Bills Committee on
United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003

Purpose

This paper addresses a number of issues raised by the Bills Committee at its meeting on 10 January 2004, including the definition of "terrorist act", the implementation of paragraph 1(d) of United Nations Security Council Resolution (UNSCR) 1373, the protection of legal privilege, the test of "reasonable grounds to believe", and related matters.

Definition of "terrorist act"

2. In drawing up the definition of "terrorist act" in the United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance) (Cap. 575), we had taken reference from anti-terrorism legislation in other jurisdictions. The current definition is based on the definition of "terrorism" in the United Kingdom Terrorism (United Nations Measures) Order 2001, with an exclusion based on the definition of "terrorist activity" in the Canadian Anti-Terrorism Act to cover protests and industrial actions.

3. The definition follows international trends by unambiguously stipulating that a "terrorist act" must fulfill all the following three criteria -

(a) there must be the use or threat of action intended to compel the Government or to intimidate the public;

(b) the use or threat of action is made for the purposes of advancing a political, religious or ideological cause; and

(c) the action causes serious violence against a person; serious damage to property; or creates a serious risk to the health or safety of the public etc.

4. The Ordinance also clearly excludes "the use or threat of action in the course of any advocacy, protest, dissent or industrial action" from the definition of "terrorist act". Legal civil activities such as peaceful demonstrations or protests do not constitute terrorist acts.

5. Indeed the definition was closely scrutinized by the then Bills Committee on the United Nations (Anti-Terrorism Measures) Bill 2002. As agreed by the majority of Members, the Administration introduced a Committee Stage amendment as follows -

(a) the language of paragraphs (a)(i)(A) and (B) was tightened by replacing "involves" with "causes";

(b) the language of paragraphs (a)(i)(E) and (F), and (a)(ii)(A) was also tightened by replacing "designed" with "intended"; and

(c) the exclusion in relation to protests and industrial actions was extended to cover not only actions under paragraph (a)(i)(F) but also actions under paragraphs (a)(i)(D) and (E).

Implementation of paragraph 1(d) of UNSCR 1373

6. UNSCR 1373 takes a very broad approach to the suppression of terrorist financing. As noted in the "Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting" compiled by the International Monetary Fund in 2003, the measures included in UNSCR 1373 are general in character and are directed at the prevention, prosecution, and punishment of all acts of terrorist financing.

7. To facilitate the setting of priorities by States to implement the wide range of measures required by UNSCR 1373, the United Nations Counter Terrorism Committee[1] (CTC) has stated that it first looks at whether a State has in place effective counter-terrorism legislation in all areas of activity related to UNSCR 1373 (including its paragraph 1(d)), with specific focus on combating terrorist financing. The CTC has also elaborated that it focuses on legislation as the key issue because without an effective legislative framework States cannot develop the executive machinery to prevent and suppress terrorism, or bring terrorists and their supporters to justice.

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[1] The United Nations Counter Terrorism Committee has been established pursuant to paragraph 6 of UNSCR 1373 to monitor the implementation of the Resolution. It consists of all the members of the United Nations Security Council.

8. In fact, the States' reports[2] submitted to the CTC have shown that many major common law jurisdictions have implemented paragraph 1(d) of UNSCR 1373 by **criminalizing** the provision of funds, financial assets, economic resources or financial or other related services to terrorists or terrorist entities. Examples are Australia, Canada, New Zealand, the United States and the United Kingdom. A number of European countries such as Belgium, France, Germany and the Netherlands have similarly adopted, or are prepared to adopt, the criminal approach.

New section 12A(9) and protection of legal privilege

9. Section 2(5) of the Ordinance provides that "nothing in this Ordinance shall require the disclosure of any items subject to legal privilege" or "authorize the search or seizure of any items subject to legal privilege". The new section 12A(9) in the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 (the Bill), which is part of the Ordinance, would, therefore, necessarily be subject to section 2(5).

10. It is envisaged that a lawyer may be required to furnish the name and address of his client in accordance with an order issued under the new section 12A in the Bill in circumstances where such information (so long as it does not constitute an "item subject to legal privilege" defined under section 2(1) of the Ordinance) reasonably appears to reflect, or assist in tracing, the identity of the terrorist/terrorist associate concerned or the actual financier of terrorism.

New sections 12A(3)(c) and (6)

11. We note the concerns expressed by Members and the deputations at the Bills Committee meeting on 10 January 2004 on the coverage of "to relate to any matter relevant to the investigation" in the new sections 12A(3)(c) and (6). Subject to further discussion at the Bills Committee, we are prepared to improve the drafting.

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[2] The States' reports are available at the CTC website at www.un.org/Docs/sc/committees/1373/submitted_reports.html.

"Reasonable grounds to believe"

12. A copy of the District Court judge's Reasons for Verdict in HKSAR v Yam Ho-keung (DCCC 651 of 2001) is attached at **Annex A**. Paragraphs 46 to 60 relate to Yam Ho-keung.

13. Two other judgments, namely, R v Lok Chak-man and Another (CACC 744 of 1995) on the offence of assisting another to retain the benefit of drug trafficking knowing or having reasonable grounds to believe that the relevant person is a person who carries on drug trafficking, and HKSAR v Lam Hei-kit (CACC 84 of 2003) on the offence of dealing with property known or believed to represent the proceeds of an indictable offence, are attached at **Annexes B and C** respectively.

14. As regards sections 7, 8 and 9 of the Ordinance, if in practice there is evidence capable of satisfying the court, on balance of probabilities, that the defendant has an honest belief that, for example, the recipient was not a "terrorist", such evidence, if accepted by the court, would invariably have been able to raise a reasonable doubt as to whether he was in fact aware of all the relevant reasonable grounds alleged by the prosecution, and/or whether a reasonable man would necessarily conclude that the recipient was a terrorist.

15. Some overseas jurisdictions have also adopted the mental element of "having reasonable grounds to suspect/believe" in creating terrorist financing offences. An example is the United Kingdom Terrorism Act 2000 which provides that a person commits an offence if he invites another to provide money or other property, receives money or other property, provides money or other property, possesses money or other property, and intends that it should be used or **has reasonable cause to suspect** that it will or may be used for the purposes of terrorism. Another example is the Singaporean Terrorism (Suppression of Financing) Act 2002 which provides that every person who collects, provides or invites a person to provide, or makes available property or financial or other related services, intending that they be used or knowing or **having reasonable grounds to believe** that they will be used for the purpose of facilitating or carrying out any terrorist act, or knowing or **having reasonable grounds to believe** that they will be used by or will benefit any terrorist or terrorist entity, shall be guilty of an offence.

16. In the "Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting" compiled by the International Monetary Fund in 2003, the relevant model provision[3] for common law countries stipulates that a person commits an offence if that person makes available funds, financial assets or economic resources or financial or other related services intending that they be used by, or knowing or **having reasonable grounds to believe** that they will be used for benefiting any person who is carrying out or facilitating a terrorist act.

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[3] See Appendix VIII (Legislative Examples: Common Law Countries) to the Handbook.

Annex A

Reasons for Verdict

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1. From 1998 until the spring of last year someone in Hong Kong was running a criminal enterprise that lent money at an excessive rate. That has not been in dispute. Annexed to written admissions is Table A which sets out details of some of the borrowers. They paid interest at an annual rate of between 525% and 1350%. This was extremely good business for someone. It generated a lot of cash.

2. The cash was for the most part paid by the borrowers into two accounts, as appears from Table A, in the names of Miranda Chan and Yiu Yuk lan. Both accounts show numerous cash deposits. They also show that the cash was removed by withdrawals made at ATM machines. Between July 1999 and April 2000 a total of $2,701,600 was so withdrawn.

3. On the 18th April 2000 the police arrested the first defendant and searched premises at Flat B, 20th Floor, Block 3 Kwai Fong Court. Many items were seized, including passbooks in relation to the two accounts. These exhibits demonstrated an undeniable link between the premises and the criminal enterprise. The first and second defendants each possessed keys to this flat.

4. The main issue in the trial has been whether the prosecution could prove that the first three defendants participated in the enterprise. From proof of participation they sought to infer the conspiracies in charges one and two.

5. Before turning to the cases of the first three defendants individually, it is convenient to discuss what was found at the flat and the evidence of PW3.

PW3

6. PW3 was an immunised witness. He told me how in 1998 he had sold his own and his brother's identity cards; how he had signed some

business registration forms and opened a number of bank accounts. He related how he did this with the first defendant and a man he knew by the nickname "Ah Dee".

7. A group identification was arranged in October 2001 at which the second defendant was present. PW3 was unable to make a positive identification. He thought Ah Dee was there but said that he could not be sure as the man he suspected now looked thinner. Over two years had passed since the events in question when he had been in Ah Dee's company for a total time of about one hour.

8. It was important to remember that this failure to identify the second defendant was not to be treated as an assertion that the second defendant could not have been Ah Dee. The difficulties of visual identification are well known to criminal lawyers and the fact that a witness cannot be sure that a suspect was the culprit must not be taken without more as evidence that the suspect could not have been the culprit.

9. PW3 told me that he had long known the first defendant and that she was his friend. He admitted that he had deliberately failed to identify her to the police in his witness statements and that he did so in an effort to protect her. His immunity was a conditional one: he had to tell the truth. He frankly related his decision before trial to do that and so identified her in his evidence. That behaviour drew a proper and predictable attack from counsel for the first defendant. I judged that this witness withstood it. I found him to be disarmingly frank and easily credible, but, of course, I looked to the rest of the evidence for confirmation of his testimony.

10. These matters directly supported his implication of the first defendant:

- His brother's identity card (exhibit 33) was found in the flat to which the first defendant had the keys and to which she was linked by overwhelming evidence.
- His own identity card (exhibit 94) was found in the first defendant's safe deposit box.

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- A passbook (exhibit 92) relating to a bank account opened in the name of PW3's brother was also found in her safe deposit box.
- A bank passbook (exhibit 34) related to the Nanyang Commercial Bank account which he opened was found in the flat.
- One of the borrowers charged an excessive rate of interest was PW13. He paid into an account opened by PW3 named Yee Fung Trading. PW13's name appears in exhibit 29, a record of repayments by debtors found in the flat and which bore the fingerprints of the first defendant.

11. Further there was a whole body of evidence, which I shall come to later, that connected the first defendant with the criminal enterprise, a feature of which was the use of identity cards belonging to other people which were used to set up bank accounts.

12. There was thus massive support for PW3. There was no evidence called by the defence to contradict him. I was sure that it was safe to act upon what he said, notwithstanding that he had deliberately chosen to protect the first defendant when making his witness statements.

Exhibits from the flat

13. It was an important part of the prosecution's case to establish that at the flat were found unconcealed the records of this moneylending business. They did so, in my judgment, by the production of:

- Exhibit 25, three passbooks on the Miranda Chan account, which account was used on 21 occasions by the borrowers set out in Table A to make repayments in respect of offending loans.
- Exhibit 14, five passbooks on the Yiu Yuk lan account, which account was used likewise on 11 occasions.
- Exhibit 36, a SIM card for phone number 98744493 which was the contact used for fifteen of the borrowers set out in Table A.
- Exhibit 37, a SIM card for 92234533 which was the phone number used for three more of those borrowers.
- Exhibit 9, a list of 162 names with all the appearances of a list of debtors, 17 names being those of borrowers set out in Table A.
- Exhibit 29, a list of similar character, with 24 names of Table A

borrowers.

- Exhibit 46, a long list of persons with their personal details recorded that would be of interest to lenders, with two entries matching Table A borrowers.
- Exhibit 33, the identity card of PW3's brother, used to set up a Standard Chartered Bank account.
- Exhibit 34, a bank passbook related to the Nanyang Commercial Bank account which was opened by PW3 and used by Table A borrower PW13.

14. Further, there were found three computers, a scanner and the supporting material sufficient to run a moneylending business of the type in question. The photographs well illustrate this set up in the flat.

The case of the first defendant.

15. The evidence against D1 on the first two charges was overwhelming. There was no defence evidence to rebut it. It consisted of:

- The direct evidence of PW3, whom I trusted for the reasons already given. He implicated the first defendant generally in what was going on and in particular said that she was present when the matter was first discussed; was with him when he opened the bank accounts; took from him his brother's identity card; and told him that they would be keeping the two identity cards.
- What was found at the flat, which I have dealt with already.
- What was found in her car, namely ATM cards for the Miranda Chan and Yiu Yuk lan bank accounts (exhibit 2 and 3).
- Her fingerprints on the papers and records at the flat as appears from schedule C annexed to the second set of written admissions.
- What was found in her safe deposit box, namely PW3's identity card and a bank account passbook opened in the name of PW3's brother. (exhibit 92)
- What she said to the police in her second video interview, (transcript exhibit 135), which included damaging admissions about playing a role of middleman.

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- An analysis in a schedule (exhibit 324) of withdrawals of cash from ATM machines from the accounts of Miranda Chan and Yiu Yuk lan married to cash deposits into her own bank account (exhibit 264) within a ten month period commencing in July 1999. The matches demonstrated an undeniable link. The two accounts were, of course, the ones used for repayments in respect of offending loans. The schedule shows by overwhelming inference that of the $2,701,600 paid into the two accounts $2,032,800 ended up, via cash transactions, in the account of the first defendant.

