Kong with that of the United Kingdom and the reasons for the differences;
   b) the reasons for not extending the jury system to the District Court and the Administration's opinion as to whether the extension of the jury system to the District Court should be made an ultimate goal; and
   c) the AG's existing power in determining the venue for trial.

I. The Hong Kong and UK Jury System Compared

Items	UK	Hong Kong	Reasons for the difference
1. Historical Background	The jury system was introduced in England after 1066. The system was transformed during the Middle Ages in England from a group of neighbours who decided according to their personal knowledge of the case to neutral deciders who must decide solely on the basis of what is presented to them during the judicial proceedings. The relevant legislation is the Juries Act 1974.	The jury system was first introduced into Hong Kong in 1845, and is at present governed by the Jury Ordinance (Cap 3). Section 37 of the Jury Ordinance provides that where that ordinance is silent, the law in force in England applies (except with regard to juries for coroners inquests).	Historical.

Items	UK	Hong Kong	Reasons for the difference
2. The role of the jury	(Please refer to the column on HK.)	In Hong Kong, as in UK, the jury plays an important role in the criminal justice system: a) First, in a trial with a jury, the jury decides the facts and it is on those facts which it then determines the guilt or innocence of the defendant. The jury is to arrive at its verdict by considering whether it is satisfied that the prosecution has proved its case solely on the evidence presented at the trial and in accordance with the direction of the judge as to the law. b) Secondly, the jury adds certainty to the law, since it gives a general verdict. The jury merely states that the accused is either guilty or not guilty, and gives no reasons. The decision is not open to dispute. c) Trial by jury reflects the principle of being judged by one's peers.	No material difference.

Items	UK	Hong Kong	Reasons for the difference
3. Availability of Jury Trial in Criminal Proceedings	In UK, magistrates deals with the vast majority of criminal cases and they have exclusive jurisdiction over summary offences. Jury trial is not available for offences designated as summary offences. For offences triable either way ie on indictment or summarily, an accused may, in most cases, opt for summary trial (ie without a jury) or trial on indictment (ie with a jury). The court may impose trial on indictment, but may not insist on summary trial if the defendant objects. Jury trial is heard in the Crown Court. The Royal Commission on Criminal Justice (1993) has recommended restricting somewhat an accused's right to trial by jury, by	Most criminal cases are heard by magistrates or in the District Court. A permanent magistrate may impose a maximum of three years of consecutive sentences. A District Judge has jurisdiction to sentence a person to imprisonment for up to 7 years. Jury trial is not available for offences designated as summary offences. It is available in the High Court, which hears the most serious types of offences such as murder and manslaughter. A full list of such offences is set out in Part III of the Second Schedule to the Magistrates Ordinance (Cap 227) (see Annex).	The distinction between summary offences and indictable offences for the purpose of trial before magistrates and the High Court in Hong Kong and UK is similar. The reason for the introduction of the District Court in Hong Kong and the absence of jury trial in that court are set out in Part II of this paper.

Items	UK	Hong Kong	Reasons for the difference
	removing his or her existing right to insist that the case, where it is triable either way, should be heard in the Crown Court before a jury.		

Items	UK	Hong Kong	Reasons for the difference
4. Qualification for Jury Service	In UK, to qualify for selection as a juror, a person must be: a) aged between 18 and 70; b) registered as a parliamentary or local government elector; and c) have been ordinarily resident in the United Kingdom for any period of at least five years since the age of 13. In addition, a person must not fall into the categories of people disqualified or ineligible by Schedule 1 of the Juries Act 1974. The people disqualified are those who: a) at any time have been sentenced in UK to life imprisonment	In Hong Kong, a person is qualified and liable for jury service if he satisfies the criteria laid down in Section 4 of the Jury Ordinance, ie he or she is: a) between the ages of 21 and 65 years; b) of sound mind, and not afflicted with deafness, blindness, or other such infirmity; c) a good and sufficient person; d) resident within Hong Kong; and e) has a knowledge of the English language sufficient to enable him or her to understand the evidence of witness, the address of counsel and the Judge's summing up. Some specific mandatory exemptions are set out in section 5 of the Jury Ordinance, and include : a) ExCo, LegCo, Urban Council and Regional Council members; b) Justices of the Peace; c) Public officers, such as judges, Government legal officers, immigration	In both UK and Hong Kong, the objectives of disqualification and ineligibility are: firstly, to exclude from participation people who are or have been intimately concerned with the administration of justice; and secondly, to exclude from participation those who are demonstrably incompetent. There is at least an implicit assumption that a basic level of intellectual ability is necessary for a person to be able to be involved in the performance by the jury of its various functions. While the major difference

