SB Ref: ICSB 16/06

Bills Committee on
Interception of Communications and Surveillance Bill

Response to issues raised

Clauses 42 to 46

- ***To provide for a mechanism for notifying the subjects of "wrongful" interception or covert surveillance.***

We have set out in our paper SB Ref. : ICSB 14/06 our proposal for a notification system in specified circumstances. The proposed Committee Stage amendments (CSAs) to reflect that mechanism are as follows –

"46A. Notifications to relevant persons

(1) If, in the course of performing any of his functions under this Ordinance, the Commissioner considers that there is any case in which any interception or covert surveillance has been carried out by a department without the authority of a prescribed authorization issued or renewed under this Ordinance, subject to subsection (6), the Commissioner shall give notice to the relevant person –

(a) stating that there has been such a case and indicating whether the case is one of interception or covert surveillance and the duration of the interception or covert surveillance; and

(b) informing the relevant person of his right to apply to the Commissioner for an examination in respect of the interception or covert surveillance.

(2) Where the relevant person makes an application for an examination in respect of the interception or covert surveillance within 6 months after receipt of the notice, the Commissioner shall, notwithstanding anything in section 44(1)(a) but subject to the other provisions of section 44, make a determination referred to in section 43(2), and the provisions of this Ordinance are to apply accordingly.

(3) Notwithstanding subsection (1), the Commissioner shall not give any notice under that subsection for so long as he considers that the giving of the notice would be prejudicial to the prevention or detection of crime or the protection of public security.

(4) Without prejudice to subsection (3), in giving notice to a relevant person under subsection (1), the Commissioner shall not –

(a) give reasons for his findings; or

(b) give details of any interception or covert surveillance concerned further to those mentioned in subsection (1)(a).

(5) In considering whether there is a case to which subsection (1) applies, the Commissioner shall apply the principles applicable by a court on an application for judicial review.

(6) This section does not require the Commissioner to give any notice to the relevant person if –

(a) the relevant person cannot be identified or traced;

(b) the Commissioner considers that the relevant person is already aware of the case;

(c) the Commissioner considers that the intrusiveness of the interception or covert surveillance on the relevant person is minimal; or

(d) in the case of interception, it is within the description of section 4(2)(b) or (c).

(7) In this section, "relevant person" ( ) means any person who is the subject of the interception or covert surveillance concerned."

2. As a related issue, taking into account Members' suggestion, we agree that the wording of the test (whether a prescribed authorization "should have been, but has not been, issued or renewed") in the Commissioner's examination of an application made under clause 42 should be amended correspondingly. The proposed CSAs would amend clause 43 as follows –

"Clause 43

(1) Where the Commissioner receives an application under section 42, he shall, subject to section 44, carry out an examination to determine –

(a) whether or not the interception or covert surveillance alleged has taken place; and

(b) if so, whether or not ***the interception or covert surveillance alleged has been carried out without the authority of a prescribed authorization issued or renewed under this Ordinance****.*

(2) If, on an examination, the Commissioner determines that ***the interception or covert surveillance alleged has been carried out without the authority of a prescribed authorization issued or renewed under this Ordinance****, he shall give notice to the applicant –*

(a) stating that he has found the case in the applicant's favour ***and indicating whether the case is one of interception or covert surveillance and the duration of the interception or covert surveillance****; and*

(b) ***inviting the applicant to confirm whether the applicant wishes to seek an order for the payment of compensation under the application, and if so, to make written submissions to him for that purpose****.*

(2A) ***Upon receiving confirmation from the applicant that an order for the payment of compensation is sought, the Commissioner, upon taking into account any written submissions made to him for that purpose, may make any order for the payment of compensation by the Government to the applicant****.*

(2B) The compensation ordered to be paid under subsection (2)(b) may include compensation for injury to feelings.

……

(4) [deleted]

……

(6) ***The Commissioner shall not make a determination referred to in subsection (2) in respect of an interception if the interception is within the description of section 4(2)(b) or (c).****"*

We will make corresponding amendments to other relevant clauses.

Clause 54

- ***To clarify whether the clause covers reviews of the issue of emergency authorizations.***

3. Emergency authorizations are issued by heads of department. As such, the review mechanism under clause 54(2) does not apply to them because that mechanism is designed for reviewing the performance of authorizing officers designated under clause 7 of the Bill. However, the issue of an emergency authorization involves many steps. Most of them have to be undertaken by a law enforcement agency (LEA) officer. Such compliance is subject to the regular review under clause 54(1).

- ***To consider providing that "mistaken" cases discovered during the reviews under clause 54 should be reported to the Commissioner.***

4. Under clause 52, where the head of department considers that there may have been any case of failure by the department or any of its officers to comply with any relevant requirement, he shall submit to the Commissioner a report with details of the case. A "mistaken" case discovered during a review is certainly an irregularity that has to be so reported.

- ***To consider whether the term "review" is appropriate, given that it is also used to describe one of the functions of the Commissioner.***

5. The term "review" has its ordinary meaning of consider, examine, investigate, probe, inspect etc. We believe that as a general encompassing term, it is appropriate to describe the function envisaged under clause 54 as well as one of the functions of the Commissioner. The use of the term in both instances should not cause confusion.

- ***To advise on the frequency of regular reviews under clause 54(1).***

6. Our intention is to have a general review at least every three months. The general review will be supplemented by targeted reviews.

Clause 55

- ***To consider amending clause 55(1) to make clear that the reviewing officer may discontinue an operation any time, and not only in the course of or further to a review.***

7. We agree to the suggestion. The necessary CSA for the purpose is as follows –

> *"Clause 55*
>
> *(1) If the officer by whom any regular review is or has been conducted is of the opinion that any ground for discontinuance of a prescribed authorization exists, he shall, as soon as reasonably practicable after forming the opinion, cause the interception or covert surveillance concerned to be discontinued."*

- ***To consider adding more grounds under clause 55(6) for discontinuing a prescribed authorization, e.g., if there has been material procedural impropriety in obtaining the authorization, the non-provision of information that would affect the determination, the provision of wrong information, the occurrence of new events or developments such as arrest of the subject, the information sought has already been obtained etc.***

8. We have in our paper SB Ref. : ICSB 15/06 (paragraph 118) proposed to introduce a new clause 55A to require that an assessment be made to the authorizing authority after the arrest of the subject of the interception or covert surveillance. If the authority considers that the conditions for continuance of the authorization no longer exist then, he shall revoke the authorization.

9. The present clause 55 should cover many of the other examples that Members have suggested. We will provide more guidance in the code of practice on when conditions for the continuance of a prescribed authorization for interception or covert surveillance are not met, and hence when the clause, in particular clause 55(6)(a), applies.

10. Where subsequent developments result in the conditions for the continuance of the authorization under clause 3 no longer being met, they would constitute a ground for discontinuance of the operation already

(clause 55(6)(a)). Clause 55(6)(b) also provides that the ground for discontinuance exists where the relevant purpose of the authorization has been achieved. These are specific and objective tests. As explained at the Bills Committee, however, it would be difficult to discontinue an authorization if some of the information sought has been obtained but the purpose has not yet been achieved.

- ***To consider allowing the reviewing officer to overturn the decision to issue the executive authorization any time after it has been issued.***

11. Clause 55 already provides that the reviewing officer may discontinue an operation if he is of the opinion that a ground for discontinuance of a prescribed authorization exists. However, it would not be appropriate to allow a duly issued authorization to be overturned from the time of issue because the reviewing officer wishes to do so on other unspecified grounds. Otherwise it would add much uncertainty to the lawfulness of the authorization and hence operation.

- ***To include in the code of practice the requirement that an officer must be designated to be in charge of a covert operation for the purpose of clause 55(2), and that he should be made aware of the relevant information and developments that may constitute grounds for discontinuance.***

12. We agree to the suggestion, and will so stipulate in the code of practice.

Clauses 56 and 57

- ***To consider providing for the retention of covert surveillance products for, say, one year after the completion of all legal proceedings, and to amend clauses 56(2)(b) and 57(2)(a)(ii)(B) for the purpose.***

13. Taking into account the suggestion, we will introduce CSAs to amend clauses 56(2)(b) and 57(2)(a)(ii)(B) to read as follows –

"*Clause 56*

……

(2) For the purposes of this section, something is necessary for the relevant purpose of a prescribed authorization –

(a) if it continues to be, or is likely to become, necessary for the relevant purpose; or

*(b) except in the case of a prescribed authorization for a telecommunications interception, **at any time before the expiration of 1 year after it ceases to be necessary** for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted."*

"Clause 57

……

(2) The record kept under subsection (1) –

(a) to the extent that it relates to any prescribed authorization or device retrieval warrant –

……

(ii) without prejudice to subparagraph (i), where it has come to the notice of the department concerned that any relevant civil or criminal proceedings before any court are pending or are likely to be instituted, or any relevant review is being conducted under section 40, or, in the case of a prescribed authorization, any relevant application for an examination has been made under section 42, is to be retained –

*(A) in the case of any pending proceedings, review or application, **at least 1 year after** the pending proceedings or application has been finally determined or finally disposed of or **at least 1 year after** the review has been completed or finally disposed of (as the case may be); or*

*(B) in the case of any proceedings which are likely to be instituted, **at least 1 year after***

they have been finally determined or finally disposed of or, if applicable, ***at least 1 year after*** *they are no longer likely to be instituted; or*

…..…"

Similar changes to clause 56(1A) will be made.

Clause 58

- ***To consider amending clause 58(4) to provide that the prosecution must disclose to the court and the defence the relevant information.***

14. Taking into account Members' concern, we will move CSAs to mandate the disclosure of exculpatory information to the trial judge. The proposed CSAs would be as follows –

"Clause 58

…..…

(4) Notwithstanding subsection (2) -

(a) each department shall disclose such information obtained pursuant to a relevant prescribed authorization that continues to be available for disclosure to the person conducting the prosecution of any offence to ensure that the person has the information he needs to determine what is required of him by his duty to secure the fairness of the trial of that offence; and

(b) the person conducting the prosecution of the offence shall then disclose the information to the trial judge in an ex parte hearing that is held in private.

(5) [deleted]

(6) Where the trial judge considers that it is essential in the interests of justice, he may direct the person conducting the prosecution of the offence to make for the purposes of the proceedings concerned any such admission of fact as the trial judge considers essential to secure the fairness of the trial of that offence.

"trial judge" ( ), in relation to the disclosure of any information by the person conducting the prosecution of any offence, means the judge or magistrate before whom the criminal proceedings instituted for the offence are or are to be heard or any other judge or magistrate having jurisdiction to deal with the matter."

- ***To provide the judgment of* Preston v United Kingdom**

15. The case is attached at **Annex A**.

- ***To provide relevant cases on the prosecution's duty of disclosure.***

16. A relevant case, *HKSAR v Chan Kau Tai*, CACC 26/2004, is attached at **Annex B**.

- ***To advise how long telecommunications intercepts are kept at present.***

17. As explained at the Bills Committee, it has been our long-held policy to destroy telecommunications intercepts as soon as practicable. In general, they are destroyed within one month of the interception.

Clause 59

- ***To provide the panel judges with a copy of the code of practice.***

18. We will provide the panel judges with a copy of the code of practice for their information.

- ***To inform the Legislative Council when the code of practice is amended.***

19. We agree to the suggestion. We will provide the Panel on Security the updated versions of the code from time to time.

- ***To consider amending the term "have regard to" under clause 59 (4) to "comply with".***

20. We agree to the suggestion, and will introduce a CSA for the purpose.

- ***To consider whether the Secretary for Justice rather than the Secretary for Security should issue the code of practice in respect of the ICAC.***

21. The code of practice is intended to provide practical guidance to LEA officers. The Secretary for Security will issue the code pursuant to the power conferred on him under the Bill in respect of matters provided for in the Bill. The procedural steps apply across the board among the LEAs. It is appropriate for one authority designated under the Bill (in this case the Secretary for Security) to issue one code applicable to all.

<u>Other issues</u>

- ***To consider arranging a briefing on interception of telecommunications and the storage facilities for records.***

22. As pointed out by some Members at the meeting, a briefing on telecommunications interception may not be strictly necessary for the Committee's deliberation of the Bill. Unlike covert surveillance which involves a diversity of devices, each with different capabilities and functions, telecommunications interception operations are relatively straightforward. Paragraph 10 of our paper SB Ref.: ICSB 15/06 already explains the operation of telecommunications interception. As for what can be done under a telecommunications interception operation, in terms of intrusiveness into privacy of communications, it is clear : we can monitor the contents of telecommunications, including the words spoken and other data produced in association with the communication. Further information than what we have provided would involve operational details which are sensitive.

23. On balance, we hope that the Committee will appreciate our difficulties. If Members have further questions, we would be pleased to try and answer them.

- ***To consider if the Commissioner under the Bill or the Privacy Commissioner should oversee the intelligence keeping system.***

- ***To advise on the decision chain involved on whether to keep intelligence obtained from covert operations, including the rank of officers involved.***

24. The Police's intelligence management system is tightly controlled. The database is centralised, and the input is done by a dedicated unit separate from the investigative teams. The unit comprises officers specially trained and disciplined for the task, working under the charge of a Superintendent of Police. The system only contains information which is relevant to the prevention or detection of crime and safeguarding security in respect of Hong Kong. Access to the database is also strictly controlled. All entries and retrievals are recorded, establishing an audit trail for inspection. We consider that the arrangement is appropriate.

- ***To clarify the flowchart at Annex B to SB Ref. : ICSB 13/06 to reflect the confirmation process for oral applications and the swearing of affidavits.***

25. The flowchart attached to SB Ref. : ICSB 13/06 is a simplified version of the steps involved. We confirm that where an application for confirmation of an oral authorization is made, an affidavit will have to be sworn.

- ***To state at the resumption of the second reading debate of the Bill that the Chief Justice will be advised if the pre-appointment checking of panel judges indicates a risk factor.***

26. The Administration will do so.

- ***To advise who will be held responsible for any loss of papers held by the panel judges.***

27. As the papers will be held in the Judiciary's premises, the Judiciary Administration will take the necessary steps to ensure the safekeeping of these documents.

- ***To advise whether the Judiciary will acknowledge receipt of documents submitted to the panel judges by the LEAs under the Bill.***

28. The LEAs will deliver the documents usually to the assistant to a panel judge to be placed before a panel judge. The panel judge will cause a copy of each of the documents or records made available to him to be certified by affixing his seal to it and signing on it; and the copy so

certified will be made available to the department making the application.

Security Bureau
June 2006

PRESTON v[1]. THE UNITED KINGDOM.txt

AS TO THE ADMISSIBILITY OF

Application No. 24193/94
by Stephen and Zena PRESTON
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 2 July 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 3 May 1994 by Stephen and Zena PRESTON against the United Kingdom and registered on 25 May 1994 under file No. 24193/94;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 22 November 1995 and the observations in reply submitted by the applicants on 19 January 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are British citizens, born in 1955 and 1951, respectively and both are currently in prison in the United Kingdom. They are represented before the Commission by Mr. Keith Dolan, a solicitor practising in London.

The facts as submitted by the applicants may be summarised as follows.

A. Particular circumstances of the case

The applicants, who were married, separated in 1988. The first applicant moved to Morocco and then to Amsterdam. The second applicant, her son and daughter returned to England and lived together in a house at Waterfall Road.

An observation log was opened by the police in relation to the

second applicant's address at Waterfall Road in February 1989. From March 1989 the second applicant's telephone at home was the subject of an interception under warrant of the Home Secretary pursuant to the Interception of Communications Act 1985 ("the 1985 Act"). On 22 April 1989 the second applicant's son was arrested and subsequently convicted in respect of cannabis dealings. On 3 August 1989 the first applicant was arrested after leaving the house at Waterfall Road with two bags containing £225,680. A subsequent search of the house in Waterfall Road revealed a bag containing approximately 10kg of cannabis resin. The second applicant was also arrested on 3 August 1989. The applicants, together with three others, were charged with, inter alia, conspiracy to import cannabis resin. The trial of the applicants took place between 1 November 1990 and 15 February 1991 before a judge and jury. Both applicants pleaded not guilty.

The case for the prosecution at the trial was later summarised by the House of Lords as follows: There were a number of monetary transactions between the applicants, the second applicant assisted the first applicant to procure a false passport and there were various meetings between the applicants and between the second applicant's children and the first applicant in Amsterdam. In addition, the prosecution relied on the frequency of telephone messages passing between, among others, the applicants on the telephones to which the applicants had access and, in particular, to a burst of telephonic activity prior to 28 July 1989. The prosecution did not seek to introduce evidence as to the contents of those telephone calls.

The prosecution case went on to refer to the fact that on 28 July 1989 the police were called to a van which had obviously been the subject of a hijacking in that large quantities of cannabis had been stolen from it. This event, according to the prosecution, was followed by more meetings (between the first applicant and the second applicant's daughter and between two other defendants in the proceedings), the hiring of vehicles and further telephone calls to and from the second applicant's telephone at Waterfall Road. When the applicants were arrested the money and cannabis resin (referred to above) were found with the first applicant and in the second applicant's home respectively. In addition, various papers were discovered at Waterfall Road which established connections between Waterfall Road and the bag containing the money. These papers also included, according to the prosecution, lists of drug dealers and lists of quantities of money and drugs. Following the applicants' arrest a police officer, according to the prosecution, took a number of telephone calls made to Waterfall Road and pretended to be a participant in a drug dealing conspiracy. While the detail of these calls remains in issue, the general nature of them appears to be undisputed. The first was from a man from Amsterdam who appeared to have a pressing need to know the whereabouts of the first applicant and the money the first applicant was said to owe to the telephone caller. The second was from the first applicant's girlfriend who said that she and the first applicant's son were being held hostage in Amsterdam for the return of money and cannabis to Holland. The third was from a man who spoke of the hijacking of cannabis.

From the evidence so presented, the prosecution asked the jury to find that the first applicant was guilty of exporting substantial quantities of cannabis from Amsterdam for some time and that at the end of July 1989 he had organised a particular deal which had gone wrong when a van containing the shipment was hijacked and the first applicant came to London to put matters right. As regards the second applicant, the prosecution's case concluded by asking the jury to find that the second applicant was the first applicant's chief organiser in the United Kingdom.

While the applicants did not deny that there was a conspiracy to import cannabis, they claimed that they had no part in it. The first applicant maintained that while he was involved in the conspiracy after 30 July 1989, this was only because of threats made to his life and the

lives of his girlfriend and child by Dutch distributors of cannabis who mistakenly thought that the first applicant had influence in drugs circles in the United Kingdom. His role after joining the conspirators after 30 July 1989 was to recover the money and drugs for those who had, at that stage, kidnapped his girlfriend and child. The second applicant claimed that the regular telephone contact with the first applicant was entirely innocent of any such conspiracy.

The question of the telephone calls came to a head during the trial when, on 26 November 1989, counsel for the first applicant was cross-examining two police officers involved in the surveillance of Waterfall Road and the arrest of the first applicant. The first officer indicated that he had been instructed that the first applicant could be armed and was expecting to be shot. The second officer indicated that there was a possibility that the first applicant was afraid for his life and that he knew from information that the first applicant was in the United Kingdom before 1 August 1989.

Counsel for the first applicant pursued, in the absence of the jury, the question of how the police officers came upon such information. On 27 November 1990 and pursuant to the application of counsel for the prosecution, the court sat in the absence of the applicants, their solicitors and the jury and counsel for the prosecution revealed that there was a warrant signed by the Secretary of State pursuant to the 1985 Act. Discussions then took place as to the possibility of disclosing any information derived from the interception of the telephone at Waterfall Road ("interception material") which might assist the defence without breaching section 9 of the 1985 Act. Prosecution counsel also revealed something of what he knew the intercepts did and did not contain.