16. I record the fact that issues of admissibility did arise in respect of her interviews. Suggestions were made to the relevant officers but they were roundly denied and remained just suggestions as there was no evidence to support them. I was sure that the interviews which I admitted in evidence were voluntarily given. I did rule inadmissible some interviews. This was based upon a breach of section 52 of the Police Force Ordinance and had nothing to do with the allegations of misconduct made. She was kept in custody too long. I accept that this was done without bad faith, but the police must remember what the law is in this regard and they must obey it, whether it suits them or not. The duty they have to put a detained person before a magistrate in proper time is an important safeguard. In this case the loss of the later interviews has not stood in the way of proper verdicts as there was ample other incriminating material.

17. I did not forget that the first defendant had a clear criminal record, both when considering the credibility of what she said in interview and the likelihood of her committing such crimes. The weight of the evidence against her was such that these considerations did not divert me from reaching verdicts of guilty.

18. There was no evidence to contradict or explain the material which so extensively incriminated the first defendant. The effect of the material I judged to be overwhelming. It proved active participation in the criminal money lending. Other evidence, which I will come to, proved the second and third defendants to have participated. It was an

irresistible inference that the participation of the three of them was referable to an agreement between them, an agreement to lend money at an excessive rate of interest. Such an agreement necessarily involved an agreement to deal with the proceeds of that money lending. Charges one and two were proved for sure against the first defendant.

19. Charges three and four deal with the first defendant's possession of three identity cards. The evidence of them being found at the flat and in her safe deposit box was undisputed. I was sure possession of each was proved for sure. There was no evidence to explain or excuse that possession. The surrounding circumstances set up the overwhelming inference that her possession of them was for use in the criminal moneylending enterprise. Verdicts of guilty were inevitable.

20. Charge five, dealing with the proceeds of an indictable offence, arose because of the withdrawal by the first defendant of $500,000 from her bank account after her first arrest. She admitted to the police in a video recorded interview (transcript exhibit 141) that she had done so. She explained doing this by saying that a time deposit had matured and that she gave the money in cash to a friend for safe keeping. She averred that the source of the funds was equally divided between her mother and her boyfriend, the second defendant.

21. I did not believe a word of the explanation. Given treasury accountants analysis (exhibit 324) of the cash deposits into the first defendant's account (exhibit 260) and the ATM withdrawals from the collecting accounts of Miranda Chan and Yiu Yuk lan, I inferred that the first defendant received over $2 million in cash from the criminal enterprise. The time deposit (exhibit 264) was fed from the first defendant's account (exhibit 260). If the $500,000 was from the claimed legitimate sources why suddenly convert it to cash and give it to a friend for safe keeping? There was an obvious motive to do so if that $500,000 was the proceeds of the crime which she had been committing and benefiting from so extensively prior to her arrest. The circumstances and the timing of her actions proved to me for sure that she was knowingly seeking to hide the proceeds of her indictable crime and

keep it safe from recovery by the police. A verdict of guilty had to follow.

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22. Lending money at an excessive rate is an indictable offence in Hong Kong. The fact that the first defendant may not have known what was meant by or what amounted to an indictable offence is of course no defence. The *mens rea* of the offence was established by her intention to deal with the $500,000 with knowledge of the conduct which would in fact found an indictment. No other interpretation makes sense.

The case of the second defendant.

23. There was unchallenged evidence, and an admission, that the nick name of the second defendant was Ah Dee.

24. The evidence of PW3 revealed that a man called Ah Dee played a prominent part in purchasing his and his brother's identity cards and in opening the bank accounts and in the creation of business registrations.

25. This activity of Ah Dee (whoever he was) demonstrated that he was playing a part in the criminal enterprise, as evidence I have already referred to linked one of the borrowers, PW13, with repayments through the Yee Fung Trading account which PW3 had opened. Beside this specific connection, it was obvious to me from what PW3 said and from all the surrounding circumstances that the purpose of the first defendant and Ah Dee in behaving as they did was to have available accounts in the names of others ready and able to receive payments from debtors. Other evidence which I have already discussed showed the first defendant to be involved in the criminal enterprise of lending money at an excessive rate of interest. In these circumstances it was an overwhelming inference that the activity of the first defendant and Ah Dee was related to the criminal enterprise of lending money at excessive rates. No one argued otherwise. The argument was that there may have been another Ah Dee. Thus the vital question here was whether the prosecution could prove that the second defendant was the Ah Dee spoken of by PW3.

26. The prosecution sought to prove that the second defendant was the same Ah Dee by connecting him to the other two co-defendants (with proof of their guilt by other evidence) and the criminal enterprise. They could point to these matters which were established by the evidence:

- the first and second defendants were co-habitants and had been so from a time antedating the commencement of the alleged conspiracies.
- The first defendant was arrested returning to the flat in the early hours of the morning. The flat contained a bed.
- The second defendant possessed keys to the flat.
- The second defendant possessed keys to the first defendant's car.
- The incriminating exhibits were openly left in the flat and the car and not hidden away.
- That a withdrawal was made from the second defendant's bank account using his card at an ATM machine at the exact time that the third defendant was there (I shall deal with the proof of this later).
- That a correlation could be shown between withdrawals from the second defendant's bank account (exhibit 290) and a book (exhibit 16b) found in the flat on the table. 33 matches can be seen over a four month period (set out in an *aide memoire* annexed to prosecution counsel's closing written submissions and called schedule 1). The book was found at the table in room A in the flat (as seen in the photographs, set up like an office or study) along with the other exhibits I have discussed which indicated lending.
- That the book made frequent reference to Ah Ken, which happened to be the nick name of the third defendant, who was proved by other evidence to have played the role in the criminal enterprise of using ATM machines to take cash from the collecting accounts of Miranda Chan and Yiu Yuk lan. The references were allied to figures which had the appearance of being payments.
- That banking documents relating to his own and his wife's transactions were found in the flat. They could be tied into entries in the book exhibit 16. The details are set out set out in an *aide memoire* annexed to prosecution counsel's closing written submissions and called schedule 2).

27. There was no direct evidence that the first and second defendants lived together in the flat. PW8, who spoke to their co-habitation, did not know their address. If it was the case that they did live together at the flat then the connection of the first defendant to it and what it contained and what was obviously and openly going on there is the greater. If they lived elsewhere, and the suggestion is made that the first defendant carried on this criminal business without the participation of the D2 Ah Dee but with some other Ah Dee, then his possession of the keys to the flat is the more incriminating. If the flat was not a home but an office for the criminal enterprise then the first defendant did not need the keys to live there. 36

28. I did not forget that Ah Dee is a common nick name. Nor did I forget the admitted fact that the second defendant was often out of Hong Kong, but the strong evidence of connection to the implicated first defendant was overwhelming. Of course there is no such thing as guilt by association: innocent men may live with guilty women involved in the running of sophisticated crime over a long period. The point of all this proof of association is to show his knowledge and his familiarity with the execution of the alleged conspiracies and to show that he must be the Ah Dee spoken to by PW3.

29. I took care before drawing the inference that the second defendant was the Ah Dee spoken of by PW3. I looked at all the evidence available. I searched hard on his part for any indications that pulled in the opposite direction. However, wherever I looked I found nothing to distance him from the criminal enterprise. I do not say that these matters implicated him but they showed how he could remain rightly identified as the participating Ah Dee by inferences from the other evidence. The matters worthy of mention, and I will condense hard as these are peripheral considerations, were:

- by the evidence of PWs 113 and 123 the second defendant was connected via companies and premises to the third defendant and to a finance company called Asia (Hong Kong) Finance, which was connected to some of the borrowers.
- Two of those borrowers personal details were in exhibit 46, the long list

of persons and their details found in the flat, and they had not provided the details to the person giving them the offending loans.

- $500,000 of proceeds of the enterprise were taken by the first defendant and given in cash to the fourth defendant. The fourth defendant was the uncle of the second defendant.
- $250,000 of the $500,000 was recovered from the wife of the second defendant.
- Exhibit 16, found at the flat and with the connection to the second defendant's bank account, showed book entries in the same nick name as used by the fourth defendant which matched cash deposits into his bank account.
- His own bank account (exhibit 290) showed the frequent depositing of cash. In the nine months to April 2000, when the first defendant was arrested, this came to $1,449,119.
- The operation of this account showed that the cash was not accumulated there, but was removed by withdrawals from ATM machines. The monthly transaction details show the cash was thus coming out as fast as it went in.
- There was no evidence as to what the second defendant did for a living, if anything. The only indication of any job skill was from the evidence of PW113 who said that the second defendant had taught him how to process a loan as regards a guarantee when he was working at the Mongkok branch of Asia (Hong Kong) Finance.

30. The sole point which could arguably indicate the contrary was the fact that the entries in the books exhibit 16 sometimes referred to "D" and at others to "Dee". Against the weight of everything else this caused me to have no doubt in my conclusions.

31. The case of the second defendant was not an easy one. One always had to bear in mind that, like the first defendant, he had the keys to what was a centre from which the criminal enterprise was run. It was against this circumstance that I had to make the judgment whether on all the evidence as it stood I could be sure that there was no second Ah Dee going out with the first defendant to open bank accounts using the Ho brothers' identity cards. I was sure, having weighed the matter, that

such an idea was fanciful. I thus rejected it. 38

32. Of course, the failure of the second defendant to give or call evidence was no indication of his guilt. Cross and Tapper, in its 9th edition, still quotes the words of Abbot CJ which are pertinent in this regard:

> "No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction if the conclusion to which the prima facie case tends to be true, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends?"

33. I quote those words now as they seem to me to meet exactly the state of the evidence in the case of the second defendant. I place no burden upon him to prove anything. The role of a second Ah Dee has been the subject of argument here. The fact is that there is not a shred of evidence to support the existence, let alone the activity, of a second Ah Dee. Common sense and experience tell one that in these days where modern technology collects masses of daily information about all of us, that it is very difficult to believe that people can leave not a trace of evidence behind them of their existence. PW8, who spoke of the first and second defendant as being lovers, spoke of it in the present tense. The first defendant, given what PW3 told me, would have to know all about a second Ah Dee if he truly existed. She was a source of knowledge available to the second defendant. There was no good reason to think that she would keep the information secret from him to his jeopardy.

34. Before leaving the case of the second defendant let me say that I seek to check my judgment in difficult cases by considering what a jury would make of the case. I judged that ordinary people looking at the matter in the round, and honouring the direction to try the case on the evidence, would find the existence of two Ah Dees in this situation to be

unworthy of belief.

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35. Once I was sure that the second defendant did what PW3 described I was sure of his participation and inferred that he was a conspirator in the same way as I did in the case of the first defendant.

The case of the third defendant.

36. Money was taken from the two collecting accounts of Miranda Chan and Yiu Yuk lan by means of cash withdrawals made from ATM machines. The ICAC identified the use of ATM machines at Kwai Fong and Lai King MTR stations. They installed a camera to keep observations on the machines between the 7th March and the 3rd April 2000.

37. It was the prosecution case that the third defendant can be seen on the video footage so taken. The third defendant's case was thus one of identification where, instead of the eye of a witness, it was the eye of a lens that captured the moments in question. The third defendant did not give evidence. He argued that the images were not of him.

38. Still photographs were made from the video film. They are exhibit 166. The detailed legend to the photographs was admitted. A schedule, marked B and annexed to the first written admitted facts, was prepared and admitted. The result of this is that we can see a man at the ATM machines at the times when transactions took place on the two collecting accounts.

39. A policeman, PW75, had repeatedly viewed this material and compared it with the image of the third defendant as seen in his video recorded interview. He told me that he was sure that it was the same man. PW113, who had known the third defendant for some considerable time, said that he was sure that photograph 6 in exhibit 166 showed the third defendant, although he was not sure about the other photographs.

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40. I have studied the photographs. I have been able to observe the third defendant in court over the considerable time this trial has taken. In my judgment they are photographs of him. However, given the problems of visual identification which are familiar to us all from the *Turnbull* guidelines I looked to the rest of the evidence lest it was possible that I was mistaken in my judgment or that the third defendant had a double walking round Hong Kong.

41. The first matter which provided some support for the identification was the fact that in photographs 12 and 15 the subject can be seen wearing a tee shirt with a distinctive pattern on the front. An identical tee shirt was recovered from the home of the third defendant.

42. The tee shirt, however, paled into comparative insignificance when one looks to the finger print evidence. This is set out in Schedule C annexed to the second set of written admissions. It shows that the third defendant's prints were found on documents connected to the criminal enterprise. Exhibits listed against the third defendant in schedule C have undeniable links to the borrowers in Table A. This was massive support for the identification. It strongly linked the third defendant to the subject matter in respect of which the challenged identification arose. This support made me sure that I and PWs 75 and 113 were all accurate in our identifications.

43. Whilst the images in the photographs were varied in quality, I was sure on all the evidence that each showed the third defendant. I remembered the point that the distinctive jacket worn in the first eight photographs was not recovered. The fact of it, of course, helped make links between the different photographs.