Items	UK	Hong Kong	Reasons for the difference
	or youth custody, or to be detained during Her Majesty's pleasure; b) at any time in the last ten years have in UK served any part of a sentence of imprisonment, youth custody or detention, or had imposed a suspended sentence of imprisonment or order for detention or a community service order; c) at any time in the last five years has been placed on probation in the UK: or d) are on bail in criminal proceedings. The people who are ineligible for jury service fall into four categories: a) the judiciary; b) others	officers; d) consuls; e) barristers and solicitors in actual practice and their clerks; f) registered doctors and dentists; and g) daily newspaper editors, chemists, clergymen, and pilots.	between Hong Kong and UK appears to lie in the mandatory English language requirement in Hong Kong, the UK court is empowered under Section 10 of the Juries Act to discharge the summons (for service as juror) where, on account of the insufficient understanding of English of the person attending in pursuance of the summons, he or she does not have the capacity to act effectively as a juror. The crucial issue remains whether the person serving as juror has an adequate understanding of the proceedings in question. The Jury

Items	UK	Hong Kong	Reasons for the difference
	concerned with the administration of justice, including barristers (and their clerks), solicitors and trainees, the staff of the Crown Prosecution Service, authorised advocates or litigators, court staff, prison officers and prison custody officers, police officers and forensic scientists; c) the clergy; and d) mentally disordered persons.		(Amendment) Bill 1997 was introduced into LegCo in early 1997. It proposes to replace the existing language requirement with a new one ie "the person has a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings". It is hoped that the Bill will be enacted before the end of the current legislative session.
5. Number of Jurors	In UK, the number is twelve.	Section 3 of the Jury Ordinance requires that all juries (criminal or civil) consist of 7 members, unless the court or the judge, before the trial is to be heard, specifically orders a jury of nine.	The number of jurors for each trial is slightly smaller than that of UK, because of the limited availability of qualified jurors in Hong Kong.

Items	UK	Hong Kong	Reasons for the difference
6. Selection of the Jury	In UK, the people selected for jury service receive a summons requiring them to attend at the Crown Court at a specified time. Accompanying the summons are a form, which is intended to identify those ineligible or disqualified, and a set of notes, which explains the procedure of jury and the functions of the juror. A failure to attend the Crown Court can result in a fine, as can unfitness for service through drink or drugs after attendance. Those summoned for service constitute the jury panel and the jury for an individual case will be selected from this panel. The panel may be divided into parts relating to different days or sittings. The	In Hong Kong, the procedure for the selection or formation of the jury panel is set out in sections 13 and 17 of the Jury Ordinance: a) The first step is that a registrar (of the Supreme Court) will compile a list of common jurors out of all those persons qualified in Hong Kong. Each time it is necessary to summon a jury, the registrar will select, at random or by ballot, such number of jurors as a judge shall direct to form a panel (usually about 60). b) The second step is that the registrar shall then issue a summons to each such person chosen, requiring him or her to appear on the day specified in the summons. The summons shall be served by post or personal service at least four clear days before the commencement of the sittings. c) As soon as convenient, the	There is no material difference between the selection procedure between UK and Hong Kong. The special power of the Court on composition of jury and exemption of woman juror by reason of the nature of evidence are peculiar to Hong Kong. This gives the court somewhat greater discretion in the composition of jurors.

Items	UK	Hong Kong	Reasons for the difference
	jury list contains the names, addresses and dates for attendance of the panel. The parties to the case and their lawyers are entitled to inspect the list before or during the trial. Such information may assist counsel in deciding whether to challenge any of the jurors for cause.	registrar must cause a list to be made of the names and addresses of those persons summoned. Defence counsel may have access to that list in order to give some advance consideration as to which jurors should be challenged. d) Empanelling the jury involves the selection from the panel, by ballot and after challenges, of those seven or nine persons who will be the jury that tries any particular case. A judge is empowered under section 20 of the Jury Ordinance, on the application of any party or at his or her own instance, to order that the jury be composed entirely of men or of women. Moreover, on the application of a woman juror, the judge may exempt her from service by reason of the nature of the evidence.	