The matter came back before the court on 3 December 1990 by which time prosecution counsel had spoken to a senior adviser to the Attorney General. He was able to tell the court, inter alia, that a senior officer in the case had informed him that so far as that officer was aware there was no material derived from the intercept which would assist the case of the first applicant. He made it clear that further information sought by the defence counsel was not going to be revealed by him. It was also made clear that the interception tape and transcripts had been destroyed. Prosecution counsel was invited by the trial judge to go back to the Attorney General to see whether there was anything in the interception material which could conceivably be of use to the defence.

Having consulted the Attorney General and advisers to the Director of Public Prosecutions and to the Home Office, counsel for the prosecution informed the court sitting in camera on 5 December 1990 that the Attorney General was of the opinion that it was not a part of the duties of counsel for the prosecution to acquaint himself with such material as existed relating to the interceptions for the purposes of assessing whether or not it should be disclosed to the defence. The argument of the Crown was that in the light of the terms of section 9 of the 1985 Act it was impossible to envisage any manner in which evidence relating to, or concerned with, or arising out of, the intercept might be introduced into this case whether orally, by admission of fact or otherwise, as it would tend to suggest the existence of a warrant. Consequently, it was unnecessary for prosecution counsel to acquaint himself with such material as existed for the purpose of disclosure.

This was treated as the end of the matter as far as disclosure was concerned, the trial judge commenting that he would have preferred "some sort of screening process" by prosecuting counsel as he had previously suggested. The second applicant's counsel then applied for an order under section 78 of the Police and Criminal Evidence Act 1984 to exclude the evidence as to the amount of telephone calls made to and from the telephone at Waterfall Road as well as the source of the calls made to that telephone ("telephonic activity evidence"). On

6 December 1990 the trial judge, still sitting in camera, refused the application under section 78 of the 1984 Act. Referring to the remainder of the trial, he ruled that "no evidence may be given about the matter and no questions asked". As regards the previously made order that neither the defendants nor their solicitors should be informed about the nature of what had occurred during the in camera sessions, the trial judge directed that counsel should respond, if asked whether there had been an interception, that they did not know.

The applicants and their solicitors were excluded from the trial for about 30 working hours due mainly to the above described applications and submissions made by counsel for the prosecution and defence in relation to the interceptions. The first applicant submits that later on that day (6 December 1990), on the advice of counsel and in light, inter alia, of the rulings in relation to the interception material and the telephonic activity evidence, he pleaded guilty to the first charge of conspiracy to import cannabis resin and the jury was discharged from giving a verdict on the other charges. On 25 February 1991 the first applicant was sentenced to ten years and six months imprisonment.

The second applicant maintained her plea of innocence and claims that she was subsequently extensively cross-examined by the prosecution about the nature of her alleged communication with, among others, the first applicant, which contact the second applicant continued to maintain was innocent. The second applicant was convicted of three charges namely, conspiracy to import cannabis resin together with the unlawful possession and use of a passport which was and she knew to be false. She received three (it appears concurrent) prison sentences of seven, two and two years for the three convictions. A confiscation order in the sum of £4000 and a costs order in the sum of £2949 were also made against the second applicant. The applicants' co-defendants were also convicted.

Both applicants were given leave to appeal to the Court of Appeal (Criminal Division) against conviction and sentence where they raised the exclusion from evidence of the interception material, the admission of the telephonic activity evidence and their exclusion from part of the trial.

The Court of Appeal asked counsel for the prosecution whether he had at some stage received information which enabled him to satisfy himself that, in his judgment, the Crown's case was not presented in relation to any defendant in a manner which was inconsistent with information known to the Crown and that there was no information known to the Crown which was not disclosed and which might have assisted the defence. The prosecution counsel answered both questions in the affirmative. The appeals against conviction were dismissed though the appeals against sentence were allowed in part, their sentences being reduced.

The applicants were given leave to appeal to the House of Lords. The questions that concerned the House of Lords were reported ([1993] 4 All ER 640) as including the question of what retention, use and disposal of materials and information derived from interceptions was permissible; to what extent the fact of an interception and the results thereof could be disclosed and put in evidence at a criminal trial; to what extent the prosecution was under a duty to disclose material derived from an interception which was or might be favourable to the defendant; whether it was fair to put in evidence the fact that telephone calls had been made without disclosing to the jury either the fact that some had been intercepted or were the fruits of such interceptions; and as to the scope of the general principle that a criminal trial should take place in the presence of the defendant.

During the hearing in the House of Lords counsel for the prosecution confirmed that all the physical products of the interceptions had been destroyed and that those involved in the

interceptions could probably not be identified and, even if they could be, could probably not remember what had been said. The House of Lords noted in this latter respect that, from the submissions of prosecution counsel in chambers to the trial judge, it was clear that at least one senior police officer appeared to have been able to recall at least some information about the interception material.

On 4 November 1993 the House of Lords gave their reasons for rejecting the appeal. The principal judgment was given by Lord Mustill, who pointed out that the obligation in domestic law was to disclose unused material to the defence and that the broader dictates of justice could not be served if the prosecution counsel was not aware of all the evidence when deciding on disclosure. However, the prosecution's duty to retain and disclose to the defence all material evidence did not extend to interception material obtained pursuant to section 2 of the 1985 Act. The purpose of the 1985 Act was that such material should not be used as evidence and, in particular, that material should not be adduced in a trial which would suggest that a telephone interception had been made. This interpretation of the 1985 Act was reinforced by sections 6 and 9 of that Act. Therefore non-disclosure of the fact of an interception and the material derived therefrom was an exception to the rule that the prosecution must disclose all unused material to the defence. It was noted that the issue had arisen due to the cross-examination by the first applicant's counsel of witnesses in a manner prohibited by the 1985 Act.

In addition, Lord Mustill held (though he noted that this question caused him "considerable anxiety") that the defendants could not argue under section 78 of the Police and Criminal Evidence 1984 that telephonic activity evidence should not have been admitted without the disclosure of the interception material. Lord Mustill noted, in this respect, that it was the cross-examination by the first applicant's own counsel in a manner prohibited by the 1985 Act that brought into evidence the material in relation to the intercepted telephone calls and that the applicants could not be allowed to take advantage of this to raise the question they did under section 78 of the 1984 Act. As to the conduct of several days of the hearing without the applicants or their solicitors in attendance, Lord Mustill stated that it had been wrong to conduct so much of the trial in camera and to prevent counsel from informing their clients and solicitors about what had transpired during those hearings. However he concluded by stating that, although it amounted to a serious irregularity, it had not affected the outcome of the trial and or the reliability of the verdicts.

B. Relevant domestic law and practice

1. The Interception of Communications Act 1985

On 10 April 1986 the Interception of Communications Act 1985 ("the 1985 Act") came into force in the United Kingdom pursuant to the judgment of the Court in the Malone case (Eur. Court HR, Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82). Its objective, as outlined in the Home Office White Paper dated February 1985, is to provide a clear statutory framework within which the interception of communications on public systems will be authorised and controlled in a manner commanding public confidence.

(a) Warrants

Section 1 of the 1985 Act makes it a criminal offence for anyone to intentionally intercept a communication in the course of its transmission by means of a public telecommunications system except in four statutorily defined situations, including when that interception is in obedience of a warrant issued in accordance with sections 2-6 of the 1985 Act. Section 2 of the 1985 Act empowers the Secretary of State to issue a warrant requiring the interception of telecommunications and the disclosure of interception material in such a manner and to such persons as are described in the warrant for the purpose, inter alia,

of "preventing or detecting serious crime". Section 3 of the 1985 Act contains a detailed series of provisions restricting the scope of any warrant issued. Section 4 deals with the manner in which a warrant may be issued and with the duration of the warrant.

Under Section 6 the Secretary of State is required, when issuing a warrant, to make arrangements to secure that disclosure of interception material is limited to the minimum necessary for the purpose of, inter alia, preventing or detecting serious crime and that any interception material is destroyed as soon as its retention is no longer necessary for such purpose.

(b) Exclusion of evidence

Section 9 of the 1985 Act provides that no evidence shall be adduced, and no question in cross-examination shall be asked, by any party in any proceedings before a court or tribunal which tends to suggest that a warrant has been or is to be issued to a person holding office under the Crown. There are some clearly defined exceptions to this rule, none of which are relevant to the present application.

(c) The Tribunal

Any person can complain to the Interception of Communications Tribunal ("the Tribunal") in respect of a suspected interception. The Tribunal consists of five members each of whom must be a lawyer of not less than 10 years standing and can hold office for five years subject to re-appointment. Section 7 of and Schedule 1 to the 1985 Act contains detailed provisions for the investigation of complaints by the Tribunal. If the application does not appear to the Tribunal to be frivolous the Tribunal will investigate whether there is or has been a relevant warrant and, if so, will apply the principles of judicial review in determining whether there has been a breach of sections 2-5 of the 1985 Act.

If there has been no such breach the Tribunal merely confirms this fact but does not confirm whether a warrant has been issued or not. However if there has been a breach, the Tribunal must notify the applicant of its conclusion on this point, and report on its findings to the Prime Minister and to the Commissioner and, if the Tribunal thinks fit, it may order the quashing of the warrant, destruction of the interception material and payment by the Secretary of State of compensation. The Tribunal does not give reasons for its decisions and there is no appeal from a decision of the Tribunal.(d) The Commissioner

The Commissioner is appointed by the Prime Minister and must have held or hold high judicial office. The Commissioner's role is mainly a supervisory one. His functions include the following:

(i) to keep under review the carrying out by the Secretary of State of the functions conferred on him by sections 2-5 of the 1985 Act;

(ii) to keep under review the adequacy of the arrangements under section 6 of the 1985 Act;

(iii) to assist the Tribunal;

(iv) to report to the Prime Minister if the Commissioner is of the opinion that there has been a breach of sections 2-5 of the 1985 Act which has not been so reported by the Tribunal or if the arrangements under section 6 of the 1985 Act are inadequate;

(v) to make an annual report to the Prime Minister on the exercise of his functions, which report must be laid before the House of Parliament. The Prime Minister has the power to exclude any matter from the report if publication would be prejudicial

to national security, to the prevention or detection of serious crime or to the economic well-being of the United Kingdom. The report must state if any matter has been excluded.

2. The Police and Criminal Evidence Act 1984

Section 78 of this Act reads as follows:

"In any proceedings the Court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the Court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

COMPLAINTS

The applicants complain under Article 6 paras. 1, 3 (b) and 3 (d) of the Convention that their trial was unfair in that the interception material was not admitted in evidence whereas the telephonic activity evidence was admitted, submitting that this amounted to an inequality of arms. The applicants also argue that the trial was unfair in that they were excluded (together with their solicitors) from several days of their trial. Secondly, the applicants complain about an infringement of their rights under Article 8 of the Convention by reason of law and practice laid down in the 1985 Act in relation to telephone interceptions, because of the absence of the substantive involvement in the process of an independent judicial authority. Thirdly, the applicants argue under Article 13 of the Convention that they have no effective domestic remedy in respect of the above claims.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 May 1994 and was registered on 25 May 1994.

On 28 June 1995 the Commission decided to communicate the applicants' complaints under Articles 6 and 13 of the Convention.

On 22 November 1995 the observations of the respondent Government were received and those of the applicants in response were received on 19 January 1996.

THE LAW

1. The applicants complain under Article 6 (Art. 6) of the Convention about the exclusion of the interception material, about the admission in evidence of the telephonic activity evidence and about their and their solicitor's exclusion from part of the trial. The relevant parts of Article 6 (Art. 6) read as follows:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

3. Everyone charged with a criminal offence has the following minimum rights: ...

b. to have adequate time and facilities for the preparation of his defence; ...

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

As regards the interception material itself, the Government specify that only the telephone at Waterfall Road was intercepted and they point out, inter alia, that such material was destroyed pursuant to section 6 of the 1985 Act on or about the date of the applicants' arrest. The Government also submit that the case against both applicants was a strong one aside from the interception material.

As regards access to and use of the interception material, the Government submit that there are three important but competing public interests at stake. The first is the public interest in ensuring that interception of communications is only authorised on strictly limited and necessary grounds and that the dissemination and retention of any interception material is limited to the minimum necessary for the purpose for which interception was authorised (preventing or detecting serious crime). The second is the public interest in maintaining the secrecy of secret surveillance. These two interests are reflected in the 1985 Act and in Article 8 (Art. 8) of the Convention. The countervailing and third public interest involved is the need to ensure the fullest practical disclosure of material to the defence.

It is the Government's view that the 1985 Act strikes a fair balance between the various public interests involved and ensures an equality of arms between the defence and the prosecution. They consider that the concern to ensure that invasions of privacy are strictly limited to the minimum necessary and the need to maintain the effectiveness of secret surveillance render it inevitable that the interception material is not available to the defence. However, the defence and the prosecution are in the same position from the outset of the criminal proceedings since neither can make use of the material and, insofar as any information derived from the product remained in the knowledge of certain police officers in the present case, that information was not helpful or relevant to the cases being put forward by the applicants. In any event, any information derived from the interception could not be used in any way adverse to the defence since if it was favourable to the defence there was an obligation to halt the prosecution or to inform the defence. As to Article 6 para. 3 (b) and 3 (d) (Art. 6-3-b, 6-3-d), the Government point out that the principal or essential purpose of those provisions is to achieve equality of arms between the prosecution and defence which, for the reasons set out above, was established.

As to the admission in evidence of telephonic activity on the telephone at Waterfall Road and the inferences the jury were invited to draw when evidence as to the content of the conversation was excluded, the Government point out that a risk would only arise if there had been an interception and if the evidence from that interception was beneficial to the defence and in contradiction therefore to the inferences against the defence which the prosecution sought to raise. The Government submit that such a risk is minimal and, in any event, the defence was free to give evidence which contradicted those inferences. In addition, the prosecuting counsel was able to inform the domestic courts that the police who had had access to the interception material knew of nothing which would support the defence submissions. It is true that the defence were not in a position to verify this, but the public interest considerations referred to above make no such verification possible.

As to the exclusion of the applicants and their solicitors from part of the trial, the Government submit that the right to be present at trial is not an absolute one and that their exclusion in the circumstances did not undermine the applicants' ability effectively to participate in the trial; the domestic courts concluded on this point that, while it had been an error and gave the applicants cause for complaint, it did not cast doubt on the reliability of the verdicts. In addition, no evidence was heard in their absence and what took place was prolonged and repetitive legal argument which did not require input from the applicants.

The applicants at the outset contest three themes which they consider run through the Government's observations. In the first place, they point out that it is precisely when the prosecution case appears strong that the trial should be scrupulously fair to an apparently feeble defence. Secondly and as to the Government's proposition that disclosure of interception material would lead to more convictions than acquittals, the applicants simply claim that they fall into the latter category - the disclosure of that material would have proved their innocence and the United Kingdom is the only country in "the advanced world" which does not allow the admission of such evidence. Thirdly, the applicants consider that the Government has misconceived the necessity for secrecy surrounding interceptions - it is logical that those whose telephones are intercepted should not be notified during the interception but victims of an interception can thereafter be notified, and the relevant material disclosed, without any prejudice to an operation that has already terminated or to the existing technology or operational secrets used.

The core of the applicants' complaints is that the admission into evidence of the telephonic activity evidence (allowing the prosecution to invite the jury to draw adverse inferences from the fact of those telephone conversations) while at the same time not admitting into evidence the interception material (that is, the content of those conversations which would allegedly have proved the applicants' innocence) led to an inequality of arms between the prosecution and the defence and meant that the trial was unfair within the meaning of Article 6 (Art. 6) of the Convention.

The first applicant submits that he pleaded guilty on counsel's advice after the in camera hearing in light of the trial judge's rulings on the interception material and the telephonic activity evidence, after the judge's inducement as regards sentencing and as a result of the psychological oppression which resulted from his exclusion from his own trial. The second applicant submits that the evidence against her was thin and fragmentary in nature and that the interception material would have positively supported her defence and rebutted the inferences that the prosecution invited the jury to draw against her. She points out that, while the Government note that prosecution counsel answered in the affirmative the two questions put by the Court of Appeal as regards the content of the interception material, it was clear from the responses of prosecution counsel during the trial to questions put by counsel for the applicants' co-accused, that that material contained nothing prejudicial to the second applicant and constituted, as such, exculpatory material to which she should have had access.

The applicants further argue that it is not sufficient to say that the interception material had been destroyed prior to the trial - the adversarial system operates from the time of arrest and the prosecution had an unfair advantage because they alone had, at one stage, possession of the transcripts and could recollect the information therein and because they used some of the information to the applicants' detriment in preparing the prosecution case. In addition, although the police claimed that there was nothing in the information to support the applicants' cases, that claim could not be tested: police officers have a motive to lie and, being psychologically committed to a defendant's guilt, police officers are likely to overlook or fail to comprehend evidence pointing to innocence. The applicants' consider that the destruction of the interception material shows contempt and not respect for their private lives. Their privacy was invaded and the fruits of such an interference were used to their detriment before being destroyed without their having had any opportunity to use that material to counter allegations made against them.

In addition, if they were not to get access to the interception material, the applicants submit that the telephonic activity evidence

should have been excluded from the trial or that some possibility for a review of the interception material, by an independent counsel or by prosecuting counsel, for its relevance to the defence should have been afforded. Contrary to the Government's submission, the telephonic activity evidence should only have been admitted if it was fair in all the circumstances to the defence as laid down in section 78 of the Police and Criminal Evidence Act 1984.

As to their exclusion from the trial, the applicants argue that this meant that they could not effectively participate in the trial since they were excluded from 30 hours of the proceedings; their solicitor was also excluded; and their counsel could not make any reference to what had gone on in closed session. It is claimed that their exclusion had a traumatic effect on the applicants and that, whether or not evidence was heard during that closed session, the applicants did not know that at the time.

The Commission considers that the first applicant's plea of guilty does not affect his ability to claim to be a victim of a violation of Article 6 (Art. 6) of the Convention since he claims that it was the trial judge's position as to the admission of the above-mentioned evidence that led to his pleading guilty and since, in any event, the Commission recalls that the determination of the first applicant's sentence is also part of the "determination of a criminal charge" (No. 8289/78, Dec. 5.3.80, D.R. 18, p. 166).

The Commission has considered these complaints of the applicants under Article 6 para. 1 (Art. 6-1) of the Convention which provides for a general right to a fair trial of which the guarantees in paragraph 3 of Article 6 (Art. 6) are specific aspects (Eur. Court HR, T v. Italy judgment of 12 October 1992, Series A no. 245-C, p. 41, para. 25).

It is recalled that Article 6 (Art. 6) does not lay down any rules on the admissibility of evidence, as such, this being primarily a matter for regulation by national law. However, the role of the Convention organs is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (Eur. Court HR, Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33, Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, pp. 29-30, paras. 45-49 and Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 26).

The Commission further recalls that it is a requirement of fairness under Article 6 para. 1 (Art. 6-1) of the Convention that the prosecution authorities disclose to the defence "all material evidence for or against the accused" (Eur. Court HR, Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247, p. 35, para. 36) and that the principle of equality of arms, requiring a fair balance between the prosecution and the defence, also constitutes a feature of the wider concept of a fair trial (Eur. Court HR, Ekbatani v. Sweden judgment of 26 May 1988, Series A. no. 134, p. 14, para. 30 and Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, p. 19, para. 33).