44. I looked to the entire evidence lest anything existed to weaken the case. As it was with the second defendant, this exercise provided no succour to the accused. What he said and his reaction in his video interview when shown the video footage I judged to be weak and inconsistent with a man being mistakenly identified. His unsworn and untested denials in interview merited little weight and did not help him. PWs

113 and 123 associated him with Asia (Hong Kong) Finance and so with the other male defendants. 41

45. In the absence of an explanation, it was an irresistible inference that the man in the photographs was playing the role in the enterprise of collecting cash from the two accounts used to receive the excessive interest. I did not forget that the third defendant had a clear criminal record when considering the likelihood of his committing such crime or weighing what he said in interview. Once his participation was proved I inferred that he was a conspirator in the same way as I did in the case of the first defendant.

The case of the fourth defendant.

46. The fourth defendant is only concerned on the fifth charge, which alleges dealing with property knowing or having reasonable ground to believe that it represented any person's proceeds of an indictable offence.

47. It was not disputed, and there was good evidence to prove, that the fourth defendant dealt with the $500,000 that came from the cash withdrawal made by the first defendant.

48. Whilst there was a background that connected the fourth defendant to Asia (Hong Kong) Finance, to the book exhibit 16 and to the other defendants, there was not sufficient evidence in my judgment to infer for sure that he knew he was dealing with the proceeds of an indictable offence. He probably did know but I could not be sure of it. Likewise the evidence would not have allowed me to infer that he believed this to be so. Whilst I could infer that he must have known that he was dealing with some 'dirty money', it could reasonably have been funds earmarked for investment in crime as opposed to its proceeds, especially in a case concerned with moneylending.

49. However, the question of whether the fourth defendant believed he was dealing with the proceeds of an indictable offence did not arise here.

The question was whether he had reasonable ground to believe that he was doing so. 42

50. To answer the question involves two stages. Firstly one asks objectively whether reasonable grounds existed for the belief. If they did then one goes on, secondly, to ask subjectively whether the defendant was aware of the existence of those reasonable grounds.

51. To be given a sum as large as $500,000 in cash and to be asked to keep it temporarily, without further explanation, when you do not know how the money was obtained would prompt a reasonable man to ask himself what was going on. I further judged that a reasonable man would, after only a little thought, come to the conclusion that:

- It was the proceeds of crime.
- It was for investment in crime.
- It was to be hidden from creditors.
- It was to be hidden from the taxman.
- It was to be hidden from a spouse.

There is some overlap in these categories and it may be that greater imagination may add further categories. However, I judged that in the absence of an explanation (and I stress that) these are the matters that must come to the mind of a reasonable man.

52. The fourth defendant did not give evidence. I thus have no direct evidence of what was in his mind at the time. I am obliged to infer it. He appears to be an adult of sound mind. There is no suggestion or evidence that there is anything wrong with him. In those circumstances I naturally inferred that his state of mind was the same as that of a reasonable man.

53. I thus inferred that he was aware that the explanation for his being asked to deal with so much cash had to be one or more of the above listed matters. That is because there were reasonable grounds to infer so.

54. Does the fact that there were reasonable grounds to believe a limited

number of scenarios mean that the defendant did not have reasonable ground to believe in any one of them? To pose the question is really to answer it, it seems clear to me that when an event can reasonably be explained on the basis of a few grounds, the man contemplating the issue holds reasonable ground for belief in them all. By using the term 'having reasonable grounds to believe' the draughtsman and the legislature clearly made a conscious departure from the old phrase 'knowing or believing'. The effect it to make the offence a wide one. It means that people who deal in cash in circumstances which produce the limited list of inferred explanations as arises here are caught by the section. Another way of putting it is that the words of the section are aimed at condemning the man who reasonably foresees that he may be dealing in the proceeds of an indictable offence yet nonetheless goes on to do it. I do not consider that such a man was not within the sights of those who promoted the Organised and Serious Crimes Ordinance.

55. I have already discussed the *mens rea* as it affects a defendant's knowledge of what an indictable offence is when dealing with the first defendant. It is difficult to imagine the proceeds of a summary offence giving rise to the handling of cash in amounts as large as $500,000. Hawking may just make the grade, but the fact that it is possible to find an example of a summary offence as providing a possible explanation for a man's dealing with such cash, does not remove from that man's mind his awareness that reasonable grounds existed to believe that the cash was the proceeds of an indictable offence. Also it matters not that the reasonable ground for belief cannot be demonstrated to attach itself to a particular indictable offence, as the section is satisfied if a defendant has reasonable ground to believe that he deals with the proceeds of any conduct which would support an indictment.

56. It thus follows that I was sure that there were reasonable grounds to believe this $500,000 was the proceeds of an indictable offence and that I was sure that the fourth defendant had that in mind. I rejected the idea that a man could be given this much cash in these circumstances and not direct his mind as to what was going on, (unless he already knew).

57. The only consideration that remains in relation to the case of the fourth defendant touches upon any explanation that the first defendant may have given him. One of the many submissions made by his counsel was that first defendant may have told him anything. What the fourth defendant said to the police was this:

> "Ah Sir, it really is the case that my friend Ho Sui yan told me to keep this sum of money temporarily for her. When required I would return the money to her. However, I do not know how she has obtained the money."

58. That account, though brief, is what he chose to say. He declined, as was his right, to say more. By this time his nephew had been arrested in the Mainland and his friend and nephew's cohabitant, the first defendant, had herself been arrested and released on bail. I have no doubt that if there was any self serving explanation of importance available to the fourth defendant he would have incorporated it into his account. It places no burden upon him to point out that if, contrary to his brief account of just being told to keep the money temporarily, he was told something else that he was quite at liberty to say so in his trial. I have no doubt that a Judge could properly make such a comment to a jury in a case like this, having of course given them the usual warning direction that a failure to give evidence was no indication of guilt.

59. I did not forget the evidence that the fourth defendant had a clear criminal record. However, the considerations I have just rehearsed proved to me that he had reasonable ground to believe that the half a million dollars in cash that he dealt with was the proceeds of an indictable offence.

60. I did not forget to apply the criminal burden and standard of proof in reaching my verdicts or to deal with the cases of the defendant separately.

Annex B

CACC000744/1995

IN THE COURT OF APPEAL

1995, No. 744
(Criminal)

- Headnote -

Assisting another to retain the benefit of drug trafficking - Meaning of the words "concerned in an arrangement" in s25(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance, Cap 405 - By the operation of s4(1)(a) the ambit of "the relevant person's proceeds of drug trafficking" in s25(1) is widened to include the proceeds of drug trafficking of others.

Observations (Court of Appeal) on the statutory scheme and on whether the indictment was bad for duplicity, by alleging more than one offence in each count.

IN THE COURT OF APPEAL

1995, No. 744
(Criminal)

BETWEEN

THE QUEEN	Respondent
AND	
LO CHAK MAN	1st Applicant
TSOI SAU NGAI	2nd Applicant

Coram: Hon Litton, V.-P., Mortimer and Mayo, JJ.A.

Date of hearing: 10, 11, 14, 15, 16, 17 October 1996

Date of delivery of judgment: 7 November 1996

JUDGMENT

Litton, V.-P. (giving the judgment of the Court):

Introduction

Each of the two applicants was convicted on one count of assisting another to retain the benefit of drug trafficking, contrary to Section 25(1)(a) of the Drug Trafficking (Recovery of Proceeds) Ordinance, Cap 405, after a trial in the High Court before Bewley J and a jury lasting from February to the end of October 1995. They were sentenced to 12 years' imprisonment. Questions of law arise on the appeal. The matter has been fully argued by counsel. Accordingly we give leave to appeal under s82(2)(b) of the Criminal Procedure Ordinance, Cap 221 and deal with counsel's submissions as on a substantive appeal.

The statutory scheme

The Ordinance under which the appellants were convicted came into force on 1 December 1989. The object of the new law was to "provide for the tracing, confiscation and recovery of the proceeds of drug trafficking, to create the offence of assisting drug traffickers to retain those proceeds, and for incidental or related matters": see the long title to the Ordinance.

"Drug trafficking" is widely defined. It not only includes a number of specific offences provided for in the Dangerous Drugs Ordinance but also:

> "entering into or being otherwise concerned in, whether in Hong Kong or elsewhere, an arrangement whereby -
>
> (i) the retention or control by or on behalf of another person of that other person's proceeds of drug trafficking is facilitated: or
>
> (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at that other person's disposal or are used for that other person's benefit to acquire property by way of investment": Section 2(1).

Section 25, where relevant, provides:

> "*25. Assisting another to retain the benefit of drug trafficking*

(1) Subject to subsection (3), a person who enters into or is otherwise concerned in an arrangement whereby-

(a) the retention or control by or on behalf of another ('the relevant person') of the relevant person's proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise);

....

knowing or having reasonable grounds to believe that the relevant person is a person who carries on or has carried on drug trafficking or has benefited from drug trafficking, commits an offence.

(2) In this section, references to any person's proceeds of drug trafficking include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of drug trafficking."

Thus, it can be seen that so long as the proceeds, to which the "arrangement" relates, are partly the proceeds of drug trafficking, they come within the scope of s25(1). The Ordinance is silent as to what is meant by "*partly*": This is a question left to the jury to decide.

As regards "proceeds of drug trafficking" in s25(1), the net is cast very wide. Section 4(1) of the Ordinance says:

"4. *Assessing the proceeds of drug trafficking*

(1) For the purposes of this Ordinance -

(a) any payments or other rewards received by a person at any time (whether before or after the commencement of this Ordinance) in connection with drug trafficking carried on by him or another are his proceeds of drug trafficking..."

As will be seen later on, the proper construction of s4(1)(a) constitutes an important point in this appeal.

The indictment

The indictment, as it was first laid, simply averred that each of the two appellants (D1 and D2):

"between the 6th day of December, 1989 and the 19th day of December, 1989 in Hong Kong, was concerned in an arrangement whereby the retention or control of another namely LAW Kin-man's proceeds of drug trafficking was facilitated, knowing or having reasonable grounds to believe that the said LAW Kin-man was a person who carried on or had carried on drug trafficking or had benefited from drug trafficking."

Particulars were sought by the defence and eventually, as against D1 his participation in the arrangement was said to have been in respect of (i) US$4,713,861.65 in the account of Valoria Investment Ltd. with Nomura, and (ii)

US$459,599.71 in the same account.

In relation to D2, his participation in the arrangement was in respect of (i) US$1,156,947.97 in the account of Mabel Chun with the Bank of Credit and Commerce, San Po Kong Branch, (ii) HK$596,980.85 in the same account with the same branch, (iii) HK$6.5m in the account of Pearl Lau Siu Chu with the same bank in the same branch and (iv) HK$600,000 in the account of Sung Tin Biu with the same bank, Kowloon City Branch.

Background facts

The person referred to in the indictment, Law Kin Man, was engaged in drug trafficking on a massive scale prior to his arrest in December 1989. At the trial, the evidence of a drug trafficker Yuen Ho-yin was adduced to the effect that in the second half of the year 1987 alone 316.5 kgs of heroin were passed to Law Kin Man, obviously for re-distribution, with an estimated cost price of US$24-odd million. Obviously, evidence of this nature is extremely difficult to obtain. Yuen Ho-yin was only a cog in the wheel: his "boss" was one Jackie Wong Kwong Kit who did not testify. The inference is inevitable that apart from Law Kin Man's acquisitions of heroin through Yuen, there were other large-scale dealings as well.

Law Kin Man had scores of accounts with banks and other financial institutions: many with the Bank of Credit and Commerce (BCC): all in the names of friends, associates, nominees, offshore companies or fictitious names. Many of those accounts were opened with no proof of identity or with false documentation. Many of the accounts in the BCC were operated by the application of a chop.

As regards the funds in the name of Valoria Investment Ltd. with Nomura averred in count 1, and in the respective names of Mabel Chun, Pearl Lau Siu Chu and Sung Tin Biu with the BCC averred in count 2, a tracing exercise had been performed by a chartered accountant Mr James Wardell. It shows funds in very substantial amounts moving into and out of the scores of Law Kin Man - controlled accounts in a bewilderingly complicated fashion: short-term fixed deposits would be rolled over for a few months and then merged with other accounts; cash would come in and cash would go out. When movements of moneys between accounts in different names were made, false documents would be created to show cash withdrawals and cash deposits: to disguise the provenance of the money.

The sums withdrawn from Valoria's account with Nomura eventually went to a Mr Fung in Taiwan through the agency of a Law Kin Man - controlled company called Homer Trading Company. The sums withdrawn from the various BCC accounts averred in count 2 were eventually also transferred to Mr Fung in Taiwan, through the agency of two Law Kin Man - controlled companies: Homer Trading Company and a company called Fu Kua Sun.

