Press Summary (English)

Press Summary (Chinese)

FACV No 13 of 2013

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO 13 OF 2013 (CIVIL)

(ON APPEAL FROM CACV NO 161 OF 2011)

Between :

HO MAN KONG	Applicant/ Appellant
and	
SUPERINTENDENT OF LAI CHI KOK RECEPTION CENTRE	1st Respondent
THE COMMONWEALTH OF AUSTRALIA	2nd Respondent

Before: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Bokhary NPJ and Lord Walker of Gestingthorpe NPJ

Date of Hearing: 24 February 2014

Date of Judgment: 24 February 2014

Date of Reasons for Judgment: 24 February 2014

REASONS OF JUDGMENT

Chief Justice Ma:

1. At the conclusion of submissions, the appeal was dismissed, with the reasons for the Court's decision to be handed down. I agree with the reasons contained in the judgments of Mr Justice Ribeiro PJ and Mr Justice Tang PJ.

Mr Justice Ribeiro PJ :

2. I respectfully agree with the reasons given by Mr Justice Tang PJ and would add a few reasons of my own.

3. The Commonwealth of Australia seeks the extradition of the appellant on drug trafficking charges on the basis of evidence acquired through telephone intercepts lawfully carried out in Australia. Mr Gerard McCoy SC seeks to argue that such evidence is inadmissible in the Hong Kong extradition proceedings.

4. If section 61(1) of the ICSO[1] were applicable, such evidence would be excluded since it lays down a prohibition on using the product of intercepts as evidence in court proceedings. However, section 61(1) is inapplicable since it does not apply to the foreign intercepts concerned.

5. The appellant seeks to rely instead on Article 30 of the Basic Law which provides:

> "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."

6. Mr McCoy SC submits that Article 30, like section 61(1), prevents use in court proceedings of evidence derived from the Australian intercepts. He accepts that the Basic Law does not have extra-territorial effect and so does not suggest that the effecting of the intercepts in Australia infringed the Basic Law. What he seeks to argue is (i) that the *use* of the product of those intercepts in the Hong Kong extradition proceedings is an infringement of the privacy right; and (ii) that such infringement renders the product inadmissible in evidence in those proceedings.

7. That is not a tenable argument. Article 30 is self-evidently concerned with protecting the privacy of communications. It creates an exception allowing officials to inspect communications for the purpose of protecting public security or investigating crime, in a manner prescribed by law. As the exception shows, the right is infringed by some third person gaining access to the content of the communication so that it loses its quality of privacy. Where a law enforcement agency seeks authority to breach such privacy the court's role is to balance the right to privacy of communications against the public interest in protecting public security and in investigating crime. The ICSO provides the machinery and framework for striking that balance.

8. The question whether certain evidence – including evidence obtained in breach of a constitutionally protected right[2] – is admissible in court proceedings involves a different balance founded on a different right, namely, the right of the defendant to a fair trial. The well-established balance here is between the public interest in the Court having access to relevant and probative evidence on the one hand, and the exclusion of evidence with a prejudicial effect which is out of proportion with its probative value on the other.[3] The Court might also be asked to consider whether the conduct of the prosecution in securing such evidence constitutes an abuse of the process on a stay application.[4] It determining the admissibility of evidence or a stay application, the Court carries out its judicial function in the light of the defendant's constitutionally protected right to a fair trial. Issues of use and admissibility of evidence are not the concern of Article 30.

9. The suggestion of inadmissibility of evidence obtained in breach of a constitutional right was authoritatively rejected by the Court in *HKSAR v Muhammad Riaz Khan*[5]and no basis exists for accepting Mr McCoy's invitation to re-visit the correctness of that decision.

10. No fair trial issues presently arise. The Hong Kong court is not concerned with determining guilt. The magistrate merely has to determine whether a *prima facie* case exists to justify sending the appellant to face trial in Australia. There is no basis for any discretionary exclusion of the intercept evidence.