Since the Commission is solely concerned, in this part of its decision, with whether the proceedings against the applicants were fair within the meaning of Article 6 (Art. 6) of the Convention outlined above, the Commission does not consider it necessary to comment on the parties' submissions, made in the context of the fairness of the proceedings, as to the necessity or otherwise of the destruction of the interception material in view of the applicants' right to privacy guaranteed by Article 8 (Art. 8). Similarly, it is not the task of the Commission to comment on the applicants' submissions that the interception material contained material which would allegedly have proved their innocence or as to the likelihood of police officers overlooking that allegedly exculpatory material.

The matter at issue concerns the fairness of proceedings in which

evidence of the contents of the telephone conversation was excluded, while evidence of the telephone activity was admitted), the prosecution using the latter material for the purpose of drawing inferences as to the content of calls made to and from the telephone at Waterfall Road.

The Commission notes that it is not disputed that the physical products of the interception were destroyed when the applicants were arrested or that, pursuant to section 9 of the 1985 Act, no party to the proceedings could adduce any evidence or put any question during the proceedings which could tend to suggest that an interception had taken place. Accordingly, the prosecution was prevented throughout the proceedings from basing the prosecution case on or referring in any way to the information gleaned from the interception material.

Further, the Commission does not consider that the applicants have shown how access to such interception material by the police prior to the applicants' arrest (and the consequent recollection by certain police officers of some information from that material) had any effect thereafter on the proceedings or in what respect that material was used to the applicants' detriment in preparing the prosecution case, other than to provide the prosecuting authorities with a starting point from which to gather admissible evidence against the applicants.

The Commission does not accept that the refusal to exclude the telephonic activity evidence led to an inequality between the parties. While the prosecution could invite the jury to draw inferences from the telephonic activity evidence, the applicants were free to give evidence to rebut those inferences.

The Commission further recalls that the prosecution case did not rest alone on the telephonic activity evidence and the inferences to be drawn therefrom - the prosecution adduced evidence relating to, inter alia, a number of monetary transactions between the applicants; the procurement of a false passport; various meetings between the applicants and between the second applicant's children and the first applicant in Amsterdam together with evidence from a police observation log; the money which the first applicant had in his possession when he was arrested; and the substantial amounts of cannabis found on the premises at Waterfall Road, at which the second applicant lived and which the first applicant had just left when he was arrested.

In addition, various papers were discovered at Waterfall Road which established connections between Waterfall Road and the bag containing the money which the first applicant retained and which papers also included lists of drug dealers together with lists of quantities of money and drugs. The prosecution case went on to refer to the finding by the police on 28 July 1989 of a van, which had obviously been the subject of a hijacking in that large quantities of cannabis had been stolen from it. The prosecution also referred to the telephone calls taken by a police officer in Waterfall Road after the applicants' arrest, the general nature of which calls is referred to above. It was on the basis of that evidence, as well as the inferences the prosecution requested the jury to draw from the telephonic activity evidence, that the prosecution invited the jury to find that the applicants were involved in a conspiracy to import drugs into the United Kingdom.

It is true that, in addition, the applicants and their solicitors were absent for approximately 30 hours of the trial hearing. The Commission recalls that it flows from the notion of a fair trial that an accused should as a general principle be entitled to be present at the trial hearing (Eur. Court HR, Ekbatani v. Sweden, loc. cit., p. 12, para. 25 and Colozza v. Italy judgment of 12 February 1985, Series A no. 89, pp. 15-16, paras. 29-30).

The Commission, however, notes that in the present case the applicants' trial lasted three and half months, whereas the applicants

were excluded from the trial on various days for a total of thirty hours during which time the matters which were mainly dealt with related to the interception of the telephone at Waterfall Road. In addition, the applicants were each legally represented by a barrister during the period of their exclusion. Moreover, while the Commission is not convinced that the extent of the applicants' exclusion was strictly necessary, it notes that the matters discussed were of a legal nature and that the jury were not present.

Furthermore, the Commission considers that the order not to divulge the nature of the discussions during the in camera hearing does not give rise to a lack of fairness. The position prior to and after the in camera hearing as regards the interception material and the telephonic activity evidence did not change - any reliance on or reference to that material by any of the parties continued to be excluded in accordance with the 1985 Act while evidence as to the telephonic activity continued to be admitted. In any event, it appears, although it is not clear from the observations, that counsel was free to inform the applicants that the application to have the telephonic activity evidence excluded had been refused and the Commission notes, from the first applicant's observations, that he was informed of the judge's orders in that respect, which observations also imply that the first applicant was informed of the judge's orders as regards the inadmissibility of the interception material.

Finally, the effect of the non-disclosure of the interception material, of the refusal to exclude the telephonic activity evidence and of the absence of the applicants from the trial was the subject of a detailed analysis before the Court of Appeal and the House of Lords (Eur. Court HR, Edwards v. the United Kingdom judgment, loc. cit., pp. 34-35, paras. 34-39). The Commission notes the responses of prosecution counsel to the questions put by the Court of Appeal and that both the Court of Appeal and the House of Lords, having considered the matter in detail, found the verdicts against the applicants to be reliable.

In such circumstances, the Commission does not consider that the matters of which the applicants complain constitute factors of such a decisive nature as to affect the fairness of the proceedings viewed as a whole (No. 13445/87, Dec. 14.10.91, D.R. 71, p. 84). Accordingly, the Commission considers these complaints manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants also complain about an infringement of their rights under Article 8 (Art. 8) of the Convention by the law and practice in relation to telephone interception as laid down by the 1985 Act.

> "1. Everyone has the right to respect for his private ... life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, ..."

The applicants argue that the law and practice of interception are not in compliance with the Malone or Klass judgments (Eur. Court HR, Klass and others v. Germany judgment of 6 September 1978, Series A no. 28 and Malone v. the United Kingdom judgment loc. cit.), referring to the absence of the substantive involvement in the process of an independent judicial authority.

However, the Commission recalls its decision in the Christie case (No. 21482/93, Dec. 27.6.94, D.R. 78-A, p. 119) where the Commission considered the interception system laid down by the 1985 Act in the context of Article 8 (Art. 8) of the Convention, which Act had been introduced in response to the above-mentioned Malone judgment. The

Commission noted the safeguards afforded by the Commissioner, the Tribunal and the Security Services Tribunal provided for in the 1985 Act. It considered that these were sufficient to render any interference with the rights guaranteed by Article 8 (Art. 8) which had been carried out in pursuance of that Act proportionate to the aims set out in paragraph 2 of that Article. Accordingly, the Commission considers this complaint manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Finally, the applicants argue under Article 13 (Art. 13) of the Convention that they had no effective remedy for their complaints under Articles 6 and 8 (Art. 6, 8) of the Convention.

Article 13 (Art. 13) of the Convention reads as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government submit that the applicants' complaints under Article 6 (Art. 6) of the Convention were dealt with by the domestic courts on appeal and if the appeal court had been of the opinion that these matters, either individually or cumulatively, rendered the proceedings unfair it is "overwhelmingly likely" that the convictions would have been quashed. The applicants rely on the above-cited Malone judgment in asserting that the 1985 Act is designed to exclude any effective remedy either for invasion of privacy or for unfair trial by preventing any mention of telephone interception in the courts. In addition, the applicants point out that the House of Lords accepted that they had been unlawfully treated and had suffered real hardship. Yet their appeal was dismissed.

As regards the applicants' complaints under Article 6 (Art. 6) of the Convention, the Commission recalls that the guarantees of Article 13 (Art. 13) are less strict than, and are absorbed by, those of Article 6 (Art. 6) of the Convention (No. 24142/94, Dec. 6.4.95, D.R. 81, p. 108). As regards their complaints under Article 8 (Art. 8) of the Convention, the Commission recalls that Article 13 (Art. 13) does not require a remedy under domestic law in respect of any alleged violation of the Convention. It only applies if the individual can be said to have an "arguable claim" of a violation of the Convention (Eur. Court HR, Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, para. 52). The Commission finds that the applicants cannot be said, in light of its findings above as regards the applicants' complaint under Article 8 (Art. 8), to have an "arguable claim" of a violation of their Convention rights (No. 21482/93, loc. cit.).

It follows that these complaints must be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber

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Annex B

CACC26/2004

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

CRIMINAL APPEAL NO. 26 OF 2004
(ON APPEAL FROM HCCC 333 OF 2002)

BETWEEN

HKSAR — Respondent

and

CHAN KAU TAI (陳裘大) — Applicant

Before : Hon Ma CJHC, Woo VP and Tang JA in Court
Dates of Hearing : 6-9, 12-14 December 2005
Date of Judgment : 14 December 2005
Date of Handing Down Reasons for Judgment : 26 January 2006

REASONS FOR JUDGMENT

Hon Ma CJHC :

1 These are the Reasons for Judgment of the Court, to which each judge has contributed.

Introduction

2 The Applicant was a Chief Building Services Engineer of the Housing Department ("HD"). On 20 October 2003, he stood trial before Pang J and a jury on an indictment containing 16 counts, each alleging that he, as a public servant, had accepted an advantage, contrary to the Prevention of Bribery Ordinance Cap. 201 ("the Ordinance"). On 12 December 2003, he was convicted on 10 counts. He was acquitted by the jury on counts 2 to 4 and by the direction of the judge earlier in the proceedings on counts 7 and 13. Count 15 was an alternative to count 14 on which no separate verdict was required. The jury had deliberated for 3 days before returning their verdict. They were unanimous on all the counts except counts 2 to 4 where they acquitted the Applicant by a majority of 5 to 2; count 10, where they convicted by a majority of 5 to 2 and count 11, guilty by 6 to 1.

3 On 5 January 2004, the Applicant was sentenced to a total term of imprisonment of 7 years. A restitution order in the sum of $2.6 million was made in favour of the government, pursuant to section12(1) of the Ordinance. The Applicant applied for leave to appeal against conviction.

4 The appeal first came for hearing before this Court (Ma CJHC, Stuart-Moore VP, Stock JA) on 25 January 2005. By a Notice of Motion pursuant to section 83V of the Criminal Procedure Ordinance, Cap. 221, the Applicant applied for leave to adduce evidence directed to the non-disclosure of the previous convictions and disciplinary records of Chief

Investigator Yang ("C I Yang"). Such evidence included an affidavit by Mr Graham Anthony Harris, counsel for the defence at trial, sworn on 28 November 2004.

5 On 25 January 2005, the Court felt that it could not proceed with the hearing of the appeal in the absence of any evidence from Mr McNamara, who was counsel for the prosecution at the trial. When the hearing resumed on 26 January 2005, an affidavit of Mr McNamara was available. On the basis of the evidence then before the Court, the Applicant decided to allege that there was bad faith involved in the non-disclosure. The hearing of the appeal had to be adjourned for further evidence to be filed.

6 On 27 January 2005, directions were made by the Court for the filing of evidence 60 days before the resumed hearing and for the cross-examination of all witnesses.

7 The hearing of the appeal resumed on 6 December 2005 before the Court as now constituted.

8 We heard oral evidence on the first 3 days followed by 4 days of submissions. On 14 December 2005 we gave leave to the Applicant to appeal against conviction, allowed the appeal and ordered a new trial but reserving our reasons.

Background

9 The Applicant was arrested by ICAC officers at 6:45 a.m., 4 August 2001, led by C I Yang. He was in ICAC custody until he was released on bail at about 5 p.m. on 5 August 2001.

10 Whilst in custody the Applicant had been interviewed on 3 occasions by C I Yang. All 3 interviews were video taped. The first interview took place between 10:49 a.m. and 1:43 p.m. on 4 August 2001, the second interview from 10:23 p.m. to 11:31 p.m. the same day and the third interview took place between 9:46 a.m. and 12:22 p.m. on the following day, 5 August 2001. The admissibility of the video tapes and transcripts were challenged in a *voir dire*.

11 On 30 October 2003, they were ruled admissible, the Judge being "satisfied beyond reasonable doubt that the three interviews were conducted under voluntary circumstances and that the defendant had not been subjected to any form of oppression at any time".

12 It is common ground that only at the third interview did the Applicant incriminate himself. He admitted receipt of corrupt payments which formed the subject of some of the counts. The Applicant's case was that he made those admissions as part of a deal offered to him by C I Yang. This is how the Judge described the inducements in his summing up : -

> "… First, his son Eason would not be subject to a high profile arrest when he returns from Taiwan.. Secondly, he would be tried in the District Court and not in the High Court. The District Court would attract a lesser sentence than the High Court.
>
> Part of the deal was the ICAC would not interfere with his lady friends or his relatives. No names will be mentioned. Another part of the deal, if he co-operated with the ICAC and made admissions he would be given bail as soon as possible"

13 It was the Applicant's case that the deal was offered to him by C I Yang in the 24 minutes between the end of the second interview and when the Applicant was returned to the detention centre. Another ground of objection was that the Applicant's right to see a lawyer had been obstructed.

14 The Applicant's challenge to the evidence contained in the interviews, in particular, the 3rd interview, was repeated before the jury. However, as the Judge has correctly pointed out in the summing up, the jury was concerned with "whether the defendant made the admissions in the records of interview, and if so, whether they are true." And that provided they were "sure that the admissions were made and they are true, you are not entitled to disregard those admissions just because the defendant's right to see a lawyer was obstructed."

15 The credibility of both C I Yang and the Applicant was of critical importance to the admissibility and reliability of the interviews, the Judge being primarily concerned with admissibility and the jury with reliability. The admissibility of these interviews was relevant to the first Ground of Appeal which concerned the non-disclosure of C I Yang's criminal convictions and disciplinary records. The content of the interviews themselves was relevant to the fourth, fifth and sixth Grounds of Appeal.

16 Another important source of evidence against the Applicant at trial were edited portions of tapes recording activities in his office between March and August 2001. This surveillance of the Applicant was obviously not carried out with his consent although it had the consent of his superior. The legality of this audio/visual surveillance and its admissibility at trial formed the subject matter of the third Ground of Appeal.

The Grounds of Appeal

17 As summarised in the Applicant's written submissions, the grounds of appeal were as follows : -

"**Ground 1 :**

The Prosecution failed to disclose C I Yang's criminal convictions and ICAC disciplinary record in circumstances where C I Yang's credibility was critical to the judge's determination of the admissibility of the A's video interviews and to the jury's consideration of the reliability of the interviews.

The Prosecution's failure to disclose these matters was caused by the deliberate failure, in bad faith, of the ICAC to disclose them to the Defence.
[Ground 1 : Non-disclosure]

Ground 2 :

The judge erred in admitting in evidence the tape recordings of the ICAC's covert video and audio surveillance of the A in his Housing Authority office when the recordings were obtained as a result of breaches of his right to privacy, as a result, their admission denied the A the right to a fair trial.
[Ground 2 : Breach of right to privacy]

Ground 3 :

Not proceeded with.

Ground 4 :

The judge erred in failing to delete those questions and answers in the tape recording and transcript of A's first interview where the A exercised his right of silence, or direct the jury that the A's failure to respond to accusations made to him was not evidence against him.

Ground 5 :

The judge erred in admitting in evidence the tape recording and transcript of A's video interview during which the A exercised his right of silence.

Ground 6 :

The judge erred in his summing-up in commenting upon the A's failure to tell the ICAC during any of the interviews that he had a habit of counting his private money, which was an adverse comment on his right of silence.
[Grounds 4, 5 and 6 : The right to silence]"

Ground 1 : Non-disclosure

18 On 20 November 2001, C I Yang was convicted on his own plea of offences committed on 28 August 2001: (i) driving a motor vehicle with alcohol concentration in his breath exceeding the prescribed limit, contrary to section 39A(1) of the Road Traffic Ordinance Cap. 374 ("RTO") and (ii) careless driving, contrary to section 38(1) of the RTO. For (i), he was fined $5,000 and disqualified from driving for 6 months; for (ii) he was fined $500.

19 The disciplinary records relevant to this Ground were the following : -

> "(2) As a result of the convictions, on 4 December 2001 the ICAC's Head of Operations reprimanded C I Yang with a written warning of dismissal:
>
> > 'Having considered the circumstances surrounding your conviction and sentencing on 20 November 2001 in the Eastern Magistracy for offences of careless driving and driving a motor vehicle with alcohol concentration above the prescribed limit, I am of the view that you have failed to live up to the standards of behaviour expected of an officer of your rank, and have set a poor example to other officers.
> >
> > I therefore reprimand you and serve you notice that, in the event that you misconduct yourself in a similar way or cause the Commission embarrassment by poor or unacceptable behaviour within three years of the date of the offences, ie 28 August 2001, serious consideration will be given to terminating your service with the Commission.'
>
> (3) On 13 September 2003 he was given a verbal warning for failing to exercise due supervision over subordinate officers in the handling and disclosure of unused material."

20 C I Yang's convictions and disciplinary records had not at any stage been disclosed to the defence. The Applicant's case was that they

should have been. Moreover, this non-disclosure was in bad faith in that the concealment was deliberate.

21 The Respondent denied that they were under a duty to disclose the convictions, or that there was bad faith on anyone's part. It was contended that the convictions and disciplinary records were irrelevant to the credibility of C I Yang.

22 Both the Director of Public Prosecutions in the Statement of Prosecution Policy and Practice 2002 ("DPP's Statement") and the ICAC in the Commission Standing Order ("the ICAC CSO") dealt explicitly with the disclosure of previous convictions and other matters going to the credibility of prosecution witnesses : -

DPP's Statement

Paragraph 18.13 provides : -

> "The prosecutor should disclose to the defence the previous convictions of a prosecution witness. If discreditable conduct has previously been established against a prosecution witness which might affect the assessment to be made of him or her as a witness, that should also be disclosed. The safest course for the prosecution is to make enquiry about a witness' record and character where his or her credibility is likely to be a crucial issue in the case."

The ICAC CSO

Section 8 of Chapter 21 provides : -

> "*Material to be disclosed*
>
> 8. Without limiting the generality of disclosure principles, the application of the rule extends to:

> a. material which may affect the credibility of prosecution witnesses, which includes previous convictions of witnesses…
>
> b. the obligation in (a) applies equally to ICAC officers. It does not extend to disclosing allegations of misconduct in other matters, but only to proved misconduct which has resulted in conviction or disciplinary findings;"

23 From the evidence of Ms Lau Yuk-yee Ada, an investigator of the Operations Department of the ICAC, we gathered that in practice and as a matter of routine, a criminal records check (EPONICS) would be conducted against all witnesses, and that if the check revealed any criminal convictions, they would be disclosed to the defence without any consideration of their relevance. However, no such check would be conducted against any ICAC officer. In this particular case, a further exception was made in relation to one other witness, a Chief Building Services Engineer with the Housing Department. He was omitted because at the time of the criminal records check, Ms Lau did not have his "HKID number or other identifying particulars such as date of birth". Ms Lau decided not to pursue the matter further after discussion with another officer "because there was no way a civil servant occupying such a senior work would have any criminal record, because he would have gone through considerable vetting before being promoted to the rank".

24 As for criminal record checks on ICAC officers, she said in an affirmation dated 13 September 2005 : -

> "4. Regarding the criminal record check on ICAC officers, I recall that until early 2004, there was no established guidelines laid down for ICAC officers to check the criminal records of their own colleagues. Moreover, I was under the personal impression that our officers would not have any criminal record and hence no checking would be necessary. Therefore, I had not included into that request any of the ICAC officers who would be called to give evidence at the trial."