D1 and D2's involvement with Law Kin Man

D1 is Law Kin Man's younger brother. Before his arrest on 19 December 1989 D1 operated a hair-dressing salon. Some time in the past, he also speculated in shares. In the October 1987 share-market crash D1 lost heavily in the stock market and had to be "rescued" by a loan of $1m from Law Kin Man. D1 was a nominee shareholder and director in a number of Law Kin Man companies: Valoria,

Andermat, Anwide. In such capacity, D1 had signed many documents, sometimes in front of bankers and solicitors. He also signed documents like account opening forms, agreements for the operation of nominee accounts, company resolutions, tax returns etc. In relation to Valoria, he had signed a letter to Bankers Trust Nominees which stated: "It is co-beneficially owned by me". There was much evidence before the jury to indicate D1's close relationship with Law Kin Man's financial affairs. In October 1987 D1 went with YY Chan, the Group Manager of BCC, to Singapore. This was in relation to another nominee company Bismark in which D1 was a nominal shareholder and legal documents had to be signed in Singapore, in front of solicitors. As regards Valoria itself, there was evidence to the effect that D1 had attended a meeting in 1988 with a Mr Brewer of Bankers Trust concerning shares held in the bank nominee's name: D1 signed some documents at that meeting, after a brief explanation of their contents. In August 1989 D1 (the sole signatory on the Valoria account with Nomura) attended a lunch meeting at Nomura, organised by a senior Japanese director for the purpose of meeting the account holder: Valoria shortly before then had opened a margin account with Nomura for the purpose of trading in foreign exchange transactions. D1 had, of course, signed the documents for that purpose as well. Law Kin Man was present at the lunch meeting, as was his "manager", Chong Khin Loke.

Chong, in his testimony, expressed the opinion that D1's English was of a "kindergarten standard", and that he did not know what he was signing. However, this was not supported by any evidence from D1 himself, for he never testified at his trial, and the jury was entitled to treat Chong's opinion with some cynicism. D1's close association with Law Kin Man is also evidenced by the fact that when he was arrested at 6.10am on 19 December 1989, he was found sleeping in Law Kin Man's bedroom at his (Law Kin Man's) home in Sai Kung. In the same room were found copies of letters signed by D1 addressed to Bankers Trust Nominees.

D2's involvement with Law Kin Man's affairs

For years D2 was heavily involved in Law Kin Man's movements of money into and out of the scores of accounts in nominee names. He had a desk in the offices of Anwide - a Law Kin Man controlled company - and one of his functions was to input the amounts held on fixed deposits into the office computer.

As regards the withdrawals from the accounts particularised in count 2, the facts established at trial were as follows:

(i) In relation to the sum of US$1,156,947 withdrawn from the Mabel Chun account and transmitted to Fu Kua Sun by telegraphic transfer, the application form was delivered to the San Po Kong Branch of the BCC by D2.

(ii) In respect of the HK$596,850.85 withdrawn from the Mabel Chun account at the same branch, banknotes totalling $600,000 in cash were handed over, and the account closed, after D2 had told the Assistant Manager Leung Hing Sang that he wanted to take all the funds out of the account. The authorisation was in the form of a chop of the signature of Mabel Chun. D2 had brought that chop with him to the branch. He took away the cash.

(iii) As regards the withdrawal of HK$6.5m from the Pearl Lau account,

the telegraphic transfer application form, instructing the BCC San Po Kong Branch to transfer the funds to Homer Trading Company, was given by D2 to the Assistant Manger Leung Hing Sang on 14 December 1989.

(iv) As regards the cash withdrawal of HK$600,000 from the Sung Tin Biu account at the BCC Kowloon City Branch, this was taken away by D2 on 11 December 1989, after D2 had telephoned the manager of that branch from the San Po Kong branch.

The "arrangement"

As can be seen from s25(1) of the Ordinance, a person commits the statutory offence by entering into or being otherwise concerned in an arrangement having the effect as provided for in paragraph (a) or (b) of ss(1). The "arrangement", as established at the trial, was simply this: Law Kin Man's sister Sybil Law Wai Wah played a pivotal role in his affairs; she had replaced Chong as Anwide's manager in October 1989; within hours of Law Kin Man's arrest, she took steps to contact, directly and indirectly, the key persons in BCC - such as the Group Manager YY Chan - to have the sums in the various Law Kin Man-controlled accounts held in the various branches of the BCC to be withdrawn and taken out of the reach of the Hong Kong authorities. She also gave instructions to Chong to call Stephen Leung, the Manager of Nomura, to liquidate all positions held in the Valoria account. The Crown's case was quite simply that by such an arrangement the retention and control of those assets by Law Kin Man was facilitated: by the acts particularised in counts 1 and 2 of the indictment, D1 and D2 had concerned themselves in the arrangement, knowing or having reasonable grounds to believe that Law Kin Man had carried on drug trafficking or had benefited from drug trafficking.

Knowing or having reasonable grounds to believe that Law Kin Man had carried on drug trafficking

The inference that D1 and D2 had grounds to believe, before the uplift of funds from the accounts, that Law Kin Man had carried on drug trafficking was not hard for the jury to draw. D1's wife was at the airport with Law Kin Man when he was arrested and it soon became a notorious fact that Law Kin Man was wanted in the USA for drug trafficking. Neither D1 nor D2 testified at the trial as to their own knowledge or belief. The evidence was all one way.

Duplicity

It was submitted on behalf of the appellants that both counts of the indictment were duplicitous, in that count 1 alleged two separate arrangements against D1 and count 2 alleged four separate arrangements against D2. We reject this argument. As we have said earlier, the indictment as originally drafted merely alleged an arrangement whereby the retention or control of Law Kin Man's proceeds of drug trafficking was facilitated, with no particulars as to how the Crown alleged that such retention or control was facilitated. The essence of the offence in each count was the appellant's concern in the arrangement, whereby the retention or control of the proceeds of drug-trafficking was facilitated. Later, this was particularized. The two "uplifts" averred in the amended count 1, and the four "uplifts" averred in count 2, merely gave particulars of how, by the arrangement averred, the retention or control of drug money was facilitated. The

amended indictment was not happily worded, but no one at the trial could possibly have been misled. Properly understood, each count alleged one distinct offence and the rule against duplicity was not infringed.

"Concerned in an arrangement"

Clearly, before the question of the defendants' guilt can be considered, there must be evidence that they were concerned in an arrangement whereby the retention or control of the relevant person's proceeds of drug trafficking was facilitated. Section 25(1) aims at the person who "enters into or is otherwise concerned" in such an arrangement. This connotes a conscious act. As far as D2 was concerned, he was so heavily implicated in the arrangement that, at the trial, no submissions were made on his behalf that he did not know what he was doing. The submission made on D2's behalf was one of law: s25(1), properly construed, required the Crown to prove beyond a reasonable doubt not only that D2 had performed a conscious act, but also this: when D2 entered into the arrangement by effecting the four "uplifts" particularised in count 2, he knew that the retention of Law Kin Man's proceeds of drug trafficking was thereby facilitated. We will need to revert to this argument in greater detail later.

As regards D1, the argument is more subtle. To fully understand the point advanced by Mr Griffiths QC on D1's behalf, it is necessary to focus on the judge's summing-up to the jury. At p4 - C, the judge said:

> " So the Crown must prove firstly that the sums in the indictment are LAW Kin-man's proceeds of drug trafficking. Secondly, that the defendants knew or had reasonable ground to believe that LAW Kin-man carried on drug trafficking. Thirdly, that the defendants were concerned in an arrangement whereby retention or control by or on behalf of LAW Kin-man of his proceeds of drug trafficking, were facilitated."

So far, the summing-up is impeccable. When it came to applying the words "concern in an arrangement", in terms of s25(1)(a), the judge directed the jury as follows (at p34-I to S):

> "Now, this is relatively new legislation and it is Draconian legislation which is aimed at preventing drug traffickers getting away with their ill-gotten gains. It aims to sweep up anyone who, with knowledge of the drug trafficker's activities, gets involved in that man's schemes to deal with the proceeds. It then provides a defence for them to establish the probability that they did not know or suspect the nature of their involvement. I direct you that in these circumstances, once the Crown has proved the defendants' involvement in, for example, signing documents authorising an uplift, or carrying documents or money, it need not go on to prove that the defendants knew the significance and the purpose of their actions. That is a matter of defence."

Mr Griffiths QC submits that where the judge told the jury that the prosecution did not "need to go on to prove that the defendants knew the significance and the purpose of their actions" this was a misdirection. It suggests that the words "concerned in an arrangement" are so wide that no conscious act had to be proved:

so that if someone was duped into signing an authorisation to transfer money, the actus reus of the crime in s25(1)(a) would still have been proved.

In the case of D1, his "concern in the arrangement" was no more than this: on Monday 11 December 1989 he went along to the offices of Nomura with Law Wai Wah: the letter giving Nomura instructions to remit US$4.7m out of Valoria's account had been typed up in advance and it was signed by D1 (in English) above the typed words "yours sincerely" in front of Stephen Leung the Manager. (At the hearing, there were some doubts as to whether D1 arrived at Nomura's office with Law Wai Wah, or went along a few minutes later. Clearly, nothing turned upon this point of detail.) As regards the withdrawal of the balance in Valoria's account on 18 December 1989 - after the liquidation of the balance of Valoria's positions - the letter of instructions was typed by the staff at Nomura on Law Wai Wah's instructions; she took it away unsigned and returned with it signed by D1.

At the hearing, there was a submission of no case to answer made by counsel (not Mr Griffiths QC) on D1's behalf. It was a lengthy submission, not focussed on the point which Mr Griffiths QC now urges on behalf of D1: namely, that unless the act of signing is a conscious act, related to the transaction in question, it cannot be said that D1 has been concerned in an arrangement of any kind.

In our judgment, Mr Griffiths' argument is correct. A person cannot enter into an arrangement or be concerned in an arrangement, in terms of s25(1), as an automaton: his act must be a conscious act. Does this mean that the jury was misdirected on this point?

At trial, counsel did not go so far as to submit that D1 was a mere automaton, wholly unconscious of the nature of his acts. To do so would have destroyed all credibility in the eyes of the jury. So counsel danced around the point, without real engagement. It was submitted that Law Kin Man only gave instructions to D1 on a "need to know" basis; that D1 "didn't want to know"; that D1 merely signed without knowing what he was signing: he was a mere hair-dresser; his command of English was "kindergarten standard". But the one person who could have spoken directly about D1's state of mind - D1 himself - never testified.

The evidence at trial was overwhelming. As to the events leading up to D1's presence in Nomura's offices on Monday 11 December 1989 and signing the letter of instructions exhibit P105, the evidence was this: On the evening of Thursday 7 December 1989 Law Kin Man was at Kai Tak airport together with D1's wife and his brother Herman, awaiting the arrival of his wife and children on a flight from Sydney. It was there that Law Kin Man was arrested. Within less than two hours of Law Kin Man's arrest, D1 had received a phone call from Law Wai Wah.

D1 was the sole signatory on Valoria's account at Nomura. Any dealings with that account therefore required his signature. He personally attended at Nomura's office on Monday 11 December and appended his signature in front of the manager Stephen Leung. In these circumstances, it would have been absurd to suggest to the jury that D1 was not conscious of the fact that he was operating that account by his signature, to transfer money. Indeed, counsel did not in terms so suggest.

The focus of the argument on behalf of D1 in the court below was therefore similar to that on behalf of D2: that mens rea is an essential ingredient of every offence, unless it is expressly ruled out by clear words in the statute:

therefore the prosecution had to prove not only the acts amounting to "being concerned in an arrangement" but also the knowledge that by such arrangement the retention or control by or on behalf of Law Kin Man of his proceeds of drug trafficking was facilitated.

In our judgment, the judge was right to reject this argument. It puts the statutory scheme on its head. Under s25(1) what the prosecution had to prove was that, at the time the defendant was concerned in the arrangement involving the retention or control of the proceeds of drug trafficking, he had at least reasonable grounds to believe that the relevant person (Law Kin Man) had been involved in drug trafficking. That is the extent of the guilty knowledge the prosecution had to prove. Once this threshold has been surmounted, the defendant is then thrown back upon his defences in s25(4) which provides:

> "In proceedings against a person for an offence under this section, it is a defence to prove -
>
> (a) that he did not know or suspect that the arrangement related to any person's proceeds of drug trafficking: or
>
> (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of the relevant person of any property was facilitated."

This construction of s25(1) is entirely consistent with Lord Woolf's judgment in Attorney General of Hong Kong v. Lee Kwong Kut (1993) AC 951 at p964.

Bewley J's choice of words - the Crown need not prove that the defendants "knew the significance and purpose of their actions" - was unfortunate and taken in isolation was misleading. But, in the light of the clear evidence and in the context of the summing-up as a whole, the judge did not misdirect the jury as regards the ingredients of the offence under s25(1).

Proceeds of Law Kin Man's drug trafficking

By the nature of the activities concerned, direct evidence of Law Kin Man's drug trafficking in the United States would have been virtually impossible to obtain. As it was, there was testimony before the jury from Yuen Ho Yin, a self-confessed drug trafficker, covering part of the calendar year 1987. According to Yuen Ho Yin, his first dealings with Law Kin Man commenced in December 1986 when, on the instructions of his "boss" Jackie Wong Kwong Kit, he handed to Law Kin Man two suitcases with US$300,000 cash in each, in a restaurant in New York. There were other occasions in 1987 when large sums in cash were handed over to Law Kin Man. These were the proceeds of drug trafficking of Yuen and Jackie Wong; the object of handing the money over to Law Kin Man was for the purpose of "laundering": having the money passed through a series of accounts to disguise their origin. In other words, there was evidence before the jury to the effect that Law Kin Man did have, within his control, at various times, the proceeds of other people's drug trafficking - not simply his own.