Mr Justice Tang PJ:

11. Extradition proceedings were commenced against the appellant, a Hong Kong permanent resident, at the request of the Government of the Commonwealth of Australia for his surrender to Australia where he was wanted for certain drug offences. It is common ground that the evidence against the appellant in respect of these offences included evidence of the appellant's telephonic communications from Hong Kong to Australia, which was intercepted and obtained by Australian authorities in Australia[6] under Australian law and that without such intercept evidence there could be no *prima facie* case against him.

12. On 17 March 2011, a magistrate made an order under s10(6)(b) of the Fugitive Offenders Ordinance Cap 503 committing the appellant to custody to await the decision of the Chief Executive as to the surrender of the appellant to Australia.

13. Thereafter, the appellant applied for the issue of a writ of *habeas corpus ad subjiciendum*. For present purpose,we are only concerned with his contention that the committal order was wrongly made because s10(6)(b)(iii) required the evidence to make out a *prima facie* case sufficient to put the appellant on trial in Hong Kong for the offences and that the intercept evidence would not be admissible in Hong Kong because of Article 30 of the Basic Law.

14. The application was dismissed by Wright J. The appellant's appeal to Court of Appeal was dismissed on31 July 2012.

15. On 15 July 2013, the appeal committee granted leave to the appellant to appeal to this court. The question of great general importance certified for the purpose of the appeal is:

> "Whether Article 30 of the Basic Law renders telecommunications intercepts obtained lawfully in a foreign jurisdiction inadmissible as evidence in extradition proceedings in Hong Kong courts? "

16. Basic Law Article 30 provides:

> "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."

17. Mr McCoy's submission is that Article 30renders any intercept evidence of any communication made to or from a Hong Kong resident while he is in Hong Kong inadmissible in Hong Kong. He submitted that the protection given to the privacy of communications is absolute save 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." Even so, the exception only permitted inspection and not use of the contents of the communication.

18. Although this appeal is concerned with telecommunications intercepts, it is plain that Article 30 is not concerned solely with telecommunications intercepts. Thus, Mr McCoy submitted that Article 30 provides the same protection to a letter sent to Australia by a Hong Kong resident from Hong Kong. Indeed, it extends to any evidence obtained in circumstances where a resident's freedom and privacy of communication was affected, for example, by covert surveillance.

19. Mr McCoy accepted that his submission is inconsistent with *HKSAR v Muhammad Riaz Khan* (2012) 15 HKCFAR 232, a decision of this court. In *Riaz Khan*, the defendant was convicted of conspiracy to traffic in dangerous drugs. The defendant and a co-conspirator met with an undercover US drug enforcement agent in a hotel room and the conversation about the contents of a suitcase, which was later found to contain 1.9 kg of heroin was secretly taped. The Court of Appeal held that *prima facie* there was a breach of the defendant's right to privacy, contrary to Article 14 of the Hong Kong Bill of Rights and Article 30 of the Basic Law. The issue was whether there was a discretion to receive evidence obtained in breach of the defendant's constitutional rights. Bokhary PJ whose judgment was agreed to by the other members of the court said:

> "15 … There is under our law no absolute bar to the reception of evidence obtained in breach of a defendant's constitutional rights. It is a matter of discretion."[7]

20. It has long been the position at common law, that evidence obtained illegally is admissible if relevant, subject to the discretion to exclude such evidence if necessary to secure a fair trial for the accused. See *R v Sang and Another* [1980] AC 402, which was decided before the advent of human rights legislation. Now, in England, s 78 of the Police and Criminal Evidence Act 1984 has put the matter on a statutory footing. In Hong Kong, the common law position has not changed notwithstanding the enactment of the Bill of Rights or the commencement of the Basic Law. *HKSAR vChan Kau Tai*[2006] 1 HKLRD 400 paras 108-116.