25 According to Mr Lau Chau Wing, an investigating officer of the ICAC who instructed Ms Lau to do a criminal records check on the civilian witnesses, he had never caused a similar check on ICAC officers in his 16 years with the ICAC. All the ICAC officers who gave evidence explained that that was not done because they did not believe any serving ICAC officer could have had a conviction involving dishonesty. This is what Wong Shiu Cheung, a Principal Investigator of the ICAC, said in his affirmation dated 9 September 2005 : -

> "5. I have to point out that when AD Godfrey asked me to run the check on the service record of PI YANG, there were no procedures in place to facilitate officers of other investigation units to obtain information from L Group for the purpose of making disclosure to the defence. Most of them did not then comply or were not in a position to comply with the relevant Commission Standing Orders (CSO), which was promulgated in September 2002 and stipulated, inter alia, that:
>
> > 'Without limiting the generality of disclosure principles, the application of the rule extends to :
> >
> > (a) material which may affect the credibility of prosecution witnesses, which includes previous convictions of witnesses: previous inconsistent statements by a witness (it being for the defence to judge the materiality of the inconsistency) and disclosable material known to a witness (including an expert witness);
> >
> > (b) the obligation in (a) applies equally to ICAC officers. It does not extend to disclosing allegations of misconduct in other matters, but only to proved misconduct which has resulted in conviction or disciplinary finding.'
>
> 6. The non-compliance of CSO might be attributed to a general presumption amongst officers that serving ICAC officers would not have any criminal convictions, hence they would not conduct criminal record check on an officer prior to him giving evidence in court. They also would not seek information on an officer's disciplinary records except in situations where they had received specific requests for such from the defence. The reason being that the disciplinary records, though available in the confidential file of the officer giving evidence or in L Group, are not easily accessible or out of bounds to them as

they might be junior in rank to the officer concerned. I recall that, during the period between October 2002 and March 2004, I had received no more than three requests for disciplinary records for the purpose of making disclosure to the defence.

7. In March 2004, I was involved in conducting a review of the CSO as well as the role played by L Group in gathering, maintaining and disseminating the disciplinary records of officers for the purpose of making disclosure to the defence. This review was conducted as a result of allegation made by Mr Andrew LAM, a member of the defence team involved in defending CHAN Kau-tai in High Court Case No. 333 of 2002, that the prosecution had, prior to the commencement and during the course of the trial, failed to disclose to the defence the criminal conviction and disciplinary record of PI YANG.

8. Consequent to the review, it was decided that:

(a) all criminal and disciplinary records of officers, including records of disciplinary action taken by individual supervising officers on their subordinates, would be centrally maintained in L Group; and that

(b) L Group would be responsible for conducting checks on all officers required to give evidence in court and forwarding those information that are relevant to disclosure to counsel of Department of Justice for consideration and eventual disclosure to the defence.

9. On 11 October 2004, the Head of Operations issued a Routine Order setting out the procedures for providing criminal/disciplinary records of ICAC officers to prosecuting counsel for consideration of disclosure to the defence. I now produce the relevant Routine Order as exhibit, marked WSC-1."

26 The Routine Order of October 2004 reads as follows : -

"**Procedures for providing disciplinary/criminal records of officers to prosecuting counsel for consideration of disclosure to the defence**

Officers are reminded that they are obliged to disclose to the defence material which may affect the credibility of prosecution witnesses, and that the obligation is equally applicable to witnesses who are ICAC officers (witness officers). In order to ensure that the material, which includes disciplinary/criminal records of witness officers, will be made available for possible disclosure to

the defence, the following procedures will be implemented with immediate effect:

(a) once a prosecuting counsel has decided on which ICAC officers will be called to give evidence, the case officer will provide details of the case, the name of the prosecuting counsel and a list of the witness officers on a computer generated form (Annex A - available at OPSLAN Form Library - Request/Checking) and submit it to CI/L3 via his CI and PI;

(b) CI/L3 or PI/L will forward to the prosecuting counsel a loose minute folder via SADPP to confirm whether there is in existence any disciplinary/criminal record that could possibly impact significantly on the credibility of a witness officer and, where applicable, provide details of the relevant records;

(c) the prosecuting counsel will be informed that:-

(i) the record should not be left on the prosecution file or made accessible to officers who are of equal or junior rank to the witness officers, and the record should be returned to L Group via SADPP after it has served its purpose;

(ii) should he feel any of these records ought to be disclosed, he should make the disclosure directly to the defence and inform the case officer of the details of the disclosure; and

(iii) a record of disclosure should be placed in the loose minute folder mentioned in (b) above for return to L Group via SADPP; and

(d) CI/L3 or PI/L will, at the same time, inform the CI or PI of the case officer and the individual witness officers details of the material that have been disclosed to the prosecuting counsel."

27 The above evidence may explain why prior to the commencement of the trial, no disclosure was made in relation to C I Yang's convictions and disciplinary records. But they also show that if the DPP's Policy and CSO had been complied with, and in our view they should have been complied with, in practice they would have resulted in the disclosure of all the convictions of prosecution witnesses, including ICAC officers.

28 Mr Zervos for the Respondent, however, contended that in law the duty of disclosure was more limited. He relied on *HKSAR v Lee Ming Tee* [2003] 6 HKCFAR 336 (*Lee Ming Tee* (*No.2)*). That case was not concerned with the disclosure of criminal convictions as such. It was concerned with a failure to disclose the fact that an expert witness at the trial had been the subject of a SFC enquiry and that the expert had resigned as a director of a company after it had suffered huge losses.

29 In his survey of authorities on the duty of disclosure, Sir Anthony Mason NPJ when discussing the position in England, referred to what Steyn LJ said in *R v Brown* [1994] 1 WLR 1599 : -

> "… the Crown is under a duty to give disclosure of *significant* material which may affect the credibility of a prosecution witness. (Emphasis added.)
>
> In other words, the credibility of a prosecution witness is relevant for the purpose of the *Melvin* categories. His Lordship referred to these examples established by authority :
>
> (1) the obligation to disclose previous statements of prosecution witnesses;
>
> (2) the obligation to disclose a request for reward by a prosecution witness; and
>
> (3) the obligation to disclose previous convictions of a prosecution witness.
>
> 147. With reference to the third example, his Lordship referred to the observation of Cooke P in *Wilson v Police* [1992] 2 NZLR 533 at p. 537 :
>
> > As to the kind of conviction within the scope of the duty, the test must be whether a reasonable jury or other tribunal of fact could regard it as tending to shake confidence in the reliability of the witness."

30 Sir Anthony Mason NPJ then went on to say : -

> "164. Fairness to the defendant requires wide disclosure. Striking the appropriate balance between fairness to the defendant and protecting the public interest in the detection and punishment of crime is to be achieved not by reducing the scope of the disclosure rules but by restricting the collateral use of disclosed material (*Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 at p. 218C-D, *per* Lord Hope of Craighead).
>
> 165. A strong obligation of disclosure will preserve the criminal trial as the appropriate forum for determining the truth or falsity of criminal allegations. The Supreme Court of the United States has recognised the general goal of establishing 'procedures under which all criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth' (*United States v Leon* 468 US 897 (1984) at pp. 900-90l, quoting *Alderman v United States* 394 US 165 (1969) at p. 175)."

31 He concluded as follows : -

> "170. The prosecution's duty is to disclose to the defence relevant material (including information) which may undermine its case or advance the defence case. The duty is not limited to the disclosure of admissible evidence. Information not itself admissible may lead by a train of inquiry to evidence which is admissible: *R v Preston* [1994] 2 AC 130 at pp. 163-164, *per* Lord Mustill. And material which is not admissible may be relevant and useful for cross-examination of a prosecution witness on credit.
>
> 171. The *Melvin* categories may be accepted as a broad statement of what, on a sensible appraisal by the prosecutor, is subject to disclosure. The *Melvin* formulation and the recognition that the credibility of a prosecution witness is relevant for the purpose of the *Melvin* categories have the consequence that disclosable material relevant to the cross-examination of a prosecution witness cannot be restricted to the three instances of disclosable material relevant to the credibility of a prosecution witness sanctioned by authority and referred to by Steyn LJ in *R v Brown* [1994] 1 WLR 1599 at p. 1607A-C. It extends to other significant material which a reasonable jury could regard as tending to shake confidence in the credibility of the witness."

32 He went on to hold that other significant material in that case included the fact that the witness was the subject of a SFC inquiry, and he explained why : -

> "174. In the usual run of things, it would be correct to say that to establish that a witness is the subject of a disciplinary inquiry and no more would not reflect adversely on the credibility of the witness. But cross-examination on the facts underlying the inquiry could reflect adversely on the credibility of the witness, depending on what the circumstances and the answers might be. And if the witness is called as an expert witness and the inquiry is conducted by the relevant professional body in response to concerns about the professional competence of the witness, this will raise a doubt about the professional standing and competence of the witness: see *R v Brooks* [2002] EWCA Crim 2107. Also, in some circumstances, there will be the possibility that disclosure of the existence of the inquiry will enable the defence to pursue a train of inquiry which will lead to material which will be of advantage to the defence.
>
> 175. These comments indicate that the proposition that the fact a prosecution witness is the subject of a disciplinary or other inquiry is not disclosable cannot be accepted as a universal and all-embracing proposition. Every case must be judged according to its own particular circumstances. What has to be kept steadily in mind is that, on credit, only significant material that a reasonable jury or tribunal of fact could regard as tending to shake confidence in the reliability of the witness is disclosable and that the answers of the witness in cross-examination on credibility alone generally cannot be rebutted by evidence: *Hobbs v CT Tinling & Co Ltd* [1929] 2 KB 1 and *HKSAR v Wong Sau Ming* (2003) 6 HKCFAR 135."

33 On the basis of the principles established by *Lee Ming Tee (No.2)*, it is clear that the duty to disclose will apply to convictions and other matters relating to a witness which a reasonable jury or other tribunal of fact could regard as tending to shake confidence in the reliability of that witness. In the present case, we are of the view that C I Yang's convictions and disciplinary records were disclosable.

34 The credibility of C I Yang was an important issue in the *voir dire* as well as at the trial. Mr Zervos made the point that C I Yang's convictions did not involve any dishonesty on his part. But as Lord Hope of Craighead said in *R v Brown* [1998] AC 367 at 378H : -

> "The fact that a witness has previous convictions, especially for crimes which imply dishonesty or disrespect for the law, may be of great significance in regard to issues of credibility."

So, disrespect for the law may also be of great significance.

35 Moreover, previous convictions are recognised as a suitable subject for cross-examination. As section 15 of the Evidence Ordinance, Cap. 8, shows, a witness may be questioned as to whether he has been convicted of any indictable offence, and, on being so questioned, if he either denies or does not admit the fact or refuses to answer, the conviction can then be proved. Thus, convictions of indictable offences not only may be the subject of cross-examination, they also are exceptional in the sense that evidence may be adduced in support of it. It will be remembered that ordinarily, rebuttal evidence on credibility is not permitted. The offence of drink driving is an indictable offence although in the present instance it was tried summarily.

36 There was also the fact that here, Mr Raymond Ho, the solicitor, who attended the first part of the second interview, in his evidence in the *voir dire* proceedings said : -

> "Now, I think my impression is that he was with a lot of beer at that time. I can smell the alcoholic smell of beer coming from a person …"

37 Mr Zervos made the point that in response, Mr Graham Harris, counsel for the defence, said : -

> "Never mind about the beer. How would you describe his demeanour?"

38 Mr Ho repeated his evidence before the jury, he said : -

> "He may just have finished his dinner and I can still feel the smell of beer coming from his mouth …"

That was not pursued by Mr Harris.

39 Mr Harris has told us that had he known about C I Yang's conviction for drink driving so close to the interviews, he would have pursued the matter. We have no doubt that he would.

40 Counsel might try to find out, how much and for how long C I Yang had been drinking, before the second interview, which, it will be recalled, commenced at 10:23 p.m. Depending on the amount which C I Yang had been drinking, it might or might not have affected his behaviour and self-control.

41 Mr Zervos contended that driving offences such as the conviction for careless driving could have no relevance to credibility. We are prepared to accept that sometimes, such convictions can be irrelevant. However, surely relevance will depend on the circumstances of the offence. We provide by way of example one possibility in the present case. It is stated in the Brief Facts of Case used in the prosecution of C I Yang : -

> "Brief Facts of Case:
>
> At about 2130 hours on 2001-08-28, deft returned to collect his private car JR 2230 which was parked in the public parking space (parking meter No. 2766A) at Shing Ping Street near Hip Wo Lane, Happy Valley. When the deft was driving and about to leave the parking space with his friend, another private car JC 1130 driven by PWl had stopped behind the deft's car waiting for the parking space. The deft reversed his car but was unaware of PWl's car. The nearside rear of the deft's car crashed into the offside front of PWl's car. Damage was caused to the point of impact. ~~The deft provided his personal particulars to PW1 and got into his car intending to go away. PW1 pursued the deft and proceeded to the front of the deft's car in order to stop the deft's car. In the meantime, the deft was unaware of the presence of PW1 and started off his car. PW1's right knee was hit but did not sustain injury. Report was made.~~"

42 As is apparent, part of the paragraph has been crossed out, presumably, for the purpose of C I Yang's plea. But as Sir Anthony Mason NPJ in *Lee Ming Tee* (*No.2*) said at 174 : -

> "But cross-examination on the facts underlying the inquiry could reflect adversely on the credibility of the witness, depending on what the circumstances and the answers might be."

43 If C I Yang did, indeed, drive off, without noticing PW1 who went "to the front of the defendant's car in order to stop the defendant's car …", we believe this may throw light on C I Yang's possible behaviour after drinking. We are of the view that C I Yang's behaviour after drinking and after being involved in a minor traffic accident might provide a jury with an insight into C I Yang's character and therefore might possibly affect their assessment of his credibility and reliability as a witness. This is quite apart from the fact that C I Yang, as a disciplined officer, chose to drive after drinking. Had timely disclosure been made, the defence could have investigated all these aspects.

44 That being the case, Mr Zervos' submission that traffic convictions such as for careless driving are not disclosable "cannot be accepted as a universal and all-embracing proposition. Every case must be judged according to its own circumstances" : *Lee Ming Tee (No. 2)* (paragraph 175). It is unsound to determine the relevance of a conviction without considering the circumstances of it. For the prosecution to discharge its duty properly, it must therefore carefully consider the circumstances of the offence before it decides that a conviction is irrelevant to credibility. Selective disclosure carries with it the risk of erring on the wrong side of what is required.

45 However, in our system, the prosecution will not know in advance just what the defence will be. Accordingly, in deciding the type of material to which access should be given to an accused, the prosecution is required to err on the side of caution. Although disclosure should only be of material relevant to an 'issue in the case', this term should be construed widely and includes in every case the issue of the credibility of witnesses : see *R v Brown* at 376G-377D; *Lee Ming Tee (No.2)* at 384C-D (paragraph 146). If there is to be any restriction, this should be left to the court restricting the use of material rather than its disclosure. We repeat here what Sir Anthony Mason NPJ said in *Lee Ming Tee (No.2)* at 389G-H (paragraph 164) : -

> "164. Fairness to the defendant requires wide disclosure. Striking the appropriate balance between fairness to the defendant and protecting the public interest in the detection and punishment of crime is to be achieved not by reducing the scope of the disclosure rules but by restricting the collateral use of disclosed material (*Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 at p. 218C-D, *per* Lord Hope of Craighead)."

Where a dispute arises as to disclosable material, it is for the court to decide the question, not the prosecution : at 386A-B (paragraph 152).

46 We believe that this requirement will, in practice, result, in the disclosure of all convictions of witnesses whose credibility might be in issue, certainly in cases where the accused is charged with serious offences. That may be the reason why, under the DPP's Policy as well as the ICAC CSO, the practice is one of blanket disclosure. This is consistent with what was said by the Court of Final Appeal in *Ching Kwok Yin v HKSAR* (2000) 3 HKCFAR 387 at 390H-I : -

> "It is common ground that there is a duty on the prosecution to disclose to the defence details of the criminal convictions of any of its witnesses if it knows of them and that a breach of that duty is a material irregularity."

47 It is noted that in New Zealand, the Court of Appeal in *Wilson v Police* [1992] 2 NZLR 533 (a case referred to in *Lee Ming Tee (No.2)*), held that at 542 : -

> "(i) Before all defended trials, whether on indictment or summary, the prosecution should as a general rule notify the defence of any conviction known to the prosecution of a proposed witness whose credibility is likely to be in issue, if that conviction could reasonably be seen to affect credibility. … If the authority is in doubt whether a conviction should be disclosed, counsel's advice should be taken.
>
> (ii) In the event of a decision not to disclose any conviction on the grounds, for instance, that it does not bear on credibility likely to be in issue or that interference with the witness is feared, the prosecution should notify the defence in general terms that there is a conviction which it is not considered necessary or appropriate to disclose. Thus, the defence, if desirous of testing the point, will have an opportunity of applying for a ruling to a Judge in Chambers, in the Court where the trial is pending."

48 The reason for (ii) is the recognition that, "however sound the intentions and policy of senior policy administration, implementation of (the

policy to disclose only those convictions which could be material to the issue of credibility) is not always reliable" : at 542.

49 In *Wilson v Police*, the practical solution found to ensure the faithful implementation of this duty, was to require the prosecution to inform the defence in the event that disclosure of a conviction was not considered necessary, so that in the event of dispute, the court could decide the issue.

50 For the above reasons, we believe the better practice to be followed is the disclosure of previous convictions of all prosecution witnesses. However, we accept that convictions which are clearly irrelevant need not, at least in theory, be disclosed, but if the prosecution should decide to withhold disclosure of any conviction, it should inform the defence of that fact, so that, if necessary, the matter could be decided by the court.

51 Finally in this review of the applicable legal principles, we would reiterate that the duty of full disclosure (referred to by Lord Bingham of Cornhill in *R v H* [2004] 2 AC 134 as the "golden rule") is one in which the prosecution ought to be proactive in at least making conscientious inquiries about the previous convictions of material witnesses. As Lord Hope of Craighead put it in *R v Brown* at 377E : -

> "The investigation process will also require an inquiry into material which may affect the credibility of potential Crown witnesses."

The prosecution, in this context, includes the investigating authorities : - see *Lee Ming Tee (No.2)* at 387H-391D.

52 We now return to the Procedures adopted in 2004 by the ICAC. We have heard no submissions on the adequacy of the new procedures and we must not be taken to have endorsed them in any way. An ICAC officer

should not be treated more favourably than any other prosecution witness. In particular, we have reservation that it is right that the duty of disclosure should be confined to material "that could possibly impact significantly on the credibility of a witness officer …" (our emphasis.) That is not the correct test and probably represents a misreading of paragraph 175 of the judgment of Sir Anthony Mason NPJ in *Lee Ming Tee (No.2)* (see paragraph 32 above) in the reference to "significant material". No doubt the ICAC will review the 2004 Procedures having regard to our judgment.

53 We turn to the disciplinary records of C I Yang. The ICAC CSO as well as the DPP's Statement correctly recognise that materials requiring disclosure may include disciplinary findings. However, having regard to *Lee Ming Tee (No.2)*, they do not seem to have gone far enough. As noted, the duty of disclosure might extend to the disclosure of the existence of an inquiry because that "will enable the defence to pursue a train of enquiry which will lead to material which will be of advantage to the defence". see paragraph 174 of the judgment (paragraph 32 above).