Yuen was arrested in the USA in December 1987. Obviously, therefore, Yuen's dealings in drugs with Law Kin Man ceased at that point. However, on the whole of the evidence before the jury, the inference was irresistible that Law Kin Man's

own drug trafficking never ceased, but continued right through until December 1989 when he was arrested.

The prosecution was able to establish at the trial, through Mr Wardell's painstaking analysis of the accounting documents seized by the police, that a "tidal wave" of money swept through the Law Kin Man-controlled accounts for the three years commencing December 1986. The amounts involved were enormous: US$84.3m, plus HK$60m. Since the direct evidence from one drug trafficker alone showed that Law Kin Man was drug trafficking on a huge scale, the inference was irresistible that the greater part of the "tidal wave" sweeping through Law Kin Man's accounts represented the proceeds of his own drug trafficking: though, somewhere within the huge flow of funds, there would have been the proceeds of drug trafficking of others. But, in the murky world in which Law Kin Man operated, who precisely were his accomplices, and what was his slice of the proceeds, were matters on which no evidence could reasonably have been forthcoming.

When the prosecutor opened his case to the jury this is what he said:

> "What are Law Kin Man's proceeds of drug trafficking? Any payment or other reward received by Law Kin Man in connection with drug trafficking carried on by Law Kin Man or another. Law Kin Man's drug trafficking or that of another are Law Kin Man's proceeds of drug trafficking .... the money must the Law Kin Man's proceeds of drug trafficking, that can come about because of Law Kin Man's own drug trafficking or that of another."

In this regard, the prosecutor relied upon the provisions of s4(1)(a) of the Ordinance which reads:

> "4. *Assessing the proceeds of drug trafficking*
>
> (1) For the purposes of this Ordinance -
>
> (a) any payments or other rewards received by a person at any time (whether before or after the commencement of this Ordinance) in connection with drug trafficking carried on by him or another are his proceeds of drug trafficking;"

No one at the trial demurred regarding this view of the law until the prosecution had closed its case. It would appear that, from February right through to October 1995, everyone in court accepted that the prosecutor was right on his interpretation of s4(1)(a). This view is consistent with the approach of the English Court of Appeal in R. v. Osei (1988) 10 Cr.App.R.(S) 289 where, in considering the effect of s2(1) of the Drug Trafficking Offences Act, 1986 - a provision virtually identical to s4(1) of the Ordinance - the English Court of Appeal held that "any payments" in the section are not confined to payments in the nature of rewards to the drug trafficker. "Any payments" means any payments.

If this construction of s4(1)(a) be correct, the practical effect is this: there was no need for the jury to unravel the various streams of money which ultimately found their way into the accounts averred in the indictment: what was withdrawn from those accounts, on any view of the matter, must have been in part at least the proceeds of drug trafficking, for the purposes of s25(2) of the Ordinance.

There was some evidence of a shadowy nature to the effect that Law Kin Man was a "money man", having his fingers in many pies. Astonishingly, Superintendent Yip, the officer in charge of the case, was allowed by the judge to be drawn in the course of cross-examination into expressing such an opinion: How his opinion on such a matter was admissible in evidence is beyond understanding. Chong, Law Kin Man's "manager", also expressed views to similar effect - with no particulars of any kind. What it therefore boils down to is this: assuming that the scope of s1 (1)(a) be as broad as contended for by the prosecution, it was inevitable that the jury should conclude upon the evidence that the bulk of the US$84.3m and HK$60m flowing through Law Kin Man's accounts represented the proceeds of drug trafficking, in terms of s25(1).

Submission of no case to answer

At the conclusion of the prosecution case, lengthy submissions were made by counsel that there was no case for the defendants to answer. One of the points taken was to the effect that s4(1)(a) only applied to moneys which represented the proceeds of Law Kin Man's own drug trafficking or some reward he had received for "laundering" other drug traffickers' money. There were other arguments advanced in support of the submission of no case.

The judge ruled that the defendants did have a case to answer, but gave no reasons. He gave no ruling as to the proper construction of s4(1)(a).

Defence counsel never sought a ruling from the judge at that stage. Both defendants elected not to give evidence and the sole witness called for the defence was an accountant, Mr Morris.

"Clarification" from the judge

After the defence had closed its case, and just before the prosecutor was about to make his closing address to the jury, counsel for D2 asked the judge how he proposed to direct the jury as to the definition of "proceeds of drug trafficking" in s4(1)(a). The judge seemed reluctant to be drawn. At one point he said:

> "I shall read them the words of the section".

The judge was then reminded of the submissions made earlier and, referring to Law Kin Man he said:

> "If he's not received any reward then he doesn't come within the definition."

In other words, for the purposes of s25(1) the "proceeds of drug trafficking" were, in the eyes of the judge: (i) the proceeds of Law Kin Man's drug trafficking: and (ii) any *commission or reward* Law Kin Man might have received for "laundering" other drug traffickers' proceeds.

Final stage of the trial

All this occurred in the space of about five minutes. The jury was then brought into the courtroom and the prosecutor immediately began his closing speech. Final

addresses for the defendants followed. The judge began his summing-up on the morning of 25 October 1995 and this continued all day, until 4.15pm. By that time the summing-up had almost finished. Just before the court adjourned, the judge invited counsel to pick up on points they felt had been overlooked or mis-stated. The case was then adjourned to 10am the next morning.

Overnight, the prosecutor prepared a written submission on the proper construction of s4(1)(a). He drew the judge's attention to the wide interpretation of the words "any payments" given by the English Court of Appeal to the same words appearing in s2(1) of the Drug Trafficking Offences Act, 1986. When the judge appeared in court the next morning (26 October) the written submission was handed up to the judge. Defence counsel did not refer to it (having only just then received a copy) and addressed the judge on other unrelated issues. The judge then retired, taking away the written submissions.

At 11.56am the court reconvened, with the jury present. The judge then said to the jury:

> "COURT: Good morning, members of the jury. Counsel have been able to put me right on a number of matters on which I may have misled you. The first is a very important matter concerning the meaning of the term 'payment or other reward.' I had not been referred to the English cases on the meaning of these words - at least I don't think I was - which makes it very clear that payment means any payment, whether by way of reward or in some other way, in connection with drug trafficking. The words 'other reward' mean rewards in some form other than payment, for instance, an air ticket with a view to a free holiday."

No-one from the Bar made any observations regarding this U-turn and shortly thereafter the judge completed his summing-up and the jury retired to consider their verdict.

Relevance of the judge's change of direction

In the course of his summing-up the judge had earlier said this to the jury:

> "Now, you may approach Mr WARDELL's evidence from two points of view. The Crown invites you to draw the inference that all the money in the LAW Kin-man accounts is drug money, even if not all was received by LAW Kin-man by way of reward. He submits that some at least of the uplifted monies, would be LAW Kin-man's proceeds of drug trafficking. And he does so on the following basis: firstly, that LAW Kin-man was a large scale drug wholesaler in New York from 1986 to 1989. Vast sums point to drug trafficking. No other business, legitimate or otherwise, produces such profits and LAW Kin-man would not be handling drug money without reward. But he was primarily a wholesaler, not a launderer. Again, the nature of the accounts. Mr Lunn points to the concealment aspect, even the false name for his sister's account way back in 1982. The free interflow between all the accounts. The pattern of many opening accounts in false names and then the money flowing into mainline accounts. Money laundering on an enormous scale. Then he mentioned the sea change, as he put it, that occurred in 1987, when the LAW Kin-man accounts were swamped by a 'tidal wave' of money. And this coincides

with YUEN'S evidence and the Piano deposits. There was also the fact that drugs were bought on credit and payment made to Jackie WONG in Hong Kong or Taiwan, which indicates a long-standing relationship and trust. And finally, the involvement in Hong Kong with suspected traffickers such as Sam Ho and Johnny ENG.

Well, members of the jury, you will ask yourselves, is there any evidence pointing the other way, that it is not derived from drug sales? Witnesses have said that LAW Kin-man had a finger in many pies in America, hotels, gambling, real estate. There is evidence, mainly from CHONG, that LAW Kin-man was investing in money belonging to American friends for the purposes of tax evasion. But there is no documentary evidence that the money had come from a legitimate source, or indeed, from any particular source - legal or illegal. There is no evidence such as the cheques found on LAW Kin-man's arrest suggesting he was engaged in illegal bookmaking in Hong Kong in 1984.

Well, if you find that it is all drug money, mostly in the form of reward to LAW Kin-man and that therefore, the uplifts in the indictment contain Law Kin-man's proceeds of drug trafficking, that would mean that you would not have to consider the disputed aspect of Mr WARDELL's evidence regarding the weighted average, and Mr MORRIS' evidence. But you may feel, having regard for the evidence, that LAW Kin-man was known as a money man and that he was evading taxes for friends; that you are unable to draw that inference. Or that a greater proportion might be somebody else's drug money, in other words, not a reward to LAW Kin-man. He was getting up to 61/2 per cent on YUEN's money which he sent to Hong Kong. In that case, you would have to concentrate on the Wallon account. You will probably have little difficulty in deciding that this 11.6 million is all LAW Kin-man's proceeds of drug trafficking.

Tracing the flows on the charts down from the Piano deposits to the uplifts in the indictment, we lose large amounts of money. They are withdrawn and they disappear. Even larger amounts come in the form of money orders, cheques, TT's and cash deposits. Much of this is also withdrawn. The equivalent of some US$93 million is paid in between December 1986 and 1989, some US$9 million and some HK$8 million remain. Mr WARDELL has traced direct lines upwards from each uplift in the indictment to some of the Piano deposits. You can do it yourselves. I have done it, I calculate the number of direct trails as follows: in the Valoria 4.7 million, there are two trails: the Valoria 459,000, four trails; the Mabel CHUN, US dollar account, one trail; the Mabel CHUN, Hong Kong dollar account, four trails; the Pearl LAU account, three trails and SUNG Tin-biu, six trails. There may be others."

Here, as can be seen, the judge was in effect directing the jury on the basis that "proceeds of drug trafficking" in s25(1) of the Ordinance were confined to (i) Law Kin Man's own proceeds and (ii) any rewards he might have received for "laundering" other person's proceeds.

If this was an error, it was an error favouring the defendants. It excluded from the scope of the charge the proceeds of, say, Jackie Wong Kwong Kit or Yuen Ho

Yin: the suitcases full of US$ notes which were handed to Law Kin Man in New York and found their way into Law Kin Man's accounts: at least, to the extent that the sums in those accounts were not simply Law Kin Man's commission for the laundering.

This trail of drug-money was real, not illusory. What was illusory were things like the supposed "tax evasion" moneys on which there was the most shadowy of evidence. But with this stream being in effect excluded, except such part as might be regarded as Law Kin Man's commission for laundering other people's money, the judge was constrained to perform before the jury an accounting exercise: pulling out of the vast web of money movements those streams which the judge felt pointed directly to Law Kin Man's proceeds of drug trafficking: directly, that is, as opposed to something which arose by necessary inference from all the circumstances. Hence the reference in the summing-up to "Piano" and the "Wallon account": these were moneys which were deposited in cash into a remittance company called Piano Remittance Company, and channelled through a nominee company called Wallon Trading. It was accepted by the defence that the Wallon deposits with Piano were Law Kin Man's proceeds of drug trafficking.

If the judge had treated the proceeds of *other persons* drug trafficking as coming within the scope of s25(1), then the trail through the accounts such as Wallon Trading, tracing the proceeds, or part of them, into the accounts averred in the indictment would have been unnecessary.

The judge's about-turn, coming at the end of his summing-up, is unquestionably an irregularity at the trial. What we have to consider is whether it is of such seriousness as to impeach the jury's verdict. The answer to this question is governed, in the first place, by the proper construction of s4(1)(a). Obviously, if "other payments" do not include the proceeds of drug trafficking by other persons, then the jury was misdirected on the law and these appeals must be allowed.

Proper construction of s4(1)(a)

In our judgment, the construction contended for by the prosecution is the correct one. Both s4 and the broad definition of "drug trafficking" in the Ordinance make it clear that the Ordinance is not only aimed at the drug trafficker himself: it seeks to include the proceeds of other drug trafficking activities within the net. The opening words of s4 make it clear that the assessments referred to in the section are for the purposes of the Ordinance as a whole and not simply for the purposes of s25(1): for instance, confiscations under s6. To confine the words "other payments" in s4(1)(a) to payments in the nature of rewards, commissions etc to the drug trafficker would seriously weaken its effect: it would be extremely difficult to determine what are rewards and what are not in the hands of the drug trafficker. This approach is entirely consistent with that of the English Court of Appeal in R. v. Ian Smith (1989) 11 Cr.App.R. (S) 290 which concerned the powers of the court to make a confiscation order. There, the court held that the words "any payments" are to be given their ordinary meaning and does not mean payment after the deduction of expenses. As the court observed at p294:

> "It may be that the wording is draconian, and that it produces a draconian result. But it seems to us that if that is the case, it was a

result intended by those who framed the Act."