21. Mr McCoy invited us to depart from *Riaz Khan*. In support, he pointed to s 61(1) of the Interception of Communications and Surveillance Ordinance Cap 589 (the Ordinance) which makes any telecommunications interception product inadmissible in evidence in any proceedings before any court. Although Mr McCoy accepted that, s 61(1) does not apply to the intercept evidence in this appeal[8],he submitted s61(1) supports his construction of Article 30 because it was obvious that s61(1)was enacted to give effect to Article 30. In effect, he asked us to interpret Article 30 by reference to s 61(1). This is an impossible argument. It ignored the fact that s61(1) only made evidence obtained by telecommunications interception inadmissible, other protected products (s2), which may include evidence obtained pursuant to a prescribed authorization for covert surveillance as well as interception product (such as product of postal interception), may be disclosed "for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted." s 59(3)(b)(ii). So, it is obvious the legislature did not share Mr McCoy's view about the effect of Article 30.

22. It is obvious as Stock VP explained s61(1) was enacted:

> "22. … to ensure that the confidentiality which the legislature has deemed desirable in the public interest to maintain in relation to methods and extent of lawful interceptions in this jurisdiction does not adversely impact upon the ability of defendants to secure a fair trial. Section 61 itself is replete with provisions designed to maintain confidentiality. ..."

23. Similar provisions in the Interception of Communications Act 1985 (the 1985 Act) were also explained by the necessity for secrecy. *R v Preston*[1994] 2 AC130. In *R v P*[2002] 1 AC 146, Lord Hobhouse of Woodborough said at 165 "Where the Act did not apply surveillance evidence was in principle admissible subject to section 78 and the ordinary safeguards." *R v P* held that telecommunications intercept evidence obtained lawfully outside the UK (hence the 1985 Act did not apply), although they involved at least one party within the UK, was admissible in criminal proceedings in the UK.

24. Mr McCoy also submitted that we should deconstruct Article 30 and give meaning to the first sentence in Article 30 by contrast-effects with the second sentence. Thus read, he said we should conclude that the only exception to the protection of the freedom and privacy of communication are the limited exceptions in the second sentence. He further submitted that the expression "department or individual" in the second sentence cover the courts. I do not agree. The clear purpose of the second sentence was to make clear that no "department or individual" other than "relevant authoritiesmay inspect communication" and then, only "in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences." It has nothing to do with the admission of relevant evidence.

25. In the interpretation of the Basic Law, "a purposive approach is to be applied" and "as to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context." *Ng Ka Ling and Others v Director of Immigration* (1999) 2 HKCFAR 4 at 28. The purpose of the second sentence is clear. Bokhary PJ explained in *Koo Sze Yiu and Another v Chief Executiveof the HKSAR*(2006) 9 HKCFAR441 at 449, it was to control covert surveillance. It was not to change the common law position about the admissibility of relevant evidence. Neither the language nor the purpose of Article 30 supports Mr McCoy's submission. On the contrary, it runs counter to the general theme of continuity reflected in the Basic Law. *Secretary for Justice v Lau Kwok Fai and Another* (2005) 8 HKCFAR 304 at 321.

26. For the above reasons, I agreed to the dismissal of the appeal at the conclusion of the hearing on 24 February 2014.

Mr Justice Bokhary NPJ:

27. The following is all that I would add to the reasons given by Mr Justice Tang PJ for the Court's decision, announced at the conclusion of the hearing, to dismiss this appeal with costs. Mr Gerard McCoy SC for the appellant invited the Court to lay down an absolute rule to the effect that no evidence obtained in violation of the freedom and privacy of communication guaranteed by art. 30 of our constitution the Basic Law would be admissible. He relies on the difference between the present case and the case of *HKSAR v Muhammad Riaz Khan* (2012) 15 HKCFAR 232 which difference consists of the fact that the present case concerns the interception of telecommunications while *Khan's* case concerned covert surveillance. That is a difference which is important for some purposes, but not for present purposes. And Mr McCoy has not shrunk from – there being no reason why he should – inviting us to depart from our decision in *Khan's* case.