Items	UK	Hong Kong	Reasons for the difference
7. Balloting, challenges and swearing in	In UK, the jury for a particular case is selected from the jury panel by ballot in open court. The clerk of the court has the names of all members of the panel. The names are put on cards, the cards are shuffled and the clerk reads out the names from the pile of cards. Hence, a random selection is achieved from a randomly-selected panel. On entering the jury box to be sworn, each juror may be challenged by the prosecution or the defence. Unlike in Hong Kong, the defence has only the right to challenge for cause. The prosecution has the right to challenge for cause or to require a juror to stand by (ie the Crown, without giving reasons, can ask a juror to stand	In Hong Kong, some 20 members of the panel, who are called the 'jury in waiting', are brought into court, usually immediately after the plea is taken. The registrar has had the names of each person printed on a separate card and placed into a ballot box and the registrar, or the clerk of the court, will draw names until a jury is obtained. If there are insufficient jurors, in theory, the judge may command the bailiff to collect a number of persons, apparently qualified, from the vicinity of the court, and if their names are on the jury roll, they can be immediately sworn in and may serve as jurors. In practice, this rarely needs to be done. Those called will then proceed to enter the jury boxes and, at this stage, the registrar or clerk will tell the accused that the names of the jurors who are to try him are to be called. If he objects to any of them, he must do so before they are sworn. All challenges occur before the jurors take a	There is no material difference in the balloting procedure between UK and Hong Kong. As for challenges, in Hong Kong, the defence has the right to challenge without cause for up to five jurors. This right to peremptory challenges was abolished by the Criminal Justice Act 1988 in UK. Both defence counsel and prosecution can only challenge for cause. The right to peremptory challenge was first introduced in Hong Kong in 1971. It entitles the defendant to object to as many as five prospective jurors without having to give any reasons.

Items	UK	Hong Kong	Reasons for the difference
	aside until the jury panel is exhausted).	seat in the jury box and are sworn in. The prosecution has the right to challenge any juror "for cause" (ie for good reasons, such as not being qualified, unable to be objective, or reasonably suspected of bias or interest or prejudice) and to require a juror to stand by. The defence has the right to challenge up to five jurors without cause and any juror for cause.	This change to the Juries Ordinance was intended to bring Hong Kong law more in line with English law in this aspect of procedure in criminal trials. However, when the UK 1988 Act abolished peremptory challenges, Hong Kong did not follow suit. This gives the defendant slightly greater protection in the composition of the jury. It will not, however, interfere with the principle of random selection of jurors because the defendant cannot select jurors, he can only remove them.

Items	UK	Hong Kong	Reasons for the difference
8. Excusal, discretionary deferral and discharge	In UK, any member of a jury panel may be excused service on the basis of previous service, or on showing entitlement to be excused, or, at the discretion of the appropriate officer, for good reason. The judicial power to discharge the jury or individual jurors once the trial has begun is closely related to the challenge for cause. A judge's decision to discharge a jury or juror is unchallengeable, whereas if the judge decides not to discharge, that decision may be challenged on appeal against conviction by the accused on the basis that the conviction is to be regarded as unsafe and unsatisfactory because there was no discharge. If doubt arises about the capacity of a juror because of	In Hong Kong, under sections 25 and 37 of the Jury Ordinance, there is considerable scope for the discretionary exclusion of persons: a) who have a personal interest, concern in, or knowledge of the parties; or b) where jury service would result in them suffering hardship. The judge may discharge a juror who is subsequently found to be unqualified, but the inclusion of such a person in a jury cannot be a ground of appeal if such inclusion is discovered after the verdict has been entered.	There are no material differences between the arrangement in UK and Hong Kong.

Items	UK	Hong Kong	Reasons for the difference
	physical disability or insufficient understanding of English, that person may be discharged It may also be appropriate to accommodate a juror by exercising the discharge power, for example, on the death of a spouse.		