54 We are of the view that both of the disciplinary reprimands of C I Yang were relevant. The first, which followed from the convictions, is relevant because it revealed the serious view which ICAC took of a conviction of drink driving. Presumably that was known to ICAC officers including C I Yang, so the fact that C I Yang committed the offence notwithstanding the serious consequence to his career is something which a reasonable jury might regard as relevant to their assessment of the character and reliability of C I Yang.

55 As for the other reprimand, insofar as it might throw light on C I Yang's attitude towards compliance with measures designed to ensure

fairness to a suspect, it is also relevant to the jury's assessment of his character.

56 The defence has not complained about the non-disclosure of the police investigation into the conduct of C I Yang in 2002 which did not result in a prosecution. We express no view on whether such material was disclosable.

Consequence of non-disclosure

57 In order to decide the consequences of the failure to disclose, it would be helpful to consider the principles which give rise to the duty to disclose.

58 In *Lee Ming Tee (No.2)*, the Court of Final Appeal commented on the principles which gave rise to the duty to disclose : -

> "155. The principles relating to disclosure articulated by the English courts are based on the defendant's common law right to a fair trial and on the principle of openness. It is, therefore, appropriate that this Court should have regard to them in ascertaining the common law of Hong Kong."

59 His Lordship identified other possible foundations for these principles in Article 39 of the Basic Law and Article 11(2) of the Bill of Rights. It was, however, unnecessary for the Court of Final Appeal to consider them. It was "acknowledged by Mr McCoy SC that the Basic Law and the Bill of Rights do not take the duty of disclosure further than it is taken by the common law" : see 387G (paragraph 157).

60 Mr Blanchflower SC, who appeared for the Applicant, referred us to 2 recent decisions of the Privy Council in Scottish appeals : -

(1) *Holland v HM Advocate (Devolution)* [2005] SLT 563. The accused appealed against his conviction in respect of *inter alia*, 2 charges of assault and robbery on the ground that his rights under Article 6 of the European Convention on Human Rights had been infringed since the Crown had relied on dock identification evidence and had failed to disclose certain information to the defence. The failure to disclose related to information about X and Y, who were assaulted during a robbery and about a police officer's remark to the latter after the identification parade that she had not done too well in that parade.

(2) *Sinclair v HM Advocate (Devolution)* [2005] SLT 563. This involved an eye witness whose evidence departed from 2 statements given by her to the police. The statements had not been disclosed to the defence. The defendant argued that he had been denied a fair trial as a result.

61 Mr Zervos submitted that these decisions had to be understood against the background of Scots law or practice regarding the prosecution's duty of disclosure.

62 However, in our view, these cases have shed further light on the principles underlying the duty of disclosure. In *Holland*, Lord Rodger of Earlsferry explained, with the concurrence of the other Law Lords, why the right to a fair trial under Article 6(1) of the European Convention on Human Rights required disclosure as follows : -

> "[69] More recently, under the influence of art 6(1) of the Convention, the weaknesses of this approach have become apparent.

In *Maan, Petr* the accused was charged on indictment with assault. He lodged a special defence of self defence and gave notice of an intention to attack the character of the complainer and the other two Crown witnesses. He sought to recover the previous convictions of the complainer and these witnesses, as well as those relating to a third witness who had been cited for the defence. The Crown resisted the motion and relied on *HM Advocate v Ashrif*. Adopting the general approach in *McLeod v HM Advocate (No 2)*, Lord Macfadyen declined to follow *Ashrif* and ordered production of the previous convictions of all four witnesses. He said, at 2001 SCCR, p 187; 2001 SLT, p 416, para 27 : 'In my opinion, provided the witnesses' previous convictions are relevant to a legitimate attack on character or to their credibility, the material sought would plainly be relevant to his defence. It is therefore material which the petitioner is prima facie entitled to have disclosed to him. Moreover, in my view he is prima facie entitled to have it disclosed to him in advance of the trial. His right is to have disclosed to him material necessary for the proper preparation as well as the proper presentation of his defence. Possession of information about the witnesses' relevant criminal records would enable the petitioner's counsel or solicitor to make proper preparation for the cross-examination of the witnesses in question. Lack of that information in advance would not wholly preclude the contemplated lines of cross-examination, but would make embarking on them a much more uncertain course. Matters of credibility and character depend very much on the impressions made on the jury, and cross-examination might well be less effective if embarked upon without knowledge of the detail of the witnesses' records. An impression unfairly unfavourable to the petitioner might be made on the jury if cross-examination were embarked upon on his behalf, appeared to be unsuccessful, then was followed by re-examination which showed that the cross-examiner had been ill-informed.'

[70] As Lord Macfadyen shows, it is in principle wrong that at trial the prosecutor should have official information about witnesses' previous convictions which has been withheld from the defence. The presentation of the defence case is liable to be less effective if the accused's counsel and agents do not have the information in advance of the trial. Reflecting a shift in the position of the Crown, in presenting his argument before the board the advocate depute did not seek to justify this situation by reference to the supposed practical difficulties identified in *Ashrif* - which, it is fair to say, have not been experienced in other jurisdictions where previous convictions have long been supplied to the defence. Nor did he advance any other reason why the public interest required that this information should be withheld.

…

> [72] Although it is open to the defence to apply to the court for an order for production, the scheme envisaged by the *Book of Regulations* places procurators fiscal and Crown Counsel in the invidious position of having to judge the relevance of previous convictions to a defence, the lines of which the accused's representatives are generally under no obligation to reveal. In reality, however, the scheme is more deeply flawed since it is obvious that a reasonably competent defence agent or counsel, considering how to approach the examination or cross examination of a witness, would wish to know whether the witness had any previous convictions and, if so, their nature. Indeed it is precisely the kind of thing he would want to know. What use, if any, the agent or counsel chooses to make of the information is a matter for him and he may well not be able to decide until he actually has it. But, at the very least, the information will help in assessing the strengths and weaknesses of the witness. Therefore, information about the previous convictions of any witnesses to be led at the trial 'would be likely to be of material assistance to the proper preparation or presentation of the accused's defence' Under art 6(1) the accused's agents and counsel are accordingly entitled to have that information disclosed so that they can prepare his defence. Since in this way both sides will have access to this information at trial, the accused's right to equality of arms will be respected. The observations to the contrary effect in *HM Advocate v Ashrif* should not be followed."

63 In *Sinclair*, Lord Hope of Craighead, with whose judgment the other Law Lords agreed, emphasised at 560 (paragraph 33) that : -

> "… First, it is a fundamental aspect of the accused's right to a fair trial that these should be on adversarial procedure in which there is equality of arms between the prosecution and the defence …"

64 Thus, the right to material disclosure is an aspect of fair trial. Fair trial as well as equality of arms (in the sense meant in *Sinclair* at 560 (paragraph 33)) are guaranteed by Article 10 of the Hong Kong Bill of Rights and protected by the common law. It is unnecessary in this context to consider whether, and if so, to what extent, common law has been extended by Article 10.

65 What then should be the consequence of the non-disclosure?

66 In *Ching Kwok Yin*, the defendant's conviction of unlawful and malicious wounding was set aside as unsafe because of the non-disclosure of the victim's previous conviction for "breaching condition of stay" and "unlawful use of electricity". Sir Alan Huggins NPJ said at 391E-F : -

> "The error would only have been immaterial if the Magistrate would undoubtedly have entered the same verdict had he known of Mr Wong's previous convictions. In our view it cannot be put any higher than that he might have entered the same verdict. The conviction was therefore unsafe, and an unsafe conviction is a miscarriage of justice."

67 Moreover, it could be said that because of the non-disclosure the Applicant has not had a fair trial. That is another reason why there was, in our view, an irregularity at trial. But must the convictions be set aside? Mr Zervos argued not. It was submitted that the proviso should be applied and in any event, that the non-disclosure had no relevance to count one. We deal with this latter point first.

Count One

68 Mr Zervos has submitted that since the credibility of C I Yang was irrelevant to the first count, the fact of non-disclosure should not affect the Applicant's conviction on that count. This count related to the alleged acceptance by the Applicant of some $1,500,000 from one Lai Sai-sang as an inducement to favour the dealings between some other persons and the government regarding the installation of electrical materials in a building project at Wong Tai Sin.

69 Mr Lai and his brother Yan-sang were concerned with counts 1, 2, 3, 4, 12 and 16, and they gave evidence at the trial. As noted above, the Applicant was acquitted of counts 2, 3 and 4 but convicted of 1, 12 and 16.

In the third interview, the Applicant had made incriminating admissions regarding counts 12 and 16. It is correct that the credibility of C I Yang had no direct bearing on count 1. However, the credibility of the Applicant was of vital importance to this count. His credibility on count 1 might have been affected by the view which the jury took of his evidence in relation to counts 12 and 16. His evidence on counts 12 and 16 in turn might have been affected by the third interview.

70 So, we cannot regard the verdict on count 1 as safe and satisfactory having regard to our views on non-disclosure.

Proviso

71 Mr Zervos has submitted that this is a case where we might apply the proviso.

72 This is not an appropriate case for the application of the proviso. This is not a case where we are able to say that had the proper disclosure been made, so that C I Yang could have been cross-examined on the undisclosed material, the jury would inevitably have convicted the Applicant : see *Grey v The Queen* [2001] 75 ALJR 1708. C I Yang's credibility was an important issue. In our view, the undisclosed material might have made a material impact on the jury's assessment of credibility. The application of the proviso was therefore inappropriate : see *Yuen Kwai Choi v HKSAR* [2003] 6 HKCFAR 113, 133A-D (paragraph 55).

73 We also note that this is a case where the jury took 3 days to reach their verdicts, had acquitted the Applicant on 3 counts, and were not unanimous when they convicted him on 2 of the counts.

Bad faith

74 We turn to consider the issue of bad faith. It was said that where this could be demonstrated, the court might then even refuse to order a retrial and effectively put a stop to the prosecution of the Applicant.

75 We do not accept Mr Blanchflower's suggestion that there was a deliberate decision not to conduct a search on C I Yang's criminal records in order to suppress that fact from the defence. Although the convictions were disclosable and ought to have been disclosed, we are of the view that no search had been made because at that time it was not the practice to do so.

76 Shortly after the Applicant's conviction, by letter dated 16 December 2003, Andrew Lam & Co, wrote to the Head of Operations, ICAC as follows : -

> "It had recently come to our attention that Mr. Eric Yang (PW4) had been convicted of a drunk driving offence. Please confirm the information we received is correct and provide details thereof before the close of business of today."

77 The confirmation was given by letter of the same date signed by Mr Ng Ping Kwok for Head of Operations.

78 Andrew Lam & Co., in their second letter dated 16 December 2003 stated : -

> "… kindly let us know the rationale behind your concealing Mr Yang's past criminal conviction from the defence."

79 The reply to the second letter was written by Mr I C McWalters, Senior Assistant Director of Public Prosecutions, for and on behalf of the Secretary for Justice and was in the following terms : -

> "Your second letter of 16th December 2003 has been referred to me for reply. I am instructed by Mr McNamara that he believes he informed your counsel, Mr G Harris, of Mr Yang's conviction. Furthermore I understand that Mr Harris would have been aware of it as he had been engaged by Mr Yang to provide him with legal advice at the time that he was charged. However I am of the very strong view that it would have been perfectly proper for the prosecution not to have disclosed this matter to you. The conviction had no relevance to an issue in the case. The only basis upon which it could be claimed to have relevance would be to Mr Yang's credibility. But not every conviction will impact upon a person's credibility as a witness and I do not accept that his conviction for drink driving is relevant and disclosable."

80 It is clear from the affidavit of Mr McWalters and the evidence of Mr Tong Wing Tak, Eric (a chief investigator of the ICAC who was with Mr McNamara at the trial) and Mr Ng Ping Kwok (a principal investigator of the ICAC), that Mr McWalters' letter was written after a meeting between them. This is what Mr McWalters said in his affidavit of 7 December 2005 referring to that meeting : -

> "8. Having heard what Mr Tong had said I decided I should speak to Mr McNamara. In the presence of the ICAC officers I telephoned him and informed him of the correspondence from Andrew Lam & Co. Mr McNamara confirmed that the ICAC had told him of Mr Yang's conviction and asserted that he had informed Mr Harris of it. At the time Mr McNamara gave no indication of being uncertain in respect of either matter."

81 To complete the picture, it is necessary to set out the 16 December 2003 letter from Mr Harris to Mr McNamara, Mr McNamara's letter of 17 December 2003 to Mr McWalters, and Mr McWalters letter of 17 December 2003 to Andrew Lam & Co. : -

(1) 16 December 2003 letter from Mr Harris to Mr McNamara : -

"Dear John,

HKSAR -v- CHAN Kau Tai

Further to our telephone conversation of this evening, I write to confirm my recollection of events concerning Eric Yang and my request to you for disclosure with specific reference to earlier complaints directed against Mr. Yang and any earlier investigations into his conduct.

As I remember it, you took me to one side prior to Yang's testimony in the voire dire and told me in terms that Yang had been the subject of an investigation which was unrelated and concluded in 2002 with no adverse findings. I have no recollection at all of any mention of a prior criminal conviction for drinking and driving. Had I been aware of this, Raymond Ho's evidence as to the smell of alcohol on Yang's breath would have assumed a greater significance than it did and would have triggered a recollection to specific earlier disclosure.

I am now told that in about November 2001, I was asked to advise Eric Yang as Defence Counsel in relation to the matter. I have to tell you and I hope you will accept this, that this had completely escaped my memory and even now 1 have no recollection of having advised Mr. Yang. Apparently, in the event I did not represent him in court due to other commitments.

I place these matters on record in the event that there is later criticism directed against either of us as, understandably, Andrew Lam is seriously concerned that there may have been material non-disclosure affecting Yang's credibility.

Yours,

Graham Harris

cc. Andrew Lam
Ian McWalters"

(2) Mr McNamara's letter to Mr McWalters of 17 December 2003 : -

"Dear Ian,

Since you rang me yesterday I have given this matter deep thought and have spoken to Graham Harris. My recollection is that Graham asked me if Eric Yang had been the subject of an internal investigation by ICAC. I made enquiries of Eric Tong

and was told there had been some sort of investigation, but no adverse result had occurred. I passed this information on to Graham in confidence.

I now do not believe that I was aware that Yang had been convicted of a drink driving offence. Although I do not think such a conviction was remotely relevant, I would have let Graham know had I known. The whole trial was conducted by me in an open and honest manner. On many occasions Graham asked me for information, and on every occasion I supplied what I knew or found out, whether it was strictly disclosurable or not. It follows that if I did know of the conviction, I would not have kept it from Graham. But, as I said, I have no recollection about this.

I am taking the liberty of copying this letter to Graham Harris whom I trust absolutely.

When you reply to Andrew Lam you might let him know that I bitterly resent the implications contained in his letter.

Regards,

John McNamara

cc: Graham Harris"

(3) Mr McWalters' letter of 17 December 2003 to Andrew Lam & Co. : -

"Dear Sir,

Re: HCCC 333 of 2002
HKSAR v Chan Kau-tai

I refer to my letter of 16th December2003 and am writing to inform you that, on further reflection and after talking to Mr Harris, Mr McNamara does not now believe that he informed Mr Harris that Mr Yang had been convicted of a drink driving offence. He was aware of another matter in relation to Mr Yang that he had communicated to Mr Harris and he thinks that he may have been confusing this matter with Mr Yang's drink driving offence when he informed me yesterday that he believed that he had told Mr Harris of the drink driving conviction. This misunderstanding is regrettable but is solely due to an imperfect recollection. There has been no intent to mislead you by he or I in this matter and we both deeply resent

the implication in your letter of today's date regarding our integrity.

I should say that as trial counsel Mr McNamara shares wholeheartedly the view that I expressed to you in my letter that this prior conviction of Mr Yang is not remotely relevant to any issue in the case.

Yours faithfully,

(I C McWalters)

Senior Assistant Director of Public Prosecutions
for and on behalf of the Secretary for Justice

cc Mr G Harris
Mr J McNamara
Commissioner of ICAC (Attn: Mr Eric Tong)"

82 We have heard oral evidence from, Messrs Harris, McNamara, Tong, Ng, Wong Shiu Cheung, Tso Wai Yan and Lau Chau Wing, Nelson and Ms Lau Yuk Yee, Ada.

83 The evidence of Mr Harris was that shortly before C I Yang testified in the *voir dire*, (C I Yang's evidence commenced on 21 October 2001), he made a specific request to Mr McNamara, "for full disclosure in relation to any known complaints of misconduct made against Mr Yang and for access to his Confidential Personal File". This is what Mr Harris said in his affidavit dated 18 November 2004 : -

"5. … This request was unusual and I made it as part of my duty as defence counsel because I had express instructions from my solicitor that he had 'intelligence' to the effect that Mr Yang had been the subject of complaints of misconduct and that adverse findings against him had been made in respect of such complaints. I informed Mr McNamara, on a counsel to counsel basis, that I had these instructions and that this was not some mischievous fishing exercise.

6. My request for access to the Confidential Personal File of Mr Yang was declined politely but firmly by Mr. McNamara. He gave me an assurance that he would make proper inquiries of the

ICAC and would let me know in the event that anything of the kind suggested was revealed by such inquiry. I trusted him without reservation.

7. Soon after my request for disclosure Mr McNamara asked me to join him in a consultation room outside court and told me privately that proper inquiries indicated that my 'intelligence' was unreliable. The only matter revealed to him by the ICAC was that there had been a complaint about Mr Yang some 2 years ago. The complaint had been fully investigated and Mr Yang had been completely cleared of any wrongdoing. I accepted what Mr McNamara told me without further question."

84 Mr Harris' evidence was supported by Mr McNamara and not disputed by the prosecution. Mr McNamara said in his affidavit dated 26 January 2005 : -

"4. I cannot now recall precisely when, but at some time before Mr Yang concluded his evidence, I was approached by Mr Harris who told me that his instructing solicitor had informed him that he believed that Mr Yang may have been the subject of an ICAC internal investigation. Mr Harris asked me to look into this allegation and inform him of the results of my enquiries. I cannot now recall whether Mr Harris also asked to see Mr Yang's confidential personal file or of any response I may have made to such a request. However I accept that Mr Harris' recollection of this conversation may be better than mine and that such a request may have been made. I then spoke to my instructing officer, Mr Tong Wing-tak Eric, Chief Investigator of the ICAC, and told him of my conversation with Mr Harris. He expressed no knowledge of an internal investigation of Mr Yang but told me he would make enquiries and get back to me. Subsequently, I believe the next day, I was informed by Mr Tong that there had indeed been an ICAC internal investigation of Mr Yang but that nothing had come of it. I passed this information onto Mr Harris who did not pursue the matter any further.

5. I have since become aware that Mr Yang has been convicted of driving offences and I am asked for my recollection of these convictions at the time when I prosecuted the Appellant. I can say quite definitely that Mr Harris never mentioned them to me or raised any issue as to Eric Yang having a criminal conviction. I cannot say with the same certainty that Mr Tong did not inform me of these convictions but I have no recollection of him doing

> so. It is my belief that had Mr Tong done so I would have informed Mr Harris of them."

85 Notwithstanding his uncertainty deposed to in his affidavit, Mr McNamara was emphathic in his oral evidence that he did not believe Mr Tong had told him that C I Yang had any previous conviction.