28. In *Khan's* case, four members of the Court simply expressed their agreement with the judgment given by one member of the Court. The fact that I was that one member emphasized in my mind the importance of looking with care at any judgment of ours which responsible counsel seriously submits is insufficiently protective of a fundamental right or freedom. I therefore approached Mr McCoy's submission in this regard with, if anything, a predisposition in its favour. Nevertheless, I found myself unable to accept it.

29. The test laid down in *Khan's* case, which is to be found at para 20 of the report, is this:

> "Evidence obtained in breach of a defendant's constitutional rights can nevertheless be received if, upon a careful examination of the circumstances, its reception (i) is conducive to a fair trial, (ii) is reconcilable with the respect due to the right or rights concerned (iii) appears unlikely to encourage any future breaches of that, those or other rights. The risk-assessment called for under the third element will always be made by the courts, vigilantly of course, in the light of their up-to-date experience. Thus is achieved, consistently with the constitution, a proper balance between the interests of individual defendants and those of society as a whole. It cannot have been the framers' intention - and is not the constitution's effect - to stand in the way of such of balance being struck. Just as rationality and proportionality can justify an impact on a non-absolute constitutional right, so can they justify a discretion to receive evidence obtained in breach of a constitutional right. Under the test stated above, the discretion concerned is rational and proportionate. The factors to be taken into account in applying this test and the weight to be accorded to each such factor will depend on the circumstances of each case."

As can be seen, there is no question of any discretion to receive evidence the reception of which is not reconcilable with the respect due to any right or freedom concerned. The discretion is the well-established one to exclude otherwise admissible evidence if its reception would be unfair in the circumstances.

Lord Walker of Gestingthorpe NPJ:

30. I agree with the judgment of Mr Justice Tang PJ and also with the concurring judgment of Mr Justice Ribeiro PJ.

(Geoffrey Ma)	(RAV Ribeiro)	(Robert Tang)
Chief Justice	Permanent Judge	Permanent Judge

(Kemal Bokhary)	(Lord Walker of Gestingthorpe)
Non-Permanent Judge	Non-Permanent Judge

Mr Gerard McCoy SC, Mr Andrew Lynn and Ms Denise Souza, instructed by Haldanes, for the applicant/appellant

Mr Anderson Chow SC, instructed by the Department of Justice, Mr Wayne Walsh, Deputy Law Officer (Mutual Legal Assistance) and Ms Linda Lam, DPGC of the Department, for the respondents

[1] Interception of Communications and Surveillance Ordinance (Cap 589), section 61(1): "Any telecommunications interception product shall not be admissible in evidence in any proceedings before any court other than to prove that a relevant offence has been committed." The qualification "other than to prove that a relevant offence has been committed" merely preserves admissibility in relation to "a relevant offence" which is defined in section 2 to involve offences involving prohibited disclosures of interception product or information relating to obtaining the same.

[2] *HKSAR v Muhammad Riaz Khan* (2012) 15 HKCFAR 232 at §§15 and 20.

[3] *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168 at 178-179; *Lau Ka Yee v HKSAR* (2004) 7 HKCFAR 510 at §53; *Kissel v HKSAR* (2010) 13 HKCFAR 27 at §96.

[4] *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336.

[5] (2012) 15 HKCFAR 232.

[6] The interception of communication takes place when, and at the place where, the electrical impulse or signal which is passing along the telephone line is intercepted in fact. *R v Aujla* [1998] 2 Cr App R 16 at 19B-E.

[7]The discretion to exclude should be exercised "whenever (the court) considers it necessary to secure a fair trial for the accused." Li CJ in *Secretary for Justice v Lam Tat Ming and Another* (2000) 3 HKCFAR 168 at 178J. Mr McCoy accepted that a magistrate hearing an application for extradition has no discretion to exclude admissible evidence. *Thanat Phaktiphat v Chief Superintendent of Lai Chi Kok Reception Centre and Another* CACV 5/1995 (12 May 1995).

[8] s 61(1) only applies to telecommunications intercepts obtained pursuant to authorization obtained under the Ordinance.