Items	UK	Hong Kong	Reasons for the difference
9. Majority Verdict	In UK, the requirement that the verdict be unanimous, which had stood since the thirteenth century, was abandoned by the Criminal Justice Act 1967, which introduced the majority verdict. The governing provision is now the Juries Act 1974, s.17: "(1) .... the verdict of a jury in proceedings in the Crown Court or the High Court need not be unanimous if - a) in a case where there are not less then eleven jurors, ten of them agree on a verdict; and b) in a case where there are ten jurors, nine of them agree on a verdict.	In Hong Kong, in all criminal proceedings, where a jury consists of seven persons, its decision must be reached by a majority of not less than five (even if the number of jurors has been reduced to six by death or proper discharge). If the jury is reduced to five, the verdict must still be five and must be unanimous. Where nine-person juries have been sworn in, then the majority shall be of not less than seven (unless properly reduced to eight, in which case the majority can be six, or if properly reduced to six or seven, then the majority may not be less than five). If the jury is properly reduced to five, the verdict must be unanimous. It is possible that the jury may be unable to agree to unanimous or even a majority verdict. Then, if it sufficiently appears to the court that this is the case, the judge must discharge the jury, cause a new jury to be empanelled and order that case be tried as if it was for the first time.	There are no material differences between the arrangement in UK and Hong Kong. The differences are due to the different number of jurors required by the UK and Hong Kong jury system respectively.

II Non-Extension of the Jury Trial to District Court

2. A Bill to set up the District Court as an intermediate court, with limited civil and criminal jurisdiction, between the Magistracy and the Supreme Court was introduced into the Legislative Council in 1952. It was prompted by the increase in volume of litigation, both civil and criminal, such that these cases could not be adequately and expeditiously dealt with by the judges and magistrates at that time. The Attorney General, when moving the Bill, explained why there would be no trial by jury in the District Court as follows:

> "In the District Court, the maximum sentence of imprisonment, whether for one or more offence, which may be imposed on conviction is limited to five years, and there are further limitations on penalties set forth in [the Bill]. Moreover, provision is made for appeals in criminal cases to go to the Full Court, and the trial judge is required ... to place on record a short statement of the reasons for his verdict. It is considered that these provisions are an adequate safeguard against miscarriages of justice. To provide for trial by jury in the District Court would place a grave additional burden on an already over-worked jury list, and to provide for a right to elect to be tried by jury would be to introduce something which is not at present available to an accused person, and might very well defeat one of the main objects of the Bill."

3. From the above, the reasons for not introducing jury trial into the District Court appears to be twofold:

   a) firstly, adequate safeguards against miscarriage of justice were provided in the Bill;
   b) secondly, and more importantly, there were not sufficient eligible persons to serve as jurors in the District Court.

4. A careful examination of these factors will be required if the question of extending jury trial into the District Court is considered. At this stage, it is possible to highlight some of the factors that should be taken into consideration:

   a) whether there will be adequate persons to serve as jurors;
   b) cost;
   c) the implication for the length of trial and the workload of the District Court.

5. Given that the introduction of juries in the District Court would be a significant development, the issue could not be considered in isolation. Other related issues that would call for consideration would include:

a) whether jury trial should be available in respect of all types of offences tried in the District Court or whether the summary jurisdiction of the District Court should be retained in part;

b) whether the sentencing power of a District Judge should be amended and whether a District Judge should be given the power to remit a case to the High Court for sentencing;

c) whether a particular level of experience should be required for District Judges presiding over a jury trial;

d) whether the accused should have the right to elect the mode of trial ie jury or non-jury trial;

e) whether committal proceedings should be available if there were jury trials in the District Court; and

f) whether solicitors should have a right of audience if there were jury trials in the District Court.

6. In view of these many important issues, the question whether there should be jury trials in the District Court would require a lengthy, detailed and in-depth study. This study would entail a consideration of the criminal justice system of other jurisdictions besides the UK.

III AG's Power to Determine Venue for Trial

7. The Attorney General has the power to institute criminal proceedings for any offence:

   a) under Section 12(a) of the Magistrates Ordinance (Cap 227), he is entrusted with the "duty and discretion" to conduct the prosecution of all offences tried before a magistrate;
   b) under Section 14 of the Criminal Procedure Ordinance (Cap 221), he has the discretion to initiate prosecutions "if he sees fit" in the High Court;
   c) under Section 75 of the District Court Ordinance, he may prefer charges against an accused for offences which are the subject matters of proceedings transferred from the Magistrates Court or the High Court.

8. Moreover, the Attorney General may apply to court for an order for transfer of the following proceedings:

   a) from the Magistrates Court to the District Court (under Section 88 of the Magistrates Ordinance);
   b) from the District Court to the High Court or to the Magistrates Court (under Section 77A of the District Court Ordinance);
   c) from the High Court to the Magistrates Court or the District Court (under Section 65F of the Criminal Procedure Ordinance).