86 However, Mr McNamara's evidence was directly contradicted by the evidence of Mr Tong and Mr Lau. According to Mr Tong in his first affirmation dated 7 January 2005, at the conclusion of the fourth day of trial (23 October 2003) : -

> "3. … I together with officer LAU had a conference with Principal Investigator NG Ping-kwok ("Mr. NG") in my office. On that occasion I thought of two issues concerning officer YANG that previously came to my knowledge from hearsay, and I raised them for discussion. First, officer YANG was interviewed by the police as a witness in relation to material non-disclosure in a District Court trial, which was handled by his team of officers. Second, officer YANG was convicted in 2001 of an offence of drink driving on his own plea. Mr NG directed that the matters should be discussed with Mr John McNamara, the prosecuting counsel, as to materiality.
>
> 4. The next day, 24 October 2003, officer YANG's evidence continued. At nearly the end of the morning break I had a chance to get hold of Mr McNamara and spoke to him outside the court room about the police investigation that involved officer YANG. Officer LAU was also present. Mr McNamara was quick to say that he had been aware of that and already had some discussions with Mr Graham Harris, the defence counsel. From his answer, I got an impression that Mr McNamara had been asked about the matter previously by Mr Harris.
>
> 5. As the proceedings were about to resume, I together with Mr McNamara and officer LAU went in the court room. After he sat down at the bar table, I further told Mr McNamara about officer YANG's drink driving conviction. Mr McNamara casually said words to the effect that the conviction was not relevant, hence not disclosable, which I totally agreed. These happenings are still clear in my mind because I remember having looked and checked if officer YANG had returned to the court

> room before I went up to speak to Mr McNamara at the bar table."

His evidence was supported by Mr Lau as well as Mr Ng.

87 Whilst we do not doubt that Mr McNamara has given evidence according to the best of his recollection, we do not believe we can act on his evidence. We perhaps need only refer to his mistaken recollection on 16 December 2003 when he confirmed to Mr McWalters that he had been told C I Yang's previous conviction of drink driving and that he in turn told Mr Harris. We have not been provided with any reason as to why Mr McNamera said what he did initially to Mr McWalters. It may be that Mr McNamera's memory on this aspect was not distinct; hardly surprising in circumstances where, even before us, he was maintaining that C I Yang's previous convictions were totally irrelevant. We see no reason in these circumstances not to accept the evidence of Mr Tong, Mr Lau and Mr Ng.

88 That being the case, we are satisfied that there was no deliberate attempt on the part of Mr Tong, Mr Lau Chau Wing or Mr Ng to conceal the previous conviction of C I Yang.

89 We should add that Mr Blanchflower made the point that it was not true that ICAC officers would not have criminal convictions and pointed to the well known and publicized fact that the late Assistant Director A A Godfrey had been convicted of drink driving. Accordingly, he cross-examined the ICAC officers on their evidence that it had not occurred to them that ICAC officers might have criminal convictions. In this regard, he also relied on the fact that another ICAC officer had been convicted of drink driving in December 1999, and that according to an internal minute of the ICAC, M24, this other incident "although not reported in the media, his

case was widely known among officers". Ms Lau was not aware of either conviction but Mr Tong, Mr Ng and Mr Wong were aware of them. However, since they did not regard traffic convictions, including drink driving convictions, as involving dishonesty they did not regard such convictions as relevant to credibility.

90 We ought also mention that at one time, though it seems only informally, Mr Harris had advised C I Yang in relation to his then pending prosecution. Mr Harris told us that he had a meeting with C I Yang after an introduction by Mr Godfrey, and that by the time of the Applicant's trial he had forgotten about it.

91 According to Mr Tong, he was made aware of that fact by Mr Godfrey. This is what Mr Tong said in his affirmation of 12 September 2005 : -

> "5. During the *voir dire*, I had a casual conversation with the defence counsel Mr. Harris during one of the morning breaks. Mr. Harris asked me how long officer YANG had been serving in the ICAC, saying that he did not recognise the officer at all. I replied that officer YANG joined the ICAC in the early 1980's, and commented that it was strange that he (Mr. Harris) should have no knowledge of the officer. I made this comment because to my understanding Mr. Harris was familiar with a number of ICAC officers, particularly those with long service.
>
> 6. That same day after I returned to the office Mr. Godfrey came to see me, something he in fact often did throughout the trial period. Mr. Godfrey would chat with me about the case generally. On that particular occasion, I told Mr. Godfrey about Mr. Harris' remark of not recognising officer YANG that I considered strange. Mr. Godfrey stated that he indeed was surprised, for he actually recommended Mr. Harris to officer YANG for legal advice in relation to the latter's drink driving case."

This explains why in Mr McWalter's letter of 16 December 2003 there was a reference to Mr Harris having once advised C I Yang. Mr Harris was unable to recall the conversation with Mr Tong about C I Yang but he could not say there was no such conversation.

92 We do not believe Mr Tong (the officer on the whole targeted by Mr Blanchflower as being responsible for the non-disclosure) had any reason to wish to conceal C I Yang's convictions. Apart from anything else, he could not be sure that Mr Harris had forgotten about his having acted for C I Yang in relation to the drink driving prosecution. Furthermore, although we are of the view that in fairness the convictions had to be disclosed and that they were relevant to credibility, they were not of such a nature as to provide a sufficient inducement to conceal deliberately in the circumstances, involving as it would a conspiracy to conceal among the relevant ICAC officers and the risk of a charge of perverting the course of public justice.

93 Another curious feature was disclosed by Mr Wong Shiu Cheung. This is what he said in his affirmation dated 9 September 2005 : -

> "4. I recall that sometime prior to the commencement of the trial of CHAN Kau-tai on 20 October 2003, the late Assistant Director A.A. Godfrey (AD Godfrey) had asked me to run a check on the service record of PI YANG, who was to give evidence at the trial. He told me that he required the information for the purpose of disclosure and that he had to disclose to the defence any information that might impact upon PI YANG's credibility as a witness. I subsequently informed AD Godfrey by telephone the above convictions and the disciplinary record of PI YANG. In the process, I had briefed AD Godfrey on the background of the police investigation on PI YANG. I also told him that the police had obtained witness statements from PI YANG and had decided, upon legal advice, to take no further action on the case in July 2003."

94 Although Mr Godfrey attended the trial briefly every day, and that occasionally Mr McNamara would speak with him, Mr McNamara has told us that Mr Godfrey did not speak to him about C I Yang's criminal or disciplinary records. Nor had Mr Godfrey spoken to any of the other ICAC officers involved in the trial.

95 Mr Godfrey was already in poor health in October 2003, and he passed away in early January 2004. From the evidence of Mr Wong, it appears that Mr Godfrey correctly recognized that he required the information for the purpose of disclosure. We do not know why no disclosure was eventually made.

96 Although we have come to the conclusion that there was no bad faith, we are disturbed that the question relating to disclosure should have been handled in such a haphazard manner. The fact that no proper record was made of any decision to withhold disclosure (presumably Mr Godfrey eventually decided against disclosure), underlined the desirability that if disclosure of any conviction or disciplinary proceedings were to be withheld, the defence should be informed.

97 For the above reasons, we were satisfied that although a material irregularity had taken place owing to the non-disclosure of relevant material, the proper course to take was to order a retrial on this basis alone. There was no proper basis effectively to put a halt to the prosecution of the Applicant.

Ground 2 : Breach of right to privacy

98. As mentioned above, some edited portions of tapes, being the covert audio and visual surveillance of the Applicant in his office between

7 March 2001 and 3 August 2001 constituted important evidence against him at trial. Investigations on the Applicant by the ICAC had begun in or about June 2000 and he was subjected to physical surveillance later that year (about November 2000). On 27 February 2001, the Director of Housing (Mr Anthony Miller) consented in writing to the installation by the ICAC of audio/visual surveillance devices in the Applicant's office, which was located at 5/F, Block 3, Housing Authority Headquarters, Fat Kwong Street, Homantin, Kowloon. Audio/visual devices were then installed in the ceiling of the Applicant's office and recording commenced on 7 March 2001 lasting until 3 August 2001. There were altogether 859 tapes. Even the edited portions of the tapes prepared for trial contained some six hours of material, comprising over 1,000 pages of transcripts. The tapes recorded the Applicant's activities and his telephone conversations in his office over the said period although as far as the telephone conversations were concerned, only what the Applicant said was recorded (there were no listening devices installed in his telephone). It is not necessary for us to go over what was contained in the tapes. Suffice it to say that they include recordings of activities that were used by the prosecution to support the charges against the Applicant. We highlight only one aspect (for this is relevant to Ground 6 of the Grounds of Appeal) : the Applicant was seen counting banknotes in his office on a number of occasions. At trial, he gave an explanation for this and it is the Judge's comments on this aspect that form the subject matter of Ground 6 of the Grounds of Appeal.

99. At the heart of Ground 2 of the Grounds of Appeal was the question of the admissibility of the evidence obtained from the covert surveillance of the Applicant. Put succinctly, the precise legal question for determination by the Court is as follows : where a constitutional right (in this case, the right of privacy) is infringed, what is the status of any evidence that

has been obtained in consequence of this breach? This is a question that goes to the admissibility of such evidence at trial.

100. In resolving the critical question identified in the previous paragraph, we think it necessary first to explain the nature of the right of privacy.

101. Here the relevant provisions are Article 30 of the Basic Law and Article 17 of the International Covenant on Civil and Political Rights ("ICCPR") (the latter being applicable in Hong Kong both by reason of Article 39 of the Basic Law and also this being Article 14 of the Hong Kong Bill of Rights) : -

Basic Law

> "**Article 30**
>
> The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.
>
> **Article 39**
>
> The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

ICCPR

> "**Article 17**
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

102. These provisions are overlapping but not identical. Whereas Article 30 of the Basic Law protects the privacy of communication, Article 17 of ICCPR is in wider terms referring as it does simply to "privacy". In the present context, while Article 30 of the Basic Law is relevant in the consideration of the audio part of the surveillance tapes (being communications), only Article 17 of the ICCPR is relevant regarding the visual part as these were not communications. But what does the term "privacy" mean and what does it encapsulate? The concept is a wide one, covering an extremely diverse range of situations. In the Shorter Oxford English Dictionary, the term "privacy" is defined in the following way : "The state or condition of being withdrawn from the society of others or from public attention; freedom from disturbance or intrusion; seclusion." Thus, for example, a conversation with a friend on the street can be said to involve some element of privacy as will obviously activities within one's own home. A right to privacy will generally exist where the person in question has a reasonable expectation of privacy, this being a test that finds favour in both the United Kingdom (see *Campbell v MGN Ltd* [2004] 2 AC 457, at 466E (paragraph 21) per Lord Nicholls of Birkenhead) and in Canada (*R v Wong* (1990) 60 CCC (3d) 460, at 477c-d and 478a per La Forest J).

103. The particular situation that faces us in the present appeal is of course the covert surveillance of a person (the Applicant) in his office. Here, as Lamer CJC said in *R v Wong* at 465h : -

> "The nature of the place in which the surveillance occurs will always be an important factor to consider in determining whether the target has a reasonable expectation of privacy in the circumstances."

There is, in our view, no reason why a person should not be entitled to privacy in his office or workplace. A number of authorities were cited to us which make this point : - see for example *Halford v United Kingdom* (1997) 24 EHRR 523, at 543 (paragraph 44) dealing with the interception of telephone calls made from an office.

104. At one point in his submissions, Mr Zervos questioned whether the right to privacy could apply in relation to a person's office or place of work at all. Referring to the circumstances of the present case, he pointed out the fact that express permission had been given by the Director of Housing for the installation of the audio/video surveillance equipment and also the fact that the Applicant was a public official who was in his office expected to discharge official duties anyway rather than any private business. We remain convinced, however, that the right to privacy (and a reasonable expectation of privacy) can exist as far as a person's office or workplace is concerned. A number of situations readily come to mind in the workplace scenario : changing in one's room, going to the bathroom, even the use of the office telephone to make personal calls. The position may be different where, as in a number of offices, it is made clear to the staff that telephone calls may be monitored or that video cameras exist to record activities. In these situations, a person may well not have any reasonable expectation of privacy. In *Halford*, it was held that the applicant there (a former Assistant

Chief Constable) was entitled to rely on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") - this being the provision which protects the right to privacy - in relation to the interception of telephone calls made from her office telephones. It was noted by the Court in the case that no restrictions had been placed on her use of the office telephones nor had any warnings been given : see 528 (paragraph 16), 543 (paragraph 45).

105. Article 30 of the Basic Law provides an exception to the right to privacy. The article states in terms "except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences". So far as Article 17 of the ICCPR is concerned, any interference with privacy must not be "arbitrary or unlawful" and any restrictions on this right must be "prescribed by law" (see Article 39 paragraph 2 of the Basic Law). The terms "arbitrary or unlawful" in the context of the Basic Law have been considered by the Court of Final Appeal (when dealing with Article 28 of the Basic Law) in *Lau Cheong and Another v HKSAR* (2002) 5 HKCFAR 415, at 434I-436H (paragraphs 42-47). The term "prescribed by law" has been considered in a number of cases, among them *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, at 401J-403J (paragraph 60-65) and *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, at 492I-493D (paragraph 34).

106. As for the term "in accordance with legal procedures", Mr Zervos drew our attention to a decision of Keith J in *The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive of the HKSAR* [1998] 1 HKLRD 615 where he contrasted the difference in terminology between this phrase and "as prescribed by law".

107. It is unnecessary to resolve this issue over terminology in the present appeal because, as Mr Zervos had to accept, it was an admitted fact that there were no legal procedures or provisions in place at the time the covert surveillance of the Applicant took place. At trial, it was an admitted fact (under section 65C of the Criminal Procedure Ordinance, Cap.221) that "There are and were at the material time no internal guidelines within the ICAC or other guidelines governing covert surveillance, including video surveillance". At the earlier hearing of the Applicant's application for leave to appeal on 25 January 2005, the Respondent had by a motion sought to withdraw this admission but the application was no longer pursued when the appeal came to be heard before us. Although the interference with a constitutional right can take place at different points of time (such as when use is sought to be made of the fruits of the original interference : see *R v P* [2002] 1 AC 146, at 158C-D), the original interference with the right in question must of course be one relevant point.

108. There is no doubt on the material before us that the Applicant's constitutional right to privacy contained in Article 30 of the Basic Law and Article 17 of the ICCPR was breached by the covert surveillance that was carried out in his offices between March and August 2001. Although in his written submissions, Mr Zervos referred to Civil Service Rules and Regulations, we were not shown any material that suggested any warnings having been given to the Applicant such that he could not have had any reasonable expectation of privacy in his office. Further, by reason of the admitted fact to which reference has been made in paragraph 107 above, there were no legal provisions or procedures in place either so as to justify any derogation from the Applicant's rights.

109. A breach of the Applicant's constitutional rights being established in the present case, the issue then arises as to the consequences of this breach; in particular, was the evidence obtained by the covert surveillance in breach of the Applicant's constitutional rights rendered inadmissible?

110. In this respect, the courts in Hong Kong have in the past applied the decision of the House of Lords in *R v Sang* [1980] AC 402 or more precisely, what has been termed by Litton VP in *R v Cheung Ka Fai* [1995] 3 HKC 214 as "the common law as expressed in *R v Sang*", namely that the test of admissibility of evidence was relevance and that it was no part of a judge's function to exercise discipline over a law enforcement agency or the prosecutor over the way evidence was obtained. In *Sang*, Lord Diplock said this at 437D-F : -

> "(1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur."

In *Cheung Ka Fai*, Litton VP said at 222 B-C : -

> "It is common ground that the test of the admissibility of evidence is relevance. As Lord Diplock in *R v Sang* [1980] AC 402 at 432-3 explained, to exclude evidence obtained 'unfairly or by trickery' involves a claim to a judicial discretion to acquit an accused of any offences in connection with which the conduct of the police incurs the disapproval of the judge. A court has no such power."

Cheung Ka Fai provides a clear example of the application of this common law rule. That case involved the use also of covert surveillance tactics. The Court of Appeal in that case were firmly of the view that the common law rule in *Sang* applied notwithstanding the existence of the Bill of Rights. Litton VP made this point in the following passage at 223C-E : -

> " As can be seen, the argument in effect boils down to this: assuming that the interceptions amounted to some violation of A1's 'privacy' in terms of art 14(1), should the trial judge have made an order, pursuant to s 6(1), excluding the evidence?
>
> This is, in effect, the same argument which is conclusively dealt with by applying the common law rule in *R v Sang*. The Bill of Rights is part of the fabric of the law of Hong Kong. It is not a self-contained code. It would be an extraordinary thing if, by applying the normal rules of evidence and procedure, a piece of evidence is admissible and yet, by the operation of s 6(1) of the Bill of Rights Ordinance, it should be inadmissible. This would, in effect, be to operate a dual system of justice. In our judgment, s 6(1) has no such effect."

111. Mr Blanchflower submitted that this statement of the rule in *Sang* now needed revision to take into account the constitutionally guaranteed provisions of the Basic Law and the ICCPR. We agree although it is doubtful whether the modern approach (see paragraph 116 below) marks a dramatic reversal of what has hitherto been the common law approach in Hong Kong. Rather, we perceive it as a natural development of the common law.

112. In *Sang*, the House of Lords did not have to deal with any constitutional or convention provisions (the European Convention was of course not applicable at that time) nor any statutory provisions. However, it is noteworthy that in the present context (namely, the discussion as to the admissibility in criminal proceedings of evidence obtained in breach of

constitutional or common law rights), Lord Scarman had this to say in *Sang* regarding the exercise of discretion by a judge (at 453C-F) : -

> " Notwithstanding its development case by case, I have no doubt that the discretion is now a general one in the sense that it is to be exercised whenever a judge considers it necessary in order to ensure the accused a fair trial. *Reg. v. Selvey* [1970] A.C. 304 can be seen to be of critical importance. Viscount Dilhorne, though he was directing his attention to the specific situation in that case (cross-examination of the accused to his record) referred to cases concerned with other situations, e.g. *Rex v. Christie* [1914] A.C. 545, *Noor Mohamed v. The King* [1949] A.C. 182, *Harris v. Director of Public Prosecutions* [1952] A.C. 694 and *Kuruma v. The Queen* [1955] A.C. 197, and concluded by saying, at pp.341-342 :
>
> > 'It [i.e. its exercise] must depend on the circumstances of each case and *the overriding duty of the judge to ensure that a trial is fair*' (my emphasis).
>
> Lord Hodson, Lord Guest and Lord Pearce, with whom Lord Wilberforce agreed, were clearly of the opinion that the discretion was a general one. Lord Hodson said at p.349: 'Discretion ought not to be confined save by the limits of fairness.' Lord Guest said, at p.352, that the discretion 'springs from the inherent power of the judge to control the trial before him and to see that justice is done in fairness to the accused': and Lord Pearce echoed his words at p.360F."

113. It can be seen from this important passage that two features stand out : - first, the existence of a discretion to exclude as well as admit; secondly, the emphasis in the exercise of discretion on ensuring the fair trial of an accused. The fairness of a trial must also of course include the concept of justice being done in fairness to the accused himself (echoing the reference to Lord Guest's speech in *Kuruma v The Queen* [1955] AC 197).

114. These two features were emphasized by the Court of Final Appeal in considering the admissibility of confessions obtained in covert operations by the ICAC : - see *Secretary for Justice v Lam Tat Ming and Another* (2000) 3 HKCFAR 168. The Chief Justice emphasized the

"overriding duty" to ensure fair trial in the following passage at 178J-179G : -

> " The Judge has the overriding duty to ensure a fair trial for the accused according to law. For this purpose, he has what should be regarded as a single discretion to exclude admissible evidence, including a voluntary confession, whenever he considers it necessary to secure a fair trial for the accused. The essential question is not whether the law enforcement agency has acted unfairly in a general sense. It is no part of the court's function to exercise disciplinary powers over the law enforcement agencies or the prosecution as regards the way in which evidence they seek to adduce at trial was obtained by them. See *R v. Sang* [1980] AC 402 at p.436G (Lord Diplock); *R v. Cheung Ka Fai & Another* [1995] 2 HKCLR 184 at p.195 line 40 (Litton V-P). The court's function is to consider whether it would be unfair to the accused to use the confession though voluntary against him at his trial.
>
> The test of unfairness is not that of a game governed by a sportsman's code of fair play. See *R v. Sang* [1980] AC 402 at p. 456D-E; *R v. Swaffield* (1997-8) 192 CLR 159 at pp.185-6, para.35 (Brennan CJ). Unfairness in this respect is to be judged against and only against what is required to secure a fair trial for the accused. *R v. Sang* at p.453C (Lord Scarman); *Scott v The Queen* [1989] AC 1242 at p.1256A-B. However, it is important to observe that in a just society, the conviction of the guilty is in the public interest, as is the acquittal of the innocent. See *R v. Sang* at p.437B (Lord Diplock), p.456E-F (Lord Scarman); *A-G v Lam Man Wah (No.2)* [1992] 2 HKC 70 at p.72C.
>
> The requirement of a fair trial for the accused involves the observance of principles including the following which are relevant in this appeal: (1) No man is to be compelled to incriminate himself; his right of silence should be safeguarded. (2) No one can be convicted except upon the probative effect of admissible evidence. To ensure a fair trial for the accused, the court will exclude admissible evidence the reception of which will compromise these principles. *R v. Sang* [1980] AC 402 at pp.436H-437D (Lord Diplock) and p.455C-E (Lord Scarman)."

115. But the following question now requires to be answered in Hong Kong : what effect do the provisions of the Basic Law and ICCPR have on the exercise of discretion to exclude evidence in criminal matters? Do they eliminate the existence of the discretion altogether or if not, how

prominent are they in the exercise of the discretion? In *Lam Tat Ming*, the Court of Final Appeal did not consider the impact of either the Basic Law or the Bill of Rights : see 173H-I. Nor was the Basic Law in existence at the time *Cheung Ka Fai* was decided.

116. In our view, the questions posed in the previous paragraph fall to be answered in the following way. First, account must of course be taken by the court of any breaches of rights contained in the Basic Law or the ICCPR. Secondly, any breach as aforesaid will not, however, automatically result in the exclusion of the evidence obtained in consequence of the breach : the court still retains a discretion to admit or exclude the evidence. Thirdly, the discretion in the court to admit or exclude evidence involves a balancing exercise in which the breach of constitutional rights is an important factor whose weight will depend on mainly two matters : the nature of the right involved and the extent of the breach. The above being the conclusions we have reached on the questions posed, we now elaborate : -

(1) As has been emphasized time and time again (but bears repetition), the constitutionally guaranteed rights and freedoms contained in Chapter III of the Basic Law lie at the heart of Hong Kong's separate system and such rights and freedoms are to be construed generously : see *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 1, at 29A-B; *Gurung Kesh Bahadur* at 485C-D (paragraph 3). Where breaches take place, these are serious matters of which account must be taken by the courts. As we have said, the rights contained in the Basic Law and the ICCPR are constitutionally guaranteed rights

and it must be recognized that common law principles will have to be changed to take into account rights found in conventions or constitutions : see *Wilson v First County Trust Ltd (No.2)* [2004] 1 AC 816, at 875 (paragraphs 180 and 182).

(2) That said, it is important to bear in mind that a constitutional document such as the Basic Law states principles only in the most general of terms without condescending to particularity, a point made in the judgment of the Court of Final Appeal in *Ng Ka Ling* : see 28E. In the present case, so far as Article 30 of the Basic Law and Article 17 of the ICCPR are concerned, no hint is given in them as to the consequences of a breach of these Articles.

(3) The jurisprudence from the European Court of Human Rights points to the view that while there may be consequences in terms of adverse declarations or awards of damages when basic rights have been infringed, the admissibility of evidence obtained for criminal proceedings resulting from any breach is a matter for the national laws of any particular state. In *Khan v United Kingdom* (2001) 31 EHRR 1016, at 1025 (paragraph 34), the court said this : -

> "While Article 6 [of the European Convention, the equivalent to Article 87 of the Basic Law] guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. It is not

> the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not."

In *Holland*, a case to which we have already referred, at 571 (paragraph 39) Lord Rodger of Earlsferry said : -

> "It is trite that the [European] Convention does not concern itself with the law of evidence as such. In particular, it does not lay down that certain forms of evidence should be regarded as inadmissible. Such questions are left to the national legal systems."

See here also *R v Khan (Sultan)* [1997] AC 558, at 581E-F per Lord Nolan and also *R v P* at 159 per Lord Hobhouse of Woodborough. In *Halford,* a case involving a breach of the right to privacy (see paragraphs 103 and 104 above), while the European Court of Human Rights held that the applicant's right had been infringed by the interception of telephone calls at her office, the remedy was an award of damages. Nothing was said about the use that could be made of the evidence obtained as a result of the interception.

(4) Mr Blanchflower made it clear in his submissions that he was not advocating an automatic exclusion of evidence should a breach of or derogation from the right to privacy occur. In our view, he was right not to do so. While it may be tempting to adhere so closely to the fundamental rights contained in Part III of the Basic Law that any breach of or derogation from them should result in the direst of consequences, this is in our view too simplistic a stance.

One of the fundamental themes of a constitutional document such as the Basic Law (and the ICCPR) is the recognition that society has many different interests to be taken into account and very often, a balance must be struck. Derogations from constitutional rights are sometimes permitted where they can be justified as being necessary, rational and proportionate. This is in no way to undermine the importance of constitutional rights but a court must at times perform what can be a delicate balancing exercise.

(5) In the present context, there are two main competing interests, both facets of what can broadly be called the public interest : on the one hand the interest in protecting and enforcing constitutionally guaranteed rights; on the other, the interest in the detection of crime and bringing criminals to justice. This latter aspect has been highlighted in many cases, among them *Lee Ming Tee (No.2)* (to which reference has already been made in the discussion of Ground 1 above) at 396A-C (paragraph 187); *R v Khan (Sultan)*; *Allie Mohammed v The State* [1999] 2 AC 111, at 123F-G. It is hardly surprising that this latter facet of the public interest receives prominence. It is not only commensurate with commonsense, the wording of the Basic Law also supports this. In Article 30 of the Basic Law, the concept of the "investigation into criminal offences" is expressly mentioned, albeit in the context of legal procedures allowing an invasion into the right to privacy.

(6) The balancing exercise that faces the court in the exercise of its discretion in each case where there has been a breach of or derogation from constitutional rights, involves a consideration of the two facets mentioned in the last paragraph. The objective of the exercise of judicial discretion is to ensure that a fair trial of the accused takes place. We have already referred to relevant passages in the decision of the House of Lords in *R v Sang* and that of the Court of Final Appeal in *Lam Tat Ming* (see paragraphs 112 and 114 above). In *R v Khan (Sultan)*, a case involving covert surveillance, Lord Nicholls of Birkenhead referred to the discretion to admit or exclude evidence and the right to a fair trial contained in Article 6.1 of the European Convention as being concerned to ensure that those facing criminal charges would receive a fair trial : at 583B-C. He added at 583C-D : -

> "In the present case the decision of the European Court of Human Rights in *Schenk v Switzerland*, 13 E.H.R.R. 242 confirms that the use at a criminal trial of material obtained in breach of the rights of privacy enshrined in article 8 does not of itself mean that the trial is unfair."

(7) More recently, in *R v Looseley (Attorney-General's Reference No.3 of 2000)* [2001] 1 WLR 2060, the House of Lords considered the question of entrapment in the context of the right to a fair trial under Article 6 of the European Convention. We believe this decision provides valuable guidance as to both the nature and the exercise of the discretion under discussion. It qualifies what might appear to have been the effect of *R v Sang* by emphasizing the

principle that the court could exclude evidence obtained by unfair means in circumstances where the court considered the admission of the evidence to have such an adverse effect on the fairness of the proceedings that the evidence ought to be excluded : at 2066D-F (paragraph 11), 2067F (paragraph 16), 2098A (paragraph 122). We are conscious of the fact that in the United Kingdom, the court's discretion on the exclusion of evidence is now governed by section 78(1) of the Police and Criminal Evidence Act 1984 which is in the following terms : -

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

However, in our view, this provision merely reflects the common law position, certainly as it exists in Hong Kong (see *Lam Tat Ming* at 178J-179G) and probably in the United Kingdom as well (see *Sang* in particular the speech of Lord Scarman referred to in paragraph 17 above). This is also recognized as a facet of the right to a fair trial contained in Article 6 of the European Convention : see *R v P* at 158F-159G per Lord Hobhouse of Woodborough.

(8) In considering the fairness of a trial, the court must take a broad view of the overall circumstances. The court must look at the fairness of the actual trial itself : for example, whether the evidence obtained in breach of constitutional

rights is reliable in the first place. Thus, for example, evidence which has been "tricked" out of a person (say, by inducements improperly made) may be so inherently unreliable that it ought to be excluded.

(9) However, the court does not just look at procedural fairness in the actual trial. It is also entitled to look at the overall behaviour of the investigating authority or the treatment of the accused. Thus, circumstances may be such that it would simply be unfair to an accused person to allow certain evidence to be used at trial, for example, where an innocent person has been enticed to commit a crime. There can be situations in which it would be such an affront to the public conscience or the integrity of the criminal justice system is so compromised that the court must step in to put a stop to it. It is clear from the passage from Lord Scarman's speech in *Sang* (see paragraph 112 above) that there must be justice done to the accused himself. The terms "affront to the public conscience" and "compromise the integrity of the judicial system" are used by Lord Nicholls of Birkenhead and Lord Hoffmann in *Looseley* at 2069H (paragraph 25) and 2080C (paragraph 71). Mr Blanchflower submitted that these terms were too vague as offering any useful yardstick. However, we are of the view that, although necessarily general in nature, they provide useful and readily comprehensible concepts for the court to apply, marking the limits where the court will take the view that enough is enough. In *Lee Ming Tee (No.2)*, Sir Anthony Mason uses

these very terms in the context of the grant of a permanent stay in criminal proceedings : see 394F-296F (paragraphs 182-188). In *Looseley*, in referring to the term "fairness of the proceedings" contained in section 78 of the Police and Criminal Evidence Act, Lord Nicholls of Birkenhead said this at 2066F-2067A (paragraph 12) : -

> "The phrase 'fairness of the proceedings' in section 78 is directed primarily at matters going to fairness in the actual conduct of the trial; for instance, the reliability of the evidence and the defendant's ability to test its reliability. But, rightly, the courts have been unwilling to limit the scope of this wide and comprehensive expression strictly to procedural fairness. In *R v Smurthwaite* [1994] 1 All ER 898, 902 Lord Taylor of Gosforth CJ stated that section 78 has not altered the substantive rule that entrapment does not of itself provide a defence. The fact that the evidence was obtained by entrapment does not of itself require the judge to exclude it. But, in deciding whether to admit the evidence of an undercover police officer, the judge may take into account matters such as whether the officer was enticing the defendant to commit an offence he would not otherwise have committed, the nature of any entrapment, and how active or passive was the officer's role in obtaining the evidence. I do not understand Auld LJ to have been expressing a contrary view in *R v Chalkley* [1998] QB 848, 874, 876. *R v Chalkley* was not an entrapment case. Most recently in *R v Shannon* [2001] 1 WLR 51, 68, para 39 Potter LJ, as I read his judgment, accepted that evidence may properly be excluded when the behaviour of the police or prosecuting authority has been such as to justify a stay on grounds of abuse of process."

(10) On the other hand, the breach of or derogation from constitutional guaranteed rights may be outweighed by the public interest in ensuring that crimes are detected and punished. Here, one needs to look closely at two inter-related aspects : the right that has been breached and the extent of the breach. Though all rights guaranteed by a

constitution are to be accorded great respect and any breach or derogation must always be considered a cogent factor in excluding evidence, one must bear in mind that some rights are more fundamental and important than others and that where a right is breached, this can occur in a multitude of different situations. In *Allie Mohammed* at 123H-124C, Lord Steyn said this : -

> "On the other hand, it is important to bear in mind the nature of a particular constitutional guarantee and the nature of a particular breach. For example, a breach of a defendant's constitutional right to a fair trial must inevitably result in the conviction being quashed. By contrast the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, is a somewhat lesser right and potential breaches can vary greatly in gravity. In such a case not every breach will result in a confession being excluded. But their Lordships make clear that the fact that there has been a breach of a constitutional right is a cogent factor militating in favour of the exclusion of the confession. In this way the constitutional character of the infringed right is respected and accorded a high value. Nevertheless, the judge must perform a balancing exercise in the context of all the circumstances of the case. Except for one point their Lordships do not propose to speculate on the varying circumstances which may come before the courts. The qualification is that it would generally not be right to admit a confession where the police have deliberately frustrated a suspect's constitutional rights."

(11) Where the gravity of a breach or derogation is small but the crime involved is a serious one, the public interest will lean more favourably towards the latter factor with the consequence that any evidence obtained as a result of the breach or derogation will be admitted. In *Shaheed*, a decision of the New Zealand Court of Appeal we have

found of great assistance, the following passages make out this point : -

> "[147] The starting point should always be the nature of the right and the breach. The more fundamental the value which the right protects and the more serious the intrusion on it, the greater will be the weight which must be given to the breach. If, for example, an unlawful search or seizure involves a substantial invasion of privacy, like the taking of a blood sample, that will count heavily against admissibility. It will do so not because the evidence of the blood sample is self-incriminatory, as has been held in Canada, but because of its invasive quality. But where the breach of rights is readily excusable (for example, a breach of s 23(1)(a) or (b) in circumstances of urgency or danger) it will require rather less in the way of vindication. The breach will then be accorded less weight.
>
> …..
>
> [152] It is also a matter which must be given weight in favour of admission if the disputed evidence is not only reliable but also central to the prosecution's case – that the admission of the evidence will not lead to an unfair trial and the case is likely to fail without it. The more probative and crucial the evidence, the stronger the case for inclusion, although this factor ought not by itself to lead to automatic admission. Of course, if the evidence is less significant there is less reason to admit it in the face of a more than a trivial breach of rights. If, however, the crime was very serious, particularly if public safety is a concern, that factor coupled with the importance of the evidence in question may outweigh even a substantial breach. It may require the view to be taken that exclusion of the evidence, leading to failure of the Crown case, is a remedy out of proportion to the circumstances of the breach. The example of the serial murderer given in *Attorney-General's Reference* is compelling. Public confidence in the justice system would obviously be severely shaken were probative evidence to be excluded in such circumstances unless perhaps the breach was both fundamental and deliberate. Weight is given to the seriousness of the crime not because the infringed right is less valuable to an accused murderer than it would be to, say, an accused burglar, but in recognition of the enhanced public interest in convicting and confining the murderer. In contrast, where the crime with which the accused is charged is comparatively minor, it is unlikely that evidence

> improperly obtained will be admitted in the face of a more than minor breach of the accused's rights.
>
> …..
>
> [156] To sum up, where there has been a breach of a right guaranteed to a suspect by the Bill of Rights, a Judge who is asked to exclude resulting evidence must determine whether that is a response which is proportionate to the character of such a breach of the right in question. The Judge must make that determination by means of a balancing process in which the starting point is to give appropriate and significant weight to the existence of that breach but which also takes proper account of the need for an effective and credible system of justice. This approach should not lead, in most cases, to results different from those envisaged in earlier judgments of this Court but will, it is hoped, lead to a judicial technique which involves a greater exercise of judgment than the previous focus on a 'prima facie rule' may have encouraged."

(12) The public interest of course lies in the effective prosecution and punishment of crime, but account must also be taken by the court of the detection of crime by the investigating authorities. In *Lee Ming Tee (No.2)*, Sir Anthony Mason referred to the "public interest in the *detection* and punishment of crime" (emphasis added) : see 396A-B (paragraph 187). Accordingly, in our view, when conducting the balancing exercise, a court must also have regard to the fact that some crimes are by their very nature surreptitious and not easily detected. Often, it may be that the investigating authorities are driven to resort to covert investigative techniques in order properly to detect criminal activity. All this does not naturally provide any excuse from the breach of or derogation from constitutional guaranteed rights, but it is a factor for the

court to weigh in the balancing process when considering the admissibility of evidence.

(13) In the present case, we are of course concerned with the right to privacy. This is without doubt an important right which must be accorded due respect. However, it must be put into proper context. As Lord Steyn said in *Attorney General's Reference (No.3 of 1999)* [2001] 2 AC 91, at 118D-G : -

> "It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public. In my view the austere interpretation which the Court of Appeal adopted is not only in conflict with the plain words of the statute but also produces results which are contrary to good sense. A consideration of the public interest reinforces the interpretation which I have adopted."

117. Returning then to the facts of the present case, we are mindful that a retrial has been ordered by us and that therefore the question of the admissibility of the covert surveillance tapes may again surface for determination. It is accordingly undesirable for the Court to say too much other than to state the legal principles that govern this matter, which we have done. It was necessary to do so since, on one view, the surveillance evidence could have been rendered inadmissible by the mere breach of the right to privacy alone. On the facts of the present case, however, as Mr Blanchflower has argued that the edited portions of the tapes of the

covert surveillance ought not to have been admitted by the Judge, we should briefly state our views on this. Essentially, Mr Blanchflower complained that Pang J paid insufficient regard to the breach of the Applicant's right to privacy by the ICAC, operating as they were without legal (or indeed any) procedures in place : see the Admitted Facts (paragraph 107 above). He also submitted that the Judge applied the wrong legal principles.

118. In our view, on the facts before the Judge (and we stress this), his decision to admit the tapes was correct : -

(1) As is clear from his succinct ruling on the question of admissibility, the Judge accepted that the Applicant's right to privacy had been infringed. He also accepted that no legal procedures were in place regarding the use of covert surveillance techniques.

(2) However, the Judge emphasized the fact the ICAC had obtained the permission of the Director of Housing to conduct the covert surveillance and that this took place in the Applicant's office. He noted that the use of covert tactics were at times an essential weapon and referred to the Chief Justice's judgment in *Lam Tat Ming* at 180J-181A where he said : -

> "The law recognises that the use of undercover operations is an essential weapon in the armoury of the law enforcement agencies; particularly their use when the criminal activities are ongoing but also their use after crimes are completed to obtain evidence to bring the criminal to book."

(3) Although the Judge could have been more detailed in the statement of the applicable legal principles, he did not

have the benefit of the extensive analysis and arguments that we have been provided nor did he have the luxury of time.

119. For the above reasons, this Ground of Appeal fails.

Grounds 4, 5 and 6 : The right of silence

120. These grounds of appeal all deal with the right of silence. Factually, Grounds 4 and 5 relate to the first two of three video-recorded interviews. Ground 6 relates to comments made by the Judge during the summing-up that the Applicant did not inform the ICAC during any of the video-recorded interviews that he had a habit or hobby of counting money and that this version only emerged during his testimony at trial.

121. The complaint in Ground 4 is that the Judge failed to delete the questions and answers in the tape recording and transcript of the Applicant's first interview where he exercised the right of silence, or he failed to direct the jury that the failure to respond to allegations made to the Applicant in that interview by exercising his right of silence could not constitute evidence against him.

122. Ground 5 challenges the Judge's admitting into evidence the tape recording and transcript of the Applicant's second video-recorded interview during which he exercised the right of silence.

123. The difference between the first and second interviews was that during the first, the Applicant answered a large number of questions only declining to answer a few whereas from the beginning of the second interview, after having taken advice from his solicitor Mr Raymond Ho, the

Applicant had steadfastly chosen not to respond to almost any of the questions put to him.

124. It will be remembered that it was during the third video-recorded interview that the Applicant started to make admissions relating to various occasions when he had received corrupt money. The questions put to him in the third interview referred to several occasions in which he was seen (as recorded by audio/visual surveillance devices) of handling money in his office. The surveillance video recording was played during the second interview when the Applicant refused to answer questions put by C I Yang. In the third interview, the video recording was not played but was referred to in the questions.

125. Objection was taken by the Applicant's counsel as to the admissibility of the video tapes of the three interviews as well as the transcript of the conversations in them. The grounds of such objection were set out in written form, raising allegations of oppression and inducement on the part of C I Yang. Any admissions made by the Applicant were accordingly said to have been made involuntarily.

126. It is trite law that the right of silence is one of the requirements of a fair trial. In *Lam Tat Ming & Anor* at 179E, the Chief Justice, with whom all other members of the Court of Final Appeal agreed, in a passage already quoted in paragraph 114 above, stated : -

> "The requirement of a fair trial for the accused involves the observance of principles including the following which are relevant in this appeal: (1) No man is to be compelled to incriminate himself; his right of silence should be safeguarded. (2) No one can be convicted except upon the probative effect of admissible evidence. To ensure a fair trail for the accused, the court will exclude

admissible evidence of the reception of which will compromise these principles. …"

127. In *Lee Fuk Hing v HKSAR* [2005] 1 HKLRD 349 at 369E, Mortimer NPJ stated categorically that : -

> "55. … it is inappropriate in Hong Kong to use a person's silence against him in any way."

He continued : -

> "56. A person's right against self-incrimination (his right of silence) would otherwise become a possible source of entrapment. It is unfair for a person to have the right to remain silent, and usually to have been reminded of this right through the caution, and then for his silence to be put against him at trial."

128. The absurdity of allowing adverse inferences to be drawn from the exercise of the right of silence has been succinctly put by Lord Mustill in *R v Director of Serious Fraud Office, Ex p Smith* [1993] AC 1, at 32 : -

> "…there is the instinct that it is contrary to fair play to put the accused in a position where he is exposed to punishment whatever he does. If he answers, he may condemn himself out of his own mouth; if he refuses he may be punished for his refusal …"

129. The previous distinction drawn between criticising the exercise by an accused of his right of silence (which was not permissible) on the one hand and commenting on his failure to put forward an innocent explanation when given an opportunity to do so, thus affecting his credibility (which was permissible) on the other hand is now no longer valid : see *Lee Fuk Hing* at paragraph 55 and *Petty & Maiden v R* [1991] 173 CLR 95. The law is now settled that no adverse inference can be drawn from the fact that an accused has exercised the right of silence.

130. The main authority on which Mr Blanchflower relied in support of Grounds 4 and 5 was *R v Welch* [1992] Crim LR 368, where the trial judge, despite objection, allowed evidence of the interviews with the accused in that case to go before the jury *in toto*. In those interviews, a number of questions had been put to the accused who answered them, but they were interspersed with questions which he declined to answer. In allowing the appeal, after identifying three questions asserting the interviewing officers' belief in guilt of the appellant, to which the accused had simply responded "Nothing to say", Taylor LJ giving the judgment of the Court of Appeal in England observed : -

> "The effect upon the jury may very well have been to make some of them wonder why on earth he [the accused] did not answer if he was an innocent man. …
>
> …it was extremely important that he [the judge] should give a proper direction as to their [the jury's] approach to the interview. They should have been reminded in regard to it that although he [the accused] was saying 'Nothing to say' at a number of points, he had every right to do that and was not bound to answer the questions. The judge should have indicated to the jury that they should not infer guilt from his failure to respond. … the learned judge ought to have indicated to the jury that accusations made in an interview by police officers, particularly accusations not supported by evidence elsewhere, did not amount to any evidence in the case, and that where the defendant declined to reply the net result of such questions and answers was nil."

131. Mr Blanchflower referred us to four occasions in the first interview in which the Applicant declined to answer the questions put to him and submitted that serious prejudice had resulted because the questions related to some of the charges and the Applicant had been cross-examined on some of them. He submitted that it therefore became necessary for the Judge either to excise them or to give a specific direction that they be disregarded. It was said the Judge's general direction in his summing-up about the

Applicant's right to silence and his exercising it was insufficient to remedy the prejudice thus caused.

132. In *Welch*, the English Court of Appeal referred to *R v Mann* [1972] 56 Cr App R 750. At 757 of *Mann*, Widgery LCJ stated : -

> "It is, of course, well established by authority that, if an accusation is made against a suspected person, the mere fact that he is silent in the face of the accusation is not the basis upon which an inference against him can be drawn. If one wanted modern authority, it is found in HALL v. R. [1971] 1 W.L.R. 299. If the accused had failed to respond and kept silent to every question, it may very well be that on that simple principle it would be said that the evidence of the abortive dialogue, the one-sided dialogue, should not be admitted. But here one gets a different situation. One gets a number of questions answered by the appellant, which means the questions and answers are clearly admissible, and interspersed with those are questions which he refused to answer. There are a great many reasons, we feel, why in a situation of this kind it is right that the whole dialogue should go in before the jury. Sometimes indeed it will be for the benefit of the suspect, although this time it must be right, Mr. Lewis says, that in the end it reacts against him rather than in his favour, but, subject always to the discretion of the judge in individual cases, we think a dialogue of this kind which is clearly admissible in part should go in *in toto* in the ordinary case. We think that is a much more likely route to the truth, and we find no substance in the end in the complaint in this case that a blue pencil should have been used and those questions which had not been answered should have been excised."

133. In *HKSAR v Chow Wing Man*, CACC 613/2002 (20 August 2004, unreported), the trial judge had allowed the prosecution to show the jury a video film of an interview with the accused in which he was not willing to answer any questions and also to produce a transcript of that interview. On appeal, this Court distinguished *Mann* by stating that in that case, there could be no reason to adduce evidence of the interview other than to attack the Applicant's credibility by his only giving an account for the first time at trial. Stuart-Moore Ag CJHC observed : -

> "63. We have concluded that the first interview … should not have been exhibited in either video or written form … The applicant's silence, in the face of highly pertinent questioning on issues of crucial significance, may, we consider, have had an adverse effect on his trial. The applicant had received legal advice, before the interview began, that he was entitled not to answer the questions he was asked and the caution, at the start of the interview, provided him with confirmation of his right to remain silent. Although the judge made no adverse comment in this regard, and had directed the jury not to hold the applicant's silence against him, we are driven to the conclusion that the jury may have used the applicant's refusal to answer as a reflection on his credibility because they had seen on video and read in the record of interview the full extent of the questioning. Such material should, in the particular circumstances which had arisen, have been excluded from their consideration. It provided a wholly 'one-sided dialogue' to adopt the words of the judgment in *R v Mann* (above). If the applicant had been selective as to which questions relating to the murder he chose to answer and those which he declined to do so, then no doubt the whole of the interview could have been admitted but the applicant answered none of them."

134. Mr Blanchflower's complaint against the admission of the first interview into evidence was that the Judge failed to excise those questions to which the Applicant had merely responded by exercising his right of silence. However, it is abundantly clear that in the duration of about 3½ hours of the first interview, there were only four or five occasions when the Applicant did exercise his right to remain silent. On the authority of *Mann*, we do not see any justification to say that the Judge was wrong. In our view, the jury was entitled to see the whole course of the interview. Moreover, Mr Harris, counsel for the Applicant at trial, did not ask the Judge to excise any part of the interview nor indeed did he raise any objection to the admissibility of the unanswered questions. This distinguishes the present case from *Welch* where a submission had been made to the judge to exclude the questions. Accordingly, Ground 4 fails.

135. The factual situation of Ground 5, which related to the second interview, is as we have already observed quite different. It commenced in

the presence of Mr Raymond Ho, the Applicant's solicitor. Upon Mr Ho's advice, the Applicant exercised his right to remain silent throughout, even after Mr Ho had left the interview in the middle of it. Mr Zervos drew our attention to a few portions of the interview in which the Applicant did give answers to make the point that there was not a total absence of answers on the Applicant's part. However, such answers as there were, consisted only of corrections of mistakes made by the interviewer.

136. Mr Blanchflower submitted that *Chow Wing Man* therefore applied to the second interview : it had no probative value and was prejudicial to the Applicant. Mr Zervos, however, contended that the relevance of the second interview was not for the purpose of attacking the Applicant's credibility at all. Rather, it provided a complete picture of what had transpired during the three interviews and if anything, this supported the Applicant. There was a marked contrast between the first two interviews (in which the Applicant made no admissions) and the third in which all the incriminating admissions were made by him. Thus, so the argument ran, this supported the Applicant's contentions that the admissions had been obtained through oppression and inducement. Moreover, Mr Zervos emphasised that there was no prejudicial effect on the Applicant, which distinguished the present case from *Welch* and *Chow Wing Man*, because the questions put to him in the second interview (which he did not answer) were similar to the questions put to him in the third interview when he made material admissions of receiving corrupt money on various occasions. The unanswered allegations in the second interview were in fact agreed to in the third interview, and as such there could be no prejudicial effect on the Applicant.

137. Mr Blanchflower informed us that although Mr Harris had not objected to the admission in evidence of the first and second interviews on the basis of irrelevance or prejudice, Mr Harris had told him that the reason was that the point had not occurred to him. In reply to Mr Zervos' submission that the first and second interviews were produced in fact for the benefit of the Applicant, Mr Blanchflower suggested that the contrast between the three interviews could have been achieved simply by the parties agreeing as a fact that there were the first two interviews where the Applicant had not made any admissions.

138. Regarding Mr Zervos' submission that the first and second interviews were adduced in evidence in order to give to the Judge and the jury the whole picture of what went on between the Applicant and the ICAC officers during all of the interviews after he had been arrested, Mr Blanchflower referred us to *R v Boyson* [1991] Crim LR 274 where the English Court of Appeal held that the judge had wrongly admitted the evidence of a co-accused's conviction at the trial. In relation to the argument that the evidence was necessary for the jury to have the whole picture, the Court stated : -

> "That in our judgment, is not a proper basis for allowing evidence to go before a jury. Before any piece of evidence which is challenged can go before a jury in a criminal case the court must be satisfied: (1) that it is relevant; (2) it is admissible; (3) that its probative value outweighs its prejudicial value; and (4) that it is not otherwise unfair under section 78 [of the Police and Criminal Evidence Act 1984]. The fact that it may be part of 'the whole picture' is nothing to the point. We do not approve what seems to be a growing practice of allowing evidence to go before a jury which is either irrelevant, inadmissible, prejudicial or unfair simply on the basis that it is convenient for the jury to have 'the whole picture'."

139. However, viewing the circumstances of this case as a whole especially given the lack of any objection raised at the time by the

Applicant's counsel and the important aspect of the benefit to the Applicant in contrasting the content of the three interviews, we are of the view that evidence of them was correctly admitted. We also agree with the submission of Mr Zervos that the allegations made in the second interview did not have the prejudicial effect on the Applicant suggested by Mr Blanchflower as similar allegations were made to him in the third interview when he made admissions. The prejudicial effect of the allegations contained in the unanswered questions in the second interview had, in our judgment, been subsumed in the Applicant's inculpating admissions in the third interview.

140. In any event, one also has to bear in mind the general direction given by the Judge in his summing-up regarding the right of silence : -

> " First, you will remember during the first interview and during part of the second interview the defendant exercised his right of silence when he was asked questions about the suspected offences by Mr Eric Yang. Members of the jury, any person suspected of a criminal offence or charged with an offence is entitled to say nothing when asked questions about it. You must not hold the defendant's refusal to answer questions against him. The exercise of the right to silence cannot amount to an admission of any kind, nor can it be taken to reflect a guilty conscience. You must bear this in mind."

141. Ground 5 therefore fails. We now turn to Ground 6.

142. This ground complains about the Judge's following comments in the summing-up : -

> " He [the Applicant] told us, nevertheless, he would also have the habit of going back to his home, throwing the money on his bed and then try to put them back right again. That was what he said. You will recall he never told the ICAC during any of the interviews that he had this habit of counting money.
>
> In cross-examination he was asked by Mr McNamara about the habit of counting money. The question was: 'Why didn't you tell

> the ICAC that you have a habit of counting money?' His answer: 'If there had been only two incidents, I would have mentioned that. But I had the impression that they had a lot of information on me. He also said – that is, Mr Yang – that he had believed that the corrupt money had something to do with my son,' hence, he had chosen not to tell the ICAC people about his habit."

143. Mr Blanchflower referred to the transcript to show that in fact Mr McNamara, counsel for the prosecution at trial, had not asked the Applicant about his alleged habit of counting money at all. Mr McNamara's questions in cross-examination of the Applicant were as to why he had not told the ICAC that two sums of money he had received from two persons as gifts were not returned to them although the Applicant testified that he had intended to do so. Mr Zervos was unable to contradict this.

144. On this issue, Mr Blanchflower relied on *Lin Ping Keung v HKSAR* [2005] 8 HKCFAR 52, where the trial judge made a mistake as to the date of the arrest of the accused's sister whom he had alleged was in possession of the dangerous drugs found in the flat they shared. In allowing the appeal, Chan PJ emphasised the importance of the great care and accuracy that needed to be taken in stating the facts in a summing-up, particularly if adverse comments were to be made based on those facts. Chan PJ observed at 61I : -

> "32. It is of course permissible for a judge to make adverse comments on the defence provided it is based on an accurate reflection of the evidence and is fair and balanced. Whether in the present case, had the judge not made an error of fact, his comments were within permissible limits is debatable. But making such comments on a basis which did not accurately reflect the evidence is unacceptable."

145. Mr Blanchflower also submitted that the Applicant's explanation at the trial about his habit of counting money went to the "heart" of his defence: the money he was seen counting in the surveillance

recordings was his own money, not corrupt money; and that his credibility was crucial to his defence. It was stressed that the Judge's comments which referred to and emphasised prosecution counsel's impermissible questioning would have been interpreted by the jury as a direct attack on the Applicant's credibility. It was an attack which impermissibly breached his right of silence and thus his right to a fair trial.

146. In respect of the right of silence, Mr Blanchflower relied on *Lee Fuk Hing*, where Mortimer NPJ said at 369I-J : -

> "58. … the questions and answers complained of were inadmissible. They invited the jury to form an adverse inference against the accused because he had not disclosed his defence earlier to the police. They raised inferences not only of guilt but also that the defence lacked credibility. It was a serious breach of the accused's right of silence and to a fair trial according to law."

147. On the other hand, Mr Zervos relied on the following passages in Mortimer NPJ's judgment in an attempt to justify the Judge's comments even though he had to accept that the Judge had made an error in quoting from the evidence:

> "57. We may add that, of course, if an accused person makes a statement to the police (under caution or otherwise) which is inconsistent with his defence which can be fairly criticized on other grounds it is open to the prosecution to cross examine and comment upon that statement and its relevance to the defence. The judge may also invite the jury to draw relevant and fair inferences even if they are adverse to the accused.
>
> …..
>
> 67. … A judge's task when summing-up includes directing the jury on the relevant law, identifying the issues to be decided and summarising the relevant evidence. In summarising the evidence he is entitled to comment upon it to assist the jury. These comments in appropriate circumstances may be robust but they must always be fair and the judge must always direct the jury to consider the evidence in a fair balanced and impartial manner."

148. Mr Zervos submitted that the video recordings of the surveillance when the Applicant was seen counting money in his office were played for his viewing during the second interview and they were referred to in the third interview. In the third interview, the Applicant provided an explanation for the counting of money. Thus, he submitted, the Judge's remarks were appropriate in the circumstances and should also be viewed in the light of his directions to the jury that the Applicant's exercise of his right to remain silent should not be held against him (see paragraph 140 above). Moreover, the present case should be distinguished from *Lee Fuk Hing* in that the Applicant here did not exercise completely his right to silence as he had relinquished that right in the third interview.

149. However, Mr Zervos had to accept that the Judge had made a mistake in quoting the evidence. He submitted nevertheless that the mistake was a minor irregularity that should not diminish the safety of the convictions.

150. In our judgment, the mistake and the comments made by the Judge created a serious irregularity. Nowhere in the interviews had the Applicant been asked as to why he counted money. He was merely asked of the source of the money that he was seen in the video recordings to be counting. At the trial, no question was directed at his habit of counting money and this fact was only volunteered by him when he was cross-examined by Mr McNamara. He was not even cross-examined on the veracity or reliability of the habit. If any adverse comment was to be made in this context, we are of the view that the Applicant ought fairly to have been given the opportunity to respond. In the absence of such an opportunity, the Judge's comments were unfair.

151. The Judge's comments could have underminded the credibility of the Applicant or his defence. In the circumstances of this case where the comments were not based correctly on the evidence and where the Applicant was not given any opportunity to answer any allegation attacking the veracity or reliability of his alleged habit of counting money, the comments were not justified and were unfair. They encroached on the right of silence and notwithstanding the general direction to the jury about this right, they were in our view not permissible.

152. Accordingly, we allow the appeal on this ground. The consequence of this is that, in circumstances where a retrial should be ordered in relation to Ground 1, a retrial should be ordered on this ground as well.

153. There is always a risk that this kind of comment by judges presiding at trials may be seen as a breach of the right to remain silent and may thus form a basis for challenge on appeal. They should well bear in mind the following advice given by Humphreys J when he delivered the judgment of the Court of Criminal Appeal in *Tune* (1944) 29 Cr App R 162, at 165 : -

> "This Court thinks it right, … to make this observation: It is probably better, where a person has been charged with a criminal offence after having been cautioned and has either made no answer at all, or has made some observation which in itself is not in the nature of an explanation of the charge, that the presiding Judge should say nothing about it beyond telling the jury exactly what was said or not said on that occasion, because many observations of different sorts by learned Judges have from time to time been made the subject of appeals to this Court. If nothing is said by way of comment by the presiding Judge, no point can be raised."

Conclusion

154. Mr Blanchflower submitted in relation to each of the Grounds of Appeal that were he to succeed on any of them, the consequence should be that the Court ought not even order a retrial. In our view, although the Applicant succeeded under Grounds 1 and 6, the correct course was to order a retrial.

155. In further support of his arguments, Mr Blanchflower also referred to the fact that the Applicant was 60 years old, had liver and kidney problems, had already served 13 months' imprisonment and that the offences with which he was charged, dated back to events of 5 to 7 years ago. We had taken all of these factors into account but remained of the view that given the seriousness of the offences and the available evidence in support of them, the interests of justice were better served by ordering a retrial.

156. On the question of costs, we now invite the parties to make their submissions in due course.

(Geoffrey Ma)	(K H Woo)	(Robert Tang)
Chief Judge, High Court	Vice President	Justice of Appeal

Mr M Blanchflower SC and Ms Maggie Wong instructed by Messrs Simon C W Yung & Co for the Applicant

Mr Kevin P Zervos SC & Ms Winnie Ho of the Department of Justice for the Respondent