Accordingly, the subsequent direction given by the judge, at the end of his summing-up, was in our judgment the correct one. His earlier interpretation was wrong: an error which favoured the defendants.

Have the appellants been prejudiced?

The question then arises: What prejudice has the defence suffered? Obviously, no complaint can be made of the course of the trial up to the stage when defence counsel sought clarification from the judge, after the close of the defence case. Up to that point, the entire case had been fought on the basis of the prosecutor's opening. Understandably, the cross-examination was aimed at exploring the fringe areas of Law Kin Man's activities: the possibility that he might have been some sort of "money man": laundering money for others in connection with "tax evasion", gambling and similar activities: Understandably, these were defence counsel's attempts to distance Law Kin Man from his own drug trafficking and the drug trafficking of others.

Counsel has argued that prejudice, or the possibility of prejudice, arises in two ways: (1) the defence might have considered recalling some of the witnesses for further cross-examination, and calling the defendants themselves to testify, and (2) the closing speeches to the jury might have been different if the judge had stated his view of the law at an earlier stage.

As to (1) above, it is difficult to imagine what the defence might have done differently if the ruling had been made at an earlier stage. It was the case for both defendants that, despite their close involvement with Law Kin Man's affairs, they knew next to nothing about the nature of his business activities. It is highly improbable that they could have given any admissible evidence concerning Law Kin Man's activities outside of drug trafficking. If there was such evidence, it seems odd that it was not adduced. As regards the cross-examination of prosecution witnesses, the judge had given defence counsel very wide latitude to explore the peripheral areas: to very little effect. Some of the latitude given - such as cross-examining Superintendent Yip on such matters - was unjustified, and it is difficult to imagine greater latitude being given had the proper ruling been made at an earlier stage.

As regards (2) above, it is difficult to imagine what else might have been said on the defendant's behalf which was not said. None has been suggested in the course of argument before us.

In our judgment, the irregularity was not such as to make the jury's verdict unsafe and unsatisfactory.

Expert evidence

Mr James Wardell, a chartered accountant, was the Crown's expert witness. He had undertaken a huge tracing exercise, trailing through the primary accounting documents seized from the BCC and other entities. From this he had prepared flow charts and written narratives describing the myriad steps in the huge web of financial dealings by Law Kin Man. Despite the deceptive devices used by Law Kin Man and his bankers, the defence has not been able to find fault with the tracing

exercise.

In relation to the flow of funds which eventually found their way into the accounts particularised in the indictment the judge said this to the jury:

> " Now, by examining the documents and applying banking principles, Mr WARDELL is of the opinion that at least some of the Piano deposits remain in all the indictment uplifts. He says that although the bank managers were trying to hide the source of the funds and have falsified documents, their evidence supports his tracing of the funds in that they agree with fixed deposits on the chart and this is not challenged. He says that there are no records of any money being held on trust so where deposits are combined, you must assume a merger. On merger, the bank's previous liabilities under the prior fixed deposits, disappear and a new liability is created. Apply the weighted average method where deposits are merged and new fixed deposits created, where records do not tell you otherwise and you have no instructions to refer to, you withdraw equally from each possible source. That is what he calls the weighted average method. He says it is not appropriate to use the first-in, first-out method and he gave an example which produced some absurdity. He says this, according to banking law, is only appropriate in a running account like a current account. He says he is prepared to consider any other reasonable methods. He gave an example from the Mabel CHUN, Hong Kong dollar account, and he accepts that only $30,000 at step 93 could be from Piano. The balance is from unknown deposits in CHEANG Siu-chu's Kelly account. He did a purity calculation showing that $177.19 from Piano remained at the uplift. Well, he was asked to do another calculation by Mr Callaghan and he did, and he found using this calculation that there was only $19.24 at the end of the trail. In the same way, his purity calculation for Wallon was 7.4 per cent and for Kenny KAN, 16 per cent. Mr Hoo describes this as an artificial situation. Mr Lunn says this is the bankers' approach, for what it is worth. "

Before considering counsel's criticisms of this passage in the summing-up, the following points should be noted:

(i) Where the judge referred to the "weighted average method" in considering the source of merged funds, he was stating nothing more than a proposition of common-sense. Obviously, where funds from two different sources are merged, and the amounts are equal, one would say that the new deposit contains funds equally from both sources. And if the amounts from those two sources were unequal, one would then say that the funds in the new deposit are *weighted* in the same proportions. This is how a jury would approach the issue, applying common-sense.

(ii) Mr Wardell, in his tracing exercise, did not seek to find out where the funds originally came from: that is to say, whether they were from the proceeds of drug trafficking or from some other activities. This was not his function. In relation to the Mabel Chun Hong Kong Dollar account from which $596,980.85 was withdrawn by D2, as averred in count 2, Mr Wardell was unable, of course, to say which of the streams which eventually found their way into that account were drug

money and which were not. But, on the *assumption* that only the "Piano deposits" represented the proceeds of Law Kin Man's drug trafficking: that is to say, only those funds going into the Wallon Trading Company account with Piano Remittance and nothing more were the proceeds of drug trafficking by Law Kin Man, then, as a matter of arithmetic, the amount of drug money in the Mabel Chun account (traceable ultimately back to Piano) was very little: as mentioned in the summing-up, only HK$19.24, out of the total of HK$596,980.85 in the account. This was, of course, to assume that none of the other streams were tainted. Nothing on the evidence justified such an assumption.

It appears that, in the course of cross-examination, Mr Wardell was driven to justify his "weighted average method" by reference to English cases decided in the Chancery Division in the last century. This, seemingly, is what the judge was referring to when he said to the jury:

> "Now, by examining the documents *and applying banking principles*, Mr WARDELL is of the opinion that at least some of the Piano deposits remain in all the indictment uplifts."

Counsel argues that this amounts to a misdirection to the jury. Here, counsel submits, the jury is asked to apply standards appropriate only to the civil law when, at the end of the day, the jury had to be satisfied on the criminal standard that the "uplifts" in the indictment were "in whole or in part" the proceeds of drug trafficking.

We do not accept this submission. Mr Wardell was not, in any way, expressing an opinion as to the proportion of "drug money" in those "uplifts". His expertise was confined to the tracing exercise. The flow of funds as shown in the charts was never challenged. Whether he was right or wrong to justify his "weighted average method" by reference to "banking law" was of little consequence.

The yellow notebook

Among the exhibits seized by the police was a yellow notebook (exhibit P16). It was in Law Kin Man's handwriting recording transactions which appeared to relate to drug trafficking covering the 18 months up to December 1989. It was the prosecution case that the notebook was found on a desk next to the place where D2 normally sat; therefore, as such, it was linked to D2 and provided some evidence as regards D2's knowledge of Law Kin Man's drug trafficking activities. Obviously, if, at the end of the prosecution case, the physical link to D2 was not established, the notebook lost whatever evidential value it might have had. In essence, that was what in fact transpired. Not only did the prosecution fail to establish where the notebook was normally kept, it even failed to establish the precise location from which that exhibit was seized. The police evidence in that regard was confusing. The officer who made the seizure failed to realize its significance.

Counsel for D2 therefore argues that the judge should have withdrawn the exhibit from the jury's consideration altogether.

The judge summed up the evidence regarding the yellow notebook very fully to the jury: in particular the contradictions between the prosecution witnesses

regarding where it was found. The judge was at pains to emphasize to the jury that the notebook was not evidence as to the source of the funds: only if the jury were sure that D2 knew what was in the notebook did the contents constitute evidence as to his state of mind.

In our judgment, it would have been better if the judge had withdrawn the notebook from the jury's consideration altogether, because its link to D2 was too tenuous. However, given the decision to leave the matter to the jury, the way the judge summed up the issue cannot be faulted. This ground of appeal fails.

Conclusion

A large number of peripheral points were taken at the trial. Some of them have been picked up as grounds of appeal in this court. A ground of appeal - that the judge should have stayed the prosecution because of the unavailability of Law Kin Man as a witness - quite rightly has not been pressed by counsel. Another ground is that the judge should not have allowed evidence to be adduced to the effect that Pearl Lau's husband Sam Ho had previous convictions for drug offences. It is unnecessary to deal with them, because these are, at the end of the day, peripheral points. The focus of the case is the "uplifts" averred in the indictment. On the evidence viewed as a whole the inference that they indirectly represented the proceeds of drug trafficking was irresistible and likewise the inference that both defendants knew that by effecting the uplifts Law Kin Man's retention or control of those funds was facilitated. The jury had ample evidence to convict. These appeals are dismissed.

(Henry Litton)
Vice-President

(Barry Mortimer)
Justice of Appeal

(Simon Mayo)
Justice of Appeal

Representation:

Mr Michael Lunn QC and Ms Judith Maguire (Crown Prosecutor) for Crown/Respondent

Mr John Griffiths QC and Mr Tony Poon (M/S Lo, Wong & Tsui) for the 1st Applicant

Mr Peter R. Callaghan (DLA) for the 2nd Applicant

Annex C

CACC000084/2003

CACC84/2003

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CRIMINAL APPEAL NO. 84 OF 2003

(ON APPEAL FROM DCCC 465 OF 2002)

BETWEEN

HKSAR	Respondent
AND	
LAM HEI KIT	Applicant

Coram: Hon Ma CJHC, Stuart-Moore VP and Jackson J

Date of Hearing : 12 December 2003

Date of Judgment : 9 January 2004

JUDGMENT

Jackson J (giving the judgment of the Court) :

1. On 7 February 2003, the applicant was convicted after trial in the District Court by Deputy Judge Tong Man of two offences of dealing with property known or believed to represent the proceeds of an indictable offence and two offences of possessing unlawfully obtained travel documents. He did not give evidence, or call witnesses, in his defence at trial.

2. He was sentenced to concurrent terms of two years' imprisonment in respect of the first two offences and to concurrent terms of three years' imprisonment in respect of the 3rd and 4th offences.

Two years of the sentence imposed in respect of the 3rd offence was ordered to be served consecutive to the concurrent terms imposed in respect of the first two offences with the result that he is to serve a total of four years' imprisonment.

3. The applicant appeals against his conviction in respect of each of the four offences.

4. The charges, and the particulars of those charges, facing the applicant at trial were these :

"

1st Charge
Statement of Offence

Dealing with property known or believed to represent the proceeds of an indictable offence, contrary to section 25(1) and (3) of the Organized and Serious Crimes Ordinance, Cap. 455.

Particulars of Offence

LAM Hei-kit, on the 5th day of July 2000, in Hong Kong, knowing or having reasonable grounds to believe that property, namely a cheque numbered 536304 made payable to CHENG Suen-ping in an amount of $1,780,000.00 Hong Kong currency, and drawn against an account numbered 259-234946-001 maintained in the name of LAM Hei-kit at the Hang Seng Bank Limited, in whole or in part, directly or indirectly, represented the proceeds of an indictable offence, dealt with the said property.

2nd Charge
Statement of Offence

Dealing with property known or believed to represent the proceeds of an indictable offence, contrary to section 25(1) and (3) of the Organized and Serious Crimes Ordinance, Cap. 455.

Particulars of Offence

LAM Hei-kit, on the 20th day of September 2000, in Hong Kong, knowing or having reasonable grounds to believe that property, namely the sum of $120,000.00 United States currency deposited into his bank account numbered 534-168737-833 at the Hongkong and Shanghai Banking Corporation Limited, in whole or in part, directly or indirectly, represented the proceeds of an indictable offence, dealt with the said property.

3rd Charge
Statement of Offence

Possession of unlawfully obtained travel documents, contrary to section 42(2)(c)(i) and (4) of the Immigration Ordinance, Cap. 115.

Particulars of Offence

LAM Hei-kit, on the 12th day of March 2001, at Flat D, 6th Floor, San Kwong Building, 2J-2Q, Sai Yeung Choi Street South, Mongkok, Kowloon, in Hong Kong, had in his possession unlawfully obtained travel documents, namely 25 People's Republic of China Passports for Public Affairs and 72 People's Republic of China Passports.

4th Charge
Statement of Offence

Possession of unlawfully obtained travel documents, contrary to section 42(2)(c)(i) and (4) of the Immigration Ordinance, Cap. 115.

Particulars of Offence

LAM Hei-kit, on the 12th day of March 2001, at Flat D, 6th Floor, San Kwong Building, 2J-2Q, Sai Yeung Choi Street South, Mongkok, Kowloon, in Hong Kong, had in his possession unlawfully obtained travel documents, namely 25 Japanese Passports."

It might perhaps be noted that in the particulars to charges 1 and 2 the 'indictable offence' is not specified.

The prosecution's case at trial

5. At about 6 a.m. on 12 March 2001 police officers went to the applicant's home in Mongkok with a search warrant. They were apparently looking for the applicant's elder brother Lam Hei Kwong and his girlfriend Cheng Suen Ping whom they suspected were involved in offences of 'money laundering' and 'people smuggling'. On searching the applicant's premises the police found, in four locked drawers of a wardrobe, 25 Japanese passports and 97 unlawfully obtained Chinese passports, and a false Mainland immigration chop. The Japanese passports had either been lost by their owners or had been stolen from them. The applicant was at home with his wife, mother, sister and son at the time of the police raid.

6. The bedroom in which all of the passports were found was apparently used as a storeroom. The Japanese passports were wrapped in newspaper and contained in a plastic bag and the other passports were contained in envelopes. Nothing in the wardrobe, where the passports were found, contained any reference to the applicant save that there was a brown undated envelope apparently addressed to him and originating from Turkey, which envelope contained 24 of the unlawfully obtained Chinese Public Affairs passports. There were, however, in the drawers of the wardrobe a considerable number of letters and documents which referred to Lam Hei Kwong and to his former wife and to his daughter which were addressed to them in 1999 and 2000 at a Tsuen Wan address. There were two sets of keys to the room in which was the wardrobe and to the wardrobe itself, one set was kept in a drawer in the bedroom used by the applicant and his wife, and the other was found on a computer desk in the living room. That latter set was identified by the applicant who gave it to a police officer to enable him to unlock the wardrobe.

7. In the bedroom used by the applicant and his wife were found a number of bank passbooks. Subsequent police enquiries relating to those passbooks revealed that the applicant had opened one HSB account on 14 October 1998, and one HSBC foreign currency account on 23 October 1995 and that his wife, Wu Siu Ling, had opened one HSBC account on 15 July 2000. Between 21 June and 25 July 2000, numerous deposits were made into these accounts. Between 21 June and 30 June 2000, there were nine cash deposits (totalling HK$1,786,285.50) made into the applicant's HSB account by or on behalf of Lam Hei Kwong. On or about 5 July 2000, the applicant drew a cheque on his HSB account in the sum of HK$1,780,000.00 which was paid into a joint account held by his elder brother Lam Hei Kwong and his girlfriend Cheng Suen Ping. This transaction was the subject matter of the first charge of which the applicant was found guilty.

8. Between 14 and 25 July 2000, there were 11 cash deposits (totalling some US$80,000.00) made into the applicant's HSBC foreign currency account. Between 15 and 24 July 2000, there were eight

cash deposits (totalling some US$40,000.00) made into his wife's newly opened HSBC account. That sum of US$40,000.00 was transferred to the applicant's account on 26 July 2000. A sum of US$122,000.00 in that account was put on time deposit for one month and on 20 September 2000, the applicant transferred US$120,000.00 from his HSBC Forex account to an account in the name of Cheng Suen Ping at the same bank. This transaction was the subject matter of the 2nd charge of which the applicant was found guilty.

What the applicant told the police

9. At the time of the police raid on 12 March 2001 and upon his arrest the applicant told a police officer that the passports found in the search had been placed in his flat by his brother Lam Hei Kwong who had told him that they were 'fake'. He also said that the money in his (the applicant's) bank account was for margin trading in foreign exchange for a friend of his.

10. The applicant was subsequently questioned about those matters in interview. At trial, objection was taken to the admissibility of both what he said upon his arrest and in interview and, following upon a *voire dire*, the judge ruled that such was admissible. In essence, and among other things, what the applicant said in interview was that Lam Hei Kwong had brought some passports to his flat at a time between June and September 2000. As a result of what Lam Hei Kwong told him the applicant believed that his brother was engaged in 'human smuggling' activities and, accordingly, he told his brother not to keep the passports in his flat. The applicant also said that he had received from his brother by express mail from overseas, 10-20 airline tickets, which he kept for him. He said that following a conversation with Lam Hei Kwong he suspected that his brother was involved with the deaths (in June 2000) of 58 illegal immigrants, who had died in a container in Dover in England, one reason being that they all came from a place near his home town in China. In addition the applicant told the police that his brother had asked him to transfer the money paid into his accounts to that of his brother's girlfriend and that he (the applicant) came to realize that his brother must have obtained that money by illegal means because his brother had told him that there was a lot of money to be made by arranging for people 'to go to other places'.

11. In respect of the possession charges (charges 3 and 4) the applicant told the police (*inter alia*) that his brother had a key to his flat and thus access to the room and wardrobe in which the passports were found; that none of the items found in that wardrobe belonged to him (the applicant); that he had not seen the Japanese passports prior to the police raid; that he did not know how some of the Chinese passports had come to be concealed in his flat and that he had not seen his brother put them into the wardrobe; that he was unable to say if the Chinese passports found there by the police were the same passports as those he had seen sometime between June and September 2000 in his brother's possession, and that he himself (i.e. the applicant) had not knowingly received any passports by mail although he had received some air tickets from overseas.

12. What the applicant told the police about the timing of these events (*inter alia*) was this :

(a) that it was only after his brother had deposited the US dollars into his account that he had seen his brother with passports which he suspected were false, and that it was only then that he suspected that the US dollars might be the proceeds from smuggling illegal immigrants. Albeit that he did not say whether his suspicion was aroused before or after he had transferred the US dollars to his brother's girlfriend's account, it is perhaps implicit in what he did say that such suspicion arose after he had transferred the Hong Kong dollars to that account on 5 July 2000 (Charge 1);

and

(b) that his brother had come to his home a few days after he (the applicant) had learned of the 'Dover incident' from a television broadcast and that on that occasion he had asked his brother if he had been involved in it. His brother told him to guess about

that.

Since that occasion his brother had not deposited any money into his (the applicant's) bank accounts and his brother had seldom come to his flat. It was (so he said) for those reasons that he had not pursued the question of his brother's involvement in the 'Dover incident' and that he did not know that passports were being stored in his home.

The grounds of appeal

13. The amended perfected grounds of appeal against conviction settled by Mr Marash SC for the applicant read as follows :

" (1) In relation to Charges 3 and 4, the learned Deputy Judge erred in finding that the Applicant was in possession of the forged passports found in the premises at Flat D, 6/F, Sun Kwong Building, 2J-2Q, Sai Yeung Choi Street South, Mongkok.

(2) In relation to Charges 1 and 2, the learned Deputy Judge failed in his Reasons for Verdict properly to identify the conduct of Lam Hei Kwong, ... which [conduct] the applicant believed, or had reasonable grounds to believe, would have constituted an indictable offence if it had occurred in Hong Kong, as required by sections 25(1) and 25(4), Organized and Serious Crimes Ordinance, Cap. 455 ('OSCO')

(3) There was no evidence that any of the conduct that the applicant believed, or had reasonable grounds to believe, his elder brother had committed, constituted an indictable offence, if it had occurred in Hong Kong.

(4) The learned Deputy Judge erred in applying the standard of proof in his Reasons for Verdict when he stated that, 'by the time the defendant helped his elder brother to transfer the funds, and very likely by the time he saw the elder brother handling the so-called forged passports, he should have already learned about the Dover incident and should thus be equipped with knowledge'.

(5) There was no, or insufficient, evidence for the learned Deputy Judge properly to conclude that the applicant believed, or had reasonable grounds to believe, at the time that he dealt with the moneys he transferred to the bank account of Cheng Suen Ping on 5 July 2000 and 20 September 2000, that they directly or indirectly represented the proceeds of conduct, which [would have amounted to] an indictable offence if [such conduct] had occurred in Hong Kong.

(6) That, in view of the foregoing and in all the circumstances generally, the convictions of the applicant on charges 1-4 are unsafe and unsatisfactory."

14. Before coming to the substance of those grounds of appeal and the respondent's answer to them, we set out a 'skeleton' response to them settled by Mr Lee which is as follows :

"*Against Ground 1*

(1) The applicant contends that there was insufficient evidence to prove the point of time when Lam Hei Kwong brought the 'forged' passports to his premises, and told him about their 'forged' nature. It is argued that that could have been any time during 'June to September'. It is also argued that they may not be the same batch seized by the Police on 12 March 2001.

The real issue

(2) The real issue here is whether there was sufficient evidence capable of supporting the finding that the Applicant had possession of the passports subject of the respective charges, and with knowledge of their illegal nature, on 12 March 2001. It is submitted that there was ample evidence capable of supporting such a finding.

(3) Four categories of evidence are relevant to the real issue, and point unambiguously to convictions :

(A) evidence of knowledge from Lam Hei Kwong

(B) evidence on how the passports reached his premises

(C) evidence on the day of seizure

(D) evidence of his assistance to Lam Hei Kwong in money laundering on two occasions before 12 March 2001.

(4) It is submitted that the 'exculpatory statements' were inherently improbable, or inconsistent with other cogent evidence, or both. The Learned Judge was well entitled to apply *R v. Sharp* in the manner he did, and to attach no weight to such exculpatory statements.

Against Grounds 2 & 3

(5) There is no legal burden on the Prosecution to prove the existence of the specific conduct of the underlying offence, whether as an element of the actus reus, or as part of the mens rea:

(6) As there is no legal requirement to prove the commission of the conduct of the underlying offence known to the Applicant or believed by him on reasonable grounds, there cannot be any duty cast upon the trial Judge to identify such specific conduct. Section 25(4) of OSCO was simply not engaged. There is also no legal duty on a trial Judge to state each and every step of his reasoning leading to the verdict:

Against Grounds 4 & 5

(7) There was ample evidence capable of supporting the finding that the Applicant knew, or had reasonable grounds to believe, before or at the time of dealing with the monies on 5 July and 20 September, that the monies had originated from illegal human smuggling activities:

(8) On all the evidence, the tribunal of fact was well entitled to infer that he had knowingly assisted Lam Hei Kwong in laundering the proceeds. There was in fact a substantial degree of complicity between the Applicant and his elder brother Lam Hei Kwong in relation to the latter's human smuggling activities.

and

(9) Given the ample evidence well capable of proving each and every element of the offences, there is nothing unsafe or unsatisfactory regarding the verdicts."

The applicant's argument in relation to the possession charges

15. If we have understood the very lengthy argument of Mr Marash correctly it seems to us that what it amounts to is this :

(a) that leaving aside what the applicant verbally told the police on 12 March 2001 there was insufficient evidence to prove that the applicant knew that the passports were in his flat, and that even if he did have that knowledge, there was insufficient evidence to prove that he was 'in possession' of the passports; and that what he did say to the police on 12 March (which was post-recorded and which was that the passports had been placed in his flat by his brother who had told him that they were 'fake') should not be looked at in isolation from what he subsequently told the police in interview which was, in effect, that the passports were nothing to do with him;

and

(b) that the judge erred in placing no weight on that exculpatory explanation given by the applicant in his interviews with the police.

16. It is, we think, implicit in what Mr Marash says (and indeed Mr Lee appears to confirm our understanding of this) that the prosecution's allegations were inextricably entwined in the sense that part of the evidence relied upon by the prosecution in seeking to prove the possession charges was the very evidence which led to the money laundering charges. And thus, it must follow, the appeal against conviction in respect of the possession charges should not be considered in isolation from the 'money laundering' convictions.

The applicant's argument in relation to the OSCO charges

17. Mr Marash argues that it was incumbent upon the trial judge in reaching his verdict to consider whether the specific conduct of the applicant's brother (whatever that conduct may have been), as opposed to its general nature, was known to the applicant himself. And that it is only if the applicant was aware of that specific conduct and that such amounted to an indictable offence had it occurred in Hong Kong, could he be guilty of these offences. Mr Marash says that the judge simply failed to address that matter.

18. As his argument proceeded Mr Marash then submitted that the judge had applied the wrong standard of proof by suggesting what it was that the applicant 'should' or 'ought' to have known or believed from the facts as he understood them to be, as against what he 'did' know or believe, and that therefore the judge fell into error when he found as a fact that the applicant had transferred the US dollars on 20 September 2000 with the knowledge requisite to establish the offence.

Additional matters complained of by the applicant

19. Mr Marash submits that in addition to, or in expansion of, those matters complained of above, the judge :

" (a) erred in stating that what the applicant said in his interviews proved that he had 'knowledge' of his brother's illegal immigrant smuggling business when in fact the applicant said he had 'suspicion';

(b) undertook no analysis of whether the fact that the applicant 'got' the keys to the drawers meant that he was in possession of the passports in the storeroom;

(c) erred in stating the applicant received air-tickets from courier companies on more than one occasion;

(d) added to the above two errors the fact that the applicant helped transfer the funds to Cheng using his own account. The fact that he openly used his own account with no attempt to hide the transfer, points more to innocence than guilt. In so doing, the judge merely recited the actus reus of the money laundering charges; and

(e) then wrongly drew the 'irresistible inference' that Lam was offering to help [his brother in his brother's] illegal business and was thus guilty of all the charges."

The arguments on behalf of the respondent

20. In his written submissions Mr Lee for the respondent seeks to deal with those matters (A) to (D) set out in paragraph 14 above. In respect of each of them he recites at some length what the applicant said to the police and no purpose is served by our repeating that here.

21. Suffice it to say that Mr Lee invites us to conclude from a reading of those extracts (*inter alia*) the following :

(a) that the applicant's brother had brought at least the Chinese passports to his home before the 'Dover incident' was reported in Hong Kong on 20 June 2000 or shortly thereafter, and that he had been told by his brother that those passports were forged or were false;

(b) that the judge was fully entitled to infer that the applicant spoke to his brother about the 'Dover incident' not later than early July 2000, and that he did that because his brother had brought the passports to his (the applicant's) home not later than early July;

(c) that there was clear evidence that at least the Chinese passports had been brought to the applicant's home by his brother in June 2000, and the judge was fully entitled to infer that the applicant had opened the envelope containing the 24 Chinese passports;

(d) that there was ample evidence giving rise to the inference that the 24 Japanese passports had been delivered to the applicant's home on or around 4 July 2000 at the latest;

(e) that the evidence regarding the applicant's 'possession' of the passports on 12 March 2001 was overwhelming, given what he told the police at that time and given where they were and who had access to the room where they were kept,

and

(f) that the fact and method of the applicant's use of his brother's very substantial sums of cash between June and September 2000, given his knowledge of his brother's limited resources and what his brother had told him, pointed directly to a link between the passports, 'human smuggling' and money laundering.

22. Mr Lee submits that (in relation to the 'possession' offences) the applicant not merely suspected but knew full well between June and September 2000 that the monies deposited into his bank accounts by his brother were monies related to the 'smuggling of people', and that that knowledge provided solid support for the inference regarding his possession of the passports at his home on 12 March 2001.

23. Mr Lee goes on from there to submit that the judge was perfectly entitled to reject the 'exculpatory' parts of what the applicant told the police in interview, he applying to himself the direction suggested in **R. v. Sharp** [1988] 1 WLR 7 and attaching little, if any, weight to them given that they were "not made on oath or affirmation; were not repeated on oath or affirmation and were not tested by cross-examination".

24. As to the 'money laundering offences' Mr Lee argues that :

(a) there is no need to prove the specific conduct of the underlying offence and

therefore no need for a tribunal to identify such specific conduct : only the type or category of the crime need be proved. In support of that proposition Mr Lee refers us to *HKSAR v. Li Ching* [1997] 4 HKC 108 and *HKSAR v. Wong Ping Shui* [2000] 1 HKC 600 which was affirmed by the Appeal Committee of the Court of Final Appeal in FAMC1/2001;

(b) there was ample evidence against the applicant to show his knowledge or belief of a cross-border crime of 'people smuggling' which involves Hong Kong not least because of the storing of the passports here, the sending of the air tickets to Hong Kong and the money laundering activities here,

and

(c) the test for determining "having reasonable grounds to believe " is well-settled. In this regard Mr Lee refers us to *HKSAR v. Shing Siu Ming & Others* [1997] 2 HKC 818 and *HKSAR v. Yam Ho Keung*, CACC 555/2001 and he argues that in the present case the judge's use of the words "he should already have learnt" in reference to the applicant should be read in the light of all of the evidence and the standard of proof ultimately referred to, and in fact applied, by the judge. Putting it another way the words 'he should already have learnt that .....' equate to the words 'I infer that .....'.

The judge's findings

25. It is quite apparent from what we have said in paragraphs 15-19 (inclusive) above, that Mr Marash takes issue with what he calls the 'methodology' adopted by the judge apparent from his Reasons for Verdict and, in the course of argument he (Mr Marash) has referred us to the judgment in **The Queen v. Sheik Abdul Rahman Bux and others** [1989] 1 HKLR 1 which, in turn, refers to the case of **R. v. Chan King Man** [1980] HKLR 105 in which these passages appear :

"It was contended ..... that a district judge's statement of his reasons for verdict prepared in pursuance of s. 30 of the District Court Ordinance was comparable to a judge's summing-up to a jury. I do not agree with this view. The district judge's only statutory duty is to record a short statement of the reasons for the verdict. There is no duty cast upon him to state the whole of the law applicable to the case or to review the whole of the evidence. Of course, if he chooses to state his views of the law, or any aspect of the law applicable to the case, and that view is held to be wrong, the position is precisely the same as when a judge misdirects a jury on a matter of law. Similarly, if he chooses to review the evidence at length and it is clear from his statement that he has substantially misapprehended or misunderstood the true nature of that evidence, or any important part of it, it may well be that it would be open to an appellant to attack his conclusions on the facts before this Court. But it must be remembered that the district judge is himself the jury. He has heard the whole of the evidence and he is not duty bound to set down precisely what he accepts, what he rejects and what weight he attaches to every piece of evidence, or the arguments of counsel on the evidence, or the whole of the workings of his mind in arriving at his conclusion.

Of course, to the extent to which he chooses to discuss the evidence, to that extent does he disclose how 'the mind of the jury' was working; and an appellate court is therefore in a stronger position to review his conclusions than it is in regard to a jury verdict. But an appellate court would not, except in the most exceptional circumstances, interfere with a finding which depended on the credibility of a witness; and, when the district judge draws inferences of fact, which inferences depend not only on an examination of documents and facts which are not in dispute but also depend partly on the credibility of witnesses and facts which were very much in dispute, then I think an appellate court should act with the greatest caution before interfering with the district judge's findings

if, having regard to the whole of the evidence, such findings appear reasonable."

26. The relevant parts of the judge's Reasons for Verdict in the present case about which Mr Marash complains are as follows :

"26. I am also aware that the notebook entry, ... and the videotapes, ... and transcripts thereof, ... and certified translation, ... all contained mixed statements made by the defendant. As the defendant had elected not to give evidence, I have directed myself in the terms of *R v Sharp* [1988] 1 WLR 7, in that both the inculpatory and exculpatory material are evidence to be considered by myself acting as a jury, and it is me who shall determine where the truth lies. The task before me is what weight I should attach to the defendant's statement made in those documents. The inculpatory part of those statements was the defendant's account of how he had become suspicious of Lam Hei-kwong's source of money were from smuggling of illegal immigrants and that he had brought forged passports to his house on prior occasions. However, even for such so-called inculpatory parts of his statements it is obvious they do not represent the whole truth. For example, he said in the first video interview ... how Lam Hei-kwong had brought a number of Chinese passports to his home at a time between June and September 2000, and that he suspected that the passports were forged, hence he asked his elder brother to take those passports away. Then, near the end of the first interview, he explained how he became suspicious over the money transferred to his account after he had already helped his brother to handle the same. It was because he saw news on the television reporting on the suffocation of a batch of Fujian illegal immigrants in England. He asked his brother if he was involved in the incident. His brother's reply was telling the defendant to think about it himself. He then became suspicious. However, it is common ground that the Dover incident in which the 58 Chinese illegal immigrants suffocated to death was reported in Hong Kong on 20 June 2000, while all the transfers of funds as shown on the two annexures of the Admitted Facts, says that all the transfers to and from the defendant's account took place after that date. I also notice that the transfers out of the funds in Charge 1 and Charge 2 respectively took place on 5 July and 20 September 2000. Hence by the time the defendant helped his elder brother to transfer the funds, and very likely by the time he saw the elder brother handling the so-called forged passports, he should have already learned about the Dover incident and should thus be equipped with knowledge.

27. All in all, after I have considered all the statements made by the defendant under caution, I am of the view that the defendant was simply trying his best to exculpate himself by fabricating stories. I attach little weight on the defendant's various statements, save and except where the statement goes to prove that the defendant had knowledge of the operation of the elder brother's illegal immigrant smuggling business. This knowledge coupled with the fact that he had got the keys to the drawers in which the passports were found, the fact that air tickets from overseas were sent to him via courier companies on more than one occasion, and the fact that he helped his elder brother and Cheng Suen-ping to transfer funds with his own account, the only irresistible inference to be drawn from such facts must be that the defendant was offering help to his elder brother's illegal business by at least assisting in fund transfer as detailed in Charges 1 and 2, and by keeping those unlawful passports in Charges 3 and 4. Indeed, as the elder brother did not live on the defendant's premises and seldom went there, why should such a large number of unlawfully obtained passports be placed there? Why the air tickets will have to be sent to the defendant at his premises in couriers' bags? And finally, why the defendant would be entrusted with such large amounts of transfers as detailed in Charges 1 and 2? In my judgment, the answer to these questions is also the conclusion to reach the irresistible inference reached.

28. In the end, I have no reasonable doubt at all that the defendant is guilty of all four charges in this case. I convict him of the same accordingly."

27. His specific grounds for complaint about the judge's reasons are as follows - and here we set out what Mr Marash referred to as his 'additional and opening comments' :

"This is the methodology the learned Deputy Judge used to discredit [the applicant's] statements in his video interviews as to when he was aware of his brother's activities, which led the Deputy Judge to place 'little weight on the defendant's various statements, save and except where the statement goes to prove that the defendant had *knowledge* of the operation of his elder brother's illegal immigrant smuggling business.'

The judge found that [he] lied about the timing of when he acquired such knowledge in relation to the time when he handled the moneys remitted to him on 5th July and 20th September 2000.

However, the only way in which the Deputy Judge could pin down 'the lie' was by reference to the first publication of the news of the Dover deaths on 20th June 2000.

The Deputy Judge made no finding that [the applicant] had become aware of that news before the 5th July 2000 or 20th September 2000; he found, by the time he helped his brother to transfer the funds and *very likely* by the time he saw the elder brother handling the so-called forged passports, he *should have already learned* about the Dover incident and should thus be equipped with knowledge.

The Deputy Judge used the wrong test of probability to discredit [the applicant], which inevitably flowed into his decision to convict [him] as the only issue in the case was his credibility. He concluded that 'the defendant was simply trying his best to exculpate himself by fabricating stories.'

This appeal is not principally about whether there was sufficient evidence to convict [the applicant] (though it is submitted that there was not): it is the way in which the judge went about convicting him as demonstrated by the passages [in his Reasons for Verdict].

Having discredited [the applicant's] statements in his interviews, in the next passage, the learned Deputy Judge assumes that he had *knowledge* of the operation of his elder brother's illegal immigrant smuggling business. There is no mention in the [Reasons] of any contrast between suspicion and knowledge.

The Deputy Judge made no reference to any portion of any of [the applicant's] interviews upon which he relied to find that he had knowledge as distinct from suspicion. [The] interviews could not really be split up into individual answers as to the state of his awareness. The interviews had to be read together and the overall effect of them was that [the applicant] did not deal with the moneys at a time he had knowledge of the source of the funds being from people smuggling. It was impossible to identify the time he reached the state of knowledge to pass the test for conviction laid down in section 25A, as being before he handled the sums on either 5th July or 20th September 2000. The Deputy Judge 'wrote off' Lam's explanations in those statements as lies due to his aforementioned error regarding the date when the Dover incident was mentioned in the media. Hence, his reliance upon only the incriminating parts of [the applicant's] statements was also flawed.

The judge then went on to *couple this knowledge* with three other matters, which led him to convict.

(a) One of those matters was the very actus reus of the money laundering charges, i.e. that he dealt with the money. That could not assist in deciding the state of his knowledge at the time he did so.

(b) The second matter the Deputy Judge referred to was that [the applicant] had received air tickets via courier companies on more than one occasion. This was an error of fact - there was only one occasion on which he said he had received such tickets and there was no other evidence that he had done so. The judge did not identify the timing of the incidents.

(c) The last matter referred to was that [the applicant] had the keys to the drawers where the passports were found. The judge gave no independent consideration as to how possession of the keys could, on the facts of the case ..... lead to a conclusion that he possessed the passports.

The rhetorical questions at the end of the Reasons for Verdict are easily answered and achieved nothing by way of support for the Deputy Judge's conclusion."

Conclusions

28. Our minds have been much exercised by the very able arguments of Mr Marash, particularly as regards what he describes as the judge's flawed methodology. We accept what he says about this appeal being principally about "the way in which the judge went about convicting [the applicant] as demonstrated by the passages [in his Reasons for Verdict]".

29. However we find ourselves unable to accept the submission of Mr Marash that there was insufficient evidence upon which to convict the appellant of all charges and, with respect, that submission (or so it seems to us) has about it an air of unreality, given the compelling evidence before the court of the cash deposits in June and July 2000; of the money transfers; of the location of the passports and of what the applicant told the police.

30. However the judge may have reached the verdicts which he did reach, it seems to us that he could not, on the evidence presented to him, have come to any other view given that we accept Mr Lee's submissions on matters of law.

31. Whilst we accept Mr Marash's criticisms of the judge's reasons for verdict limited to those relating to apparent expressions regarding the burden of proof; to one factual error and to the rhetorical questions which he, perhaps unhappily, posed; and whilst we treat that criticism as in itself fully justifying our decision to grant leave to appeal and to treat the application for leave as the hearing of the appeal, we consider that no miscarriage of justice has occurred and accordingly by applying the proviso in section 83(1) of Cap. 221 we dismiss the appeal.

(G. Ma)
Chief Judge

(M. Stuart-Moore)
Vice-President

(C.G. Jackson)
Judge of the Court of
First Instance

Representation:

Mr Daniel Marash SC leading Ms Osmond Lam instructed by M/s Louis K Y Pau & Co for the Applicant

Mr Robert LEE, SADPP and Ms Catherine Fung, SGC of the Department of Justice for the Respondent