9. In any application for transfer by the Attorney General under section 88 of the Magistrates Ordinance, the magistrate is required to make an order for transfer. Where an application is made under Section 77A of the District Court Ordinance or Section 65F of the Criminal Procedure Ordinance, the judge may make an order for transfer where it is in the interests of justice to do so.

10. In the Attorney General's Chambers' Prosecution Policy - Guidance For Crown Counsel (1993) (pages 9-10), guidelines for the decision by Crown Counsel as to the mode of trial is set out as follows:

> "Where a case is considered too serious for trial in the Magistrates Court Crown Counsel should consider carefully whether the trial can properly take place in the District Court rather than the High Court bearing in mind that the maximum sentence that can be passed in the District Court is 7 years imprisonment. If Crown Counsel considers that the sentence to be passed in the event of conviction after trial is likely to be less than seven years he should transfer the case to the District Court for trial. Where it is known that the defendant will plead guilty the case should be transferred for hearing in the District Court where it is thought the starting point for sentence is unlikely to exceed 7 years."

"Whilst the attraction of an expeditious disposal should never be the sole reason for summary trial, Crown Counsel is entitled to have regard to the fact that trial in the Magistrates Court is almost certain to be speedier as well as less expensive. Other considerations such as the length of trial or the possibility of a plea of guilty by the defendant are also relevant."

Legal Department
June 1997

PART III

[s. 88]

1. Any offence which is punishable with death.

2. Any offence which is punishable with imprisonment for life except an offence against section 37C, 37D, 37O or 37P of the Immigration Ordinance (Cap. 115), an offence against section 53 or 123 of the Crimes Ordinance (Cap. 200), an offence against Part VIII of the Crimes Ordinance (Cap. 200), an offence against section 4 or 6 of the Dangerous Drugs Ordinance (Cap. 134), an offence against section 10 or 12 of the Theft Ordinance (Cap. 210), section 17, 28 or 29 of the Offences against the Person Ordinance (Cap. 212) or section 16, 17 or 18 of the Firearms and Ammunition Ordinance (Cap. 238). *(Replaced 49 of 1965 s. 21. Amended L.N. 165 of 1967; 41 of 1968 s. 59; 21 of 1970 s. 35; 48 of 1972 s. 4; 25 of 1978 s. 6; 59 of 1980 s. 2; 68 of 1981 s. 56; 59 of 1984 s. 7; 52 of 1992 s. 11)*

3. Any offence against section 21 or 22 of the Crimes Ordinance (Cap. 200).

4. Misprision of treason.

5. Any offence against the Queen's title, prerogative, person or government.

6. Blasphemy and offences against religion.

7. Composing, printing or publishing blasphemous, seditious or defamatory libels.

8. Genocide and any conspiracy or incitement to commit genocide. *(Added 52 of 1969 s. 4)*

(Part III added 2 of 1953 s. 4)

(Second Schedule replaced 24 of 1949 Schedule)

第III部

〔第88條〕

1. 任何可處死刑的罪行。

2. 任何可處終身監禁的罪行，但以下罪行除外——

違反《人民入境條例》(第115章)第37C、37D、37O或37P條的罪行，違反《刑事罪行條例》(第200章)第53或123條的罪行，違反《刑事罪行條例》(第200章)第VIII部的罪行，違反《危險藥物條例》(第134章)第4或6條的罪行，違反《盜竊罪條例》(第210章)第10或12條的罪行，違反《侵害人身罪條例》(第212章)第17、28或29條的罪行，或違反《火器及彈藥條例》(第238章)第16、17或18條的罪行。 *(由1965年第49號第21條代替。由1967年第165號法律公告修訂；由1968年第41號第59條修訂；由1970年第21號第35條修訂；由1972年第48號第4條修訂；由1978年第25號第6條修訂；由1980年第59號第2條修訂；由1981年第68號第56條修訂；由1984年第59號第7條修訂；由1992年第52號第11條修訂)*

3. 違反《刑事罪行條例》(第200章)第21或22條的任何罪行。

4. 隱匿叛逆。

5. 對女皇陛下的稱號、特權、人身或政府所犯的任何罪行。

6. 褻瀆神明及宗教罪行。

7. 撰寫、印刷或出版褻瀆神明、煽動性或誹謗名譽的永久形式誹謗。

8. 危害種族罪及任何串謀或煽惑犯危害種族罪。 *(由1969年第52號第4條增補)*

(第III部由1953年第2號第4條增補)

(附表2由1949年第24號附表